EUROTUNNEL/SEAFRANCE MERGER INQUIRY REMITTAL

SUBMISSION BY GROUP EUROTUNNEL S.A. REGARDING JURISDICTION

1. **When deciding whether, as a matter of law, that GET acquired an 'enterprise' and therefore that it has jurisdiction, the CC should consider each of the following factors both individually and in aggregate because the factors clearly inter-relate and mutually reinforce each other. GET considers that these factors indicate that no enterprise was acquired by it:**

- The liquidation process imposed a requirement by the Paris Court on SeaFrance to cease carrying on any business. That requirement was observed because the ex-SeaFrance assets were not used for the carrying on of any business until they were sold to GET;
- The period of non-operation is even more significant in view of the "context of the industry concerned": it coincided with the busiest time of year (being winter 2011/2012, Easter 2012 and the majority of Summer 2012);
- The extreme length of the period during which the assets it acquired were not used operationally (totalling 9 months) means that especially cogent and coherent evidence is required by the CC in order to justify the proposition that it did in fact acquire an enterprise;
- The ex-SeaFrance personnel employed by SCOP were not selected merely because of their specific SeaFrance experience and knowhow (e.g. their prior knowledge of the Vessels or of SeaFrance's business). They were assessed according to their suitability for the role, a significant element of which was their availability in Calais at the relevant time;
- The SeaFrance staff did not transfer across to GET or SCOP under TUPE or its French equivalent;
- Any payments that may or not have been received or due under the liquidation plan are simply irrelevant to the question of whether the assets acquired by GET were engaged in the activities, or part of the activities, of a business;
- There was no continuity between SeaFrance and MFL in the individuals holding management positions or the location from which the businesses were are managed;
- There was no continuity of branding or acquisition of goodwill;
- The Vessels are capable of being used elsewhere than on the Short Straits - these types of vessels are easily transferred between routes;
- There was no continuity of customer contracts or essential supply contracts; and
- The placing of the vessels into 'hot-layby' was not enough to keep the vessels operation-ready.

INTRODUCTION

1.1 Groupe Eurotunnel S.A. ("GET") acquired from the liquidator of SeaFrance assets which could be (and were) used to create a new business under the MFL brand. However, this does not mean that GET/MFL continued the SeaFrance business. The particular circumstances in this case, individually and even more so when the inter-related factors are all considered together, clearly indicate that GET did not acquire *"the activities, or part of the activities, of a business".*

1.2 As noted in more detail at section 1 below, the part of the Competition Appeal Tribunal's (the "CAT") judgment dated 4 December 2013 which dealt with the issue of enterprise challenged the CC's view that there had been a transfer of an enterprise. The CAT noted, for example, that the maintenance of the vessels in hot layby was not "*enough to turn these assets into an enterprise*"[1]. Two considerations identified by the CAT were that (i) the "*SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed*"; and (ii) "*that the factors considered in paragraph 4.68* [of the CC's Final Report] *are not separate, but to an extent inter-relate*"[2]. As noted below at paragraphs 7.5 and 3.2.1 respectively, the payment of €25,000 was irrelevant to the question of whether the assets acquired by GET were engaged in *"the activities, or part of the activities, of a business"*. As concerns the interrelation of factors arguing for GET having acquired an enterprise, GET notes that the factors arguing against it having acquired an enterprise also inter-relate and mutually support each other.

1.3 As also noted at paragraph 1 below, the CAT queried whether, at the time of the acquisition, "*there still remained the embers of an enterprise*[3]*"*. As noted in more detail below, a significant number of factors, including the length of time for which the Vessels had been out of operation, and the French insolvency law requirement for SeaFrance to cease all business activity, clearly demonstrate that, at the time of GET's acquisition, no embers remained of the former SeaFrance business.

1.4 The most striking aspect of the jurisdiction issue in this case is the extremely long duration (nine months) during which the acquired assets were not commercially used or exploited, and were in fact expressly prevented from being so used by the Paris Court, prior to GET's acquisition. This very lengthy period is even more significant in view of the 'context of the industry concerned', because the inactivity coincided with the busiest time of year on the Short Sea. GET submits that in such a context unusually cogent and powerful evidence would be required for the CC to be able properly to conclude that GET acquired *"the activities, or part of the activities, of a business".* For the reasons outlined in this submission, GET considers that all of the available evidence - when considered individually and even more so when the evidence (which inter-relates closely) is considered in aggregate – points unambiguously against GET having acquired *"the activities, or part of the activities, of a business".*

1.5 GET reiterates the submissions it made on this issue during the course of the original Competition Commission ("CC") investigation: its Initial Submissions, Enterprise Working Paper Response, and Response to the Provisional Findings. In addition, a number of further factors are discussed below.

1.6 For ease of reference, in this submission GET has used the same defined terms as in its previous submissions to the CC.

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[1] CAT judgment, paragraph 114
[2] CAT judgment paragraphs 117 and 120
[3] CAT Judgment, paragraph 105

2. THE RELEVANT STATUTORY TEST

2.1 A relevant merger situation within the meaning of section 23(1) Enterprise Act 2002 (the "Act") arises where *"two or more enterprises have ceased to be distinct enterprises".* An *"enterprise"* is defined in section 129(1) of the Act as *"the activities, or part of the activities, of a business".* The term *"business"* is itself defined in section 129(1) of the Act as including *"any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge".*

2.2 The Joint Merger Assessment Guidelines of the OFT and the CC[4] state the factors the CC will have regard to in considering whether a purchaser has acquired an *"enterprise":* these include at paragraph 3.2.4 the transfer of physical assets, and in particular whether they *"enable a particular business activity to be continued",* as well as whether the purchaser has acquired *"the assets and records needed to carry on the business...together with the benefit of existing contracts and goodwill."*

2.3 In its judgment dated 4 December 2013[5], the CAT found that the CC had failed to demonstrate that GET acquired *"the activities, or part of the activities, of a business".* In its judgment remitting the analysis of this issue of jurisdiction to the CC, the CAT considered in detail the test which the CC should apply when considering whether GET acquired the activities of the business, and therefore whether the CC had jurisdiction to review the transaction on concluding that a "relevant merger situation" had arisen.

2.4 The CAT drew reference to the report of the Monopolies and Mergers Commission into the merger between AAH Holdings plc and Medicopharma NV. The CAT noted[6] that in *AAH/Medicopharma*, *"the period during which the United Kingdom operation had not traded was extremely short – essentially comprising the period between 3 November 1991...and 7-8 November 1991".*

2.5 In seeking to identify the approach to be taken to the question of jurisdiction, the CAT drew a distinction between: *"the acquisition of 'bare assets' – which would not constitute the activities of a business – and the acquisition of something more than bare assets."* The key to distinguishing this was stated by the CAT to be as follows:

> *"a) defining or describing exactly what, over-and-above "bare assets", the acquiring entity obtained; and*
>
> *b) asking whether – and if so how – this placed the acquiring entity in a different position than if it had simply gone out into the market and acquired the assets."*[7]

2.6 This test is then applied by the CAT, with the GET / SeaFrance merger stated as an example of the *"difficult case...where the combination of assets is fractured, such that the assets are no longer, or no longer to the same extent, being used in combination".* The CAT noted: "*This case is a particularly good one, where what was clearly once an enterprise was wound down: the difficult question is whether, even though the business of SeaFrance had been wound down to a very considerable extent, there still remained the embers of an enterprise*" [8] (emphasis added).

2.7 The CAT specifically identified at paragraph 106 two further important considerations:

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[4] CC2, OFT1254
[5] Group Eurotunnel S.A. v Competition Commission, Societe Cooperative de Production Sea France S.A. v Competition Commission [2013] CAT 30 (the "CAT Judgment")
[6] CAT Judgment, paragraph 104
[7] CAT Judgment, paragraph 105
[8] CAT Judgment, paragraph 105

2.7.1 First, *"the mere fact that in the past the activities of a business were being carried on by an entity does not necessarily mean that, as at the time of the merger, that entity was an enterprise."*

2.7.2 *"Secondly, the fact that the acquiring entity emulates the business of the acquired entity, and even uses that entity's assets, does not necessarily mean that the acquiring entity has acquired an enterprise."*

2.8 Furthermore, the CAT identifies that *"the statutory test is not satisfied if the acquiring entity reconstructs a business that was once conducted by a different entity, even if the assets of that entity were used to do so."*[9] As set out below, the facts in this case correlate with this test. There was no continuation between the SeaFrance business and the MFL business: as a result of the liquidation process the SeaFrance business was no longer being conducted, which means that GET did not acquire assets that were at the time of purchase being used to undertake a commercial activity. All that happened was that GET purchased assets that had at one stage been used by SeaFrance, but which had already been dormant for 7.5 months, and used them in order to start from scratch an entirely new business on the Short Sea.

2.9 As the CAT itself states: *"had GET simply gone to a shipbuilder and commissioned the building of three vessels identical...*[to those bought]... *or with similar capabilities and used these vessels to establish a Dover-Calais ferry service using a crew or crews comprising anyone other than ex-SeaFrance employees, then this would not involve the acquisition of an 'enterprise'".*[10]

2.10 In short, the key question is the following: in acquiring assets from the liquidator of SeaFrance which were then used by MFL was there a continuation of the previous SeaFrance business, or in buying assets was GET "*using assets that it had acquired to <u>create</u> an enterprise*"[11]*?*

2.11 The issue to be decided is therefore the preliminary one of jurisdiction **only**. In considering this preliminary issue, the CC must disregard any previous findings it made in relation to whether or not it considered that GET's acquisition was likely to result in a substantial lessening of competition as well as any previous findings concerning remedies.

2.12 The CC must show that as a strict question of law the assets acquired by GET constitute an enterprise, i.e. that they amounted to *"the activities, or part of the activities, of a business".* GET does not consider that this legal test can conceivably be satisfied when all relevant factual considerations are taken into account.

2.13 As discussed in further detail below while GET acquired the Vessels, it did not acquire former SeaFrance staff: only some of these persons were recruited independently by the SCOP. GET considers this does not mean that it acquired an enterprise.

2.14 The CAT identified at paragraph 112 the following factors which point towards the acquisition of the Vessels being nothing more than an acquisition of assets:

2.14.1 The length of the period during which SeaFrance carried out no activity;

2.14.2 The surrender of SeaFrance's berthing slots; and

2.14.3 The dismissal of the SeaFrance workforce and the placing of the Vessels into "hot lay-by".

[9] CAT Judgment, paragraph 106(b)(ii)
[10] CAT Judgment, paragraph 107
[11] CAT judgment, paragraph 107

2.15 The CAT identified at paragraph 113 the contrary considerations suggested by the CC:

2.15.1 GET agrees with the CAT's view that the fact the Vessels were suitable for Short Sea crossings, and had been maintained in hot lay-by was not *"enough to turn these assets into an enterprise"*[12] (see paragraph 14 below).

2.15.2 GET agrees with the CAT's scepticism as to whether the ex-SeaFrance employees can be seen to have been acquired from SeaFrance: *"These employees were made redundant by SeaFrance over a period of time. Their contracts of employment were terminated, with no thought as to how they might be employed in the future...it can easily be said that the formation of the SCOP, and the subscription of a number of ex-SeaFrance employees to the SCOP, and the subsequent employment of some of them by the SCOP, constituted the creation of a new legal relationship, with no element of transfer from SeaFrance to the SCOP."*[13] GET agrees with this interpretation by the CAT: this point is discussed in further detail in paragraph 6 below.

2.15.3 The CAT identified but did not discuss the CC's consideration that the acquisition of the brand and goodwill of SeaFrance, carried *"some, but limited, positive value".*

2.16 The CAT identified two possible additional considerations. First, the "*SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed*"; and secondly, "*that the factors considered in paragraph 4.68 are not separate, but to an extent inter-relate*"[14]. These are considered below at paragraphs 7 and 3.2.1 respectively.

3. GET'S SUBMISSIONS DURING THE ORIGINAL CC INQUIRY

3.1 GET reiterates its previous submissions during the original CC inquiry on the issue of jurisdiction, as contained in its Initial Submission, Enterprise Working Paper Response and Response to Provisional Findings. For ease of reference and to avoid duplication, the relevant extracts from these documents are annexed to this submission, as Annexes 1 – 3 respectively.

3.2 In the rest of this submission, GET identifies considerations as to why it believes that it did not acquire *"the activities, or part of the activities, of a business".* GET has the following general observations:

3.2.1 In the same way that the CAT commented "*that the factors considered in paragraph 4.68 are not separate, but to an extent inter-relate*", so GET considers that the factors arguing against it having acquired an enterprise also inter-relate. Consequently, when deciding whether, as a matter of law, it has jurisdiction, the CC should consider each of the factors on the issue of enterprise which have been identified by GET and the SCOP, both individually and in aggregate because the factors clearly inter-relate and mutually reinforce each other.

3.2.2 GET considers that the extreme length of the period during which the assets it acquired were not used operationally means that especially cogent and coherent evidence is required by the CC in order to justify, as a matter of law, that the assets acquired constitute an enterprise.

[12] CAT Judgment, paragraph 114
[13] CAT Judgment, paragraph 115
[14] CAT judgment paragraphs 117 and 120

4. SEAFRANCE'S LIQUIDATION MEANT THAT IT WAS REQUIRED TO CEASE CARRYING ON ANY BUSINESS ACTIVITY

4.1 The CAT in its judgment[15] acknowledged that SeaFrance was expressly prohibited from operating by the Paris Court on 9 January 2012. According to para 2 of Article L. 640-1 French commercial code: "*the purpose of the liquidation procedure is to end the business activity or to sell the debtor's assets through a general or separate sale of its interests and property*".

4.2 As a matter of French law, a liquidation judgment of a French Court usually implies the cessation of the activity, unless the maintenance of the activities is allowed by the court, according to Article L. 641-10 French commercial code. **As a consequence, unless the Paris Court expressly stated in its judgment that it allowed the continuation of the activities previously undertaken by SeaFrance (as the company going into liquidation) SeaFrance must cease any activity as a matter of French law.** The Paris court did not do so. These issues are clear from a reading of the Paris Court's judgment (with the relevant extract being annexed to this submission as Annex 4):

> *"The Paris Commercial Court, in its judgment dated January 9th, 2012 terminated the company's business continuity given the insufficiency of the only bid submitted."*

4.3 The Paris Court's judgment, in its summary of the SeaFrance bankruptcy proceedings, draws a clear distinction between (i) the period during which time SeaFrance was obliged to continue business activity (from 30 June 2010, when it was put into receivership, to 9 January 2012), and (ii) the period from 9 January 2012 when it "*terminated the company's business continuity*" (in the original French: "*mis fin au maintien de l'activité de la société*").

4.4 During the former period (when SeaFrance was in receivership) the court notes that a business continuity solution (in the original French: "*une solution de continuation de l'activité*") was sought, aimed at rescuing the company and continuing its operations. This involved a so-called New Industrial Project ("*Nouveau Projet Industriel*"), including a financial rescue package from SNCF. Even when, on 16 November 2011, the French Court put SeaFrance into liquidation, it did so expressly "*with SeaFrance continuing its activities*" (in the original French: "*avec poursuite d'activité de la SA SEAFRANCE*"). The purpose of this was stated to be "*to provide for the submission of satisfactory offers*" (in the original French: "*afin de permettre le depot d'offres satisfaisantes*"). The judgment of 9 January 2012 made it clear however that any business continuity was terminated from that date onwards.

4.5 Consequently, when GET acquired the Vessels and other assets from the liquidator of SeaFrance (which followed a period of 7.5 months from 16 November 2011 to 2 July 2012 during which time the acquired assets had not been used in any commercial operations) this followed a liquidation process in which the Paris Court ordered SeaFrance to cease carrying on any business. Further, as a matter of fact, that requirement of the Paris Court was observed because the ex-SeaFrance assets were not used for the carrying on of any business until they were sold to GET.

4.6 In addition, it should be recalled that the assets acquired by GET were not used to undertake a ferry business for a further period of 1.5 months following the acquisition, indicating a total period of nine months during which the ex-SeaFrance assets were not used operationally.

[15] CAT Judgment, paragraph 112(a)

5. LENGTH OF TIME FOR WHICH THE VESSELS AND OTHER ASSETS ACQUIRED WERE NOT OPERATIONAL

5.1 It is a matter of fact that from at least the period of 7.5 months from 16 November 2011 until 2 July 2012:

5.1.1 there were no crossings of the Short Sea using the Vessels, on which freight or passenger customers were carried;

5.1.2 no crossings of the Short Sea using the Vessels were advertised in any media to potential freight or passenger customers, and there was no ongoing communication by any person with previous SeaFrance passenger or freight customers to try and persuade them that the interruption to the SeaFrance service would only be temporary (all of which would have been expected if the ex-SeaFrance business was continuing);

5.1.3 there was no solicitation of business from potential freight or passenger customers for crossings on the Short Sea using the Vessels by MFL/GET; and

5.1.4 no revenue was received from or invoiced to customers by MFL/GET in respect of the Vessels, and no contracts were negotiated with freight customers for 2012.

5.2 There is no legal precedent for the CC having considered that, where assets have not been used operationally for an extended period, they may nevertheless be deemed at the time of subsequent acquisition by the purchaser either to represent or to be engaged in *"the activities, or part of the activities, of a business".* The definition of *"business"* in section 129(1) of the Act in turn refers to *"an undertaking in the course of which goods or services are supplied otherwise than free of charge"* (emphasis added). In this case, there was an extremely long period during which the acquired assets were not used operationally, and no goods or services were supplied using the assets that GET subsequently acquired. Further, as noted above, the Paris Court had prohibited SeaFrance from carrying on commercial activities during the 7.5 months between SeaFrance's liquidation and GET's acquisition.

5.3 As the CAT noted, the precedent cited by the CC of *AAH/Medicopharma* related to a much shorter period during which the acquired assets had not been used: "*the period during which the United Kingdom operation had not traded was extremely short – essentially comprising the period between 3 November 1991...and 7-8 November 1991*"[16].

5.4 A nine month period of inactivity is exceptional, especially given all of the surrounding (and inter-related) circumstances discussed in the remainder of this submission and in the submissions previously made by GET to the CC on the issue of jurisdiction. When considering the impact of the acquired assets not being used for a period of nine months, together with appraising whether GET acquired *"the activities, or part of the activities, of a business",* consideration should be given, as the CAT noted, to "*the context of the industry concerned*"[17].

5.5 By abruptly and without prior notice ceasing operations on 16 November 2011 and not being used operationally by MFL until 20 August 2012, SeaFrance and its assets were not operational (and were not being used to supply goods or services) during the peak freight and passenger travel times of winter 2011/2012, Easter 2012 and the majority of Summer 2012:

[16] CAT judgment paragraph 104
[17] CAT judgment paragraph 120

5.5.1 On the Short Sea, the busiest times of year for passenger travel are Christmas, Easter and the Summer Holidays (which in 2012 coincided with the London Olympics). During all of these key times, the assets later acquired by GET were not used operationally;

5.5.2 The busiest time of the year for freight traffic is in the late Autumn run-up to Christmas (and this is also the period when contractual negotiations occur between Short Sea operators and freight companies in relation to the rates and terms for travel during the following calendar year). A break in the supply of services by a ferry operator for such a long period of time leads to such customers moving their business to an alternative provider. However, during this Autumn period the acquired assets were not used operationally and no commercial negotiations were conducted in respect of the Vessels with freight customers.

5.6 The extremely low passenger and freight traffic levels of MFL after it began operations are in themselves cogent evidence that there was no transfer of the SeaFrance business and no continuation of its previous customer relationships. In its first month of operation (August 2012), MFL had just [✂] freight vehicles and [✂] passenger vehicles. In its first three months of trading, MFL carried a total of only [✂] freight vehicles and [✂] passenger vehicles, and in the whole period from August 2012 to February 2013 (being its first seven months of operation), MFL had just [✂] freight vehicles and [✂] passenger vehicles;

5.7 Consequently, in "*the context of the industry concerned*", such a scale of interruption to the business previously undertaken by SeaFrance means that the assets acquired by GET could not be said to have been engaged in *"the activities, or part of the activities, of a business"* when they were acquired by GET.

5.8 In the following paragraphs, GET sets out further factors as to why it did not acquire assets which enabled *"the activities, or part of the activities, of a business"* to be continued.

6. NO CONTINUITY OF PERSONNEL

The ex-SeaFrance personnel employed by SCOP were not selected merely because of their specific SeaFrance experience and knowhow (e.g. their prior knowledge of the Vessels or of SeaFrance's business). They were assessed according to their suitability for the role, a significant element of which was their availability in Calais at the relevant time

6.1 The CAT states in its judgment that MFL had a crew of *"persons fully familiar with both these particular vessels and their intended operation"* by virtue of these individuals being former SeaFrance employees.[18]

6.2 At the time of the commencement of MFL's operations, the SCOP needed quickly to find individuals suitable to operate ferries. However, no jobs undertaken by individuals working on a ferry are specific or specialised to such an extent that they relate to a particular ferry. Some require nautical training, but many others are generic (for example, bar and restaurant staff and shop assistants).

6.3 GET understands from the SCOP that [✂] sailors who used to work for SeaFrance entered into contracts of employment with the SCOP in the relevant period to work on the Vessels. Of these individuals, fewer than [✂]% are assigned to work on the same vessels for SCOP/MFL as they did for SeaFrance. Furthermore, there was no requirement that applicants had to have experience of working on the Short Sea.

[18] CAT Judgment, paragraph 120

6.4 It was instead much more important for MFL that the employees to be hired for working on the Vessels were readily available, which in practice meant that they had to be readily available to work in the Calais region, where the Vessels are based. Of those individuals who would have been so available it is not surprising that, in a region where SeaFrance had previously been a major employer but which had since gone into liquidation, many of the individuals readily available for work and who were hired by the SCOP had previously worked for SeaFrance.

6.5 In any event, even if MFL might be said to have received some tangible benefit in terms of the speed with which it could begin operations using the Vessels because SCOP had hired a high proportion of ex-SeaFrance employees (and the CC has put forward no evidence in support of such a claim), that is not the same as saying that the acquired assets were undertaking the activities of a business when they were acquired by GET.

6.6 As the CAT noted, if GET *"emulates the business of the acquired entity, and even uses that entity's assets,* [this] *does not necessarily mean that the acquiring entity has acquired an enterprise".* The CC would still need to show (but has not done so) how hiring the ex-SeaFrance employees means that the activities of SeaFrance have, despite the nine-month hiatus and the Paris Court's prohibition, been continued.

The SeaFrance staff did not transfer across to GET or SCOP under TUPE or its French equivalent

6.7 As regards the employees of SeaFrance who now work for the SCOP, the CAT stated that *"these employees were made redundant by SeaFrance over a period of time. Their contracts of employment were terminated, with no thought as to how they might be employed in the future...it can easily be said that the formation of the SCOP, and the subscription of a number of ex-SeaFrance employees to the SCOP, and the subsequent employment of some of them by the SCOP, constituted the creation of a new legal relationship, with no element of transfer from SeaFrance to the SCOP."*[19]

6.8 GET agrees with this interpretation. The relationship between GET and SCOP is one of an arm's-length subcontract arrangement: the contract was established on the basis that if GET were to terminate the arrangement, it would have no legal responsibility for SCOP's employees and no TUPE-equivalent obligations.

6.9 Due to the French legal notion of *'délit de marchandage'* (making it a criminal offence to 'buy staff' otherwise than from a temporary workers' agency), GET ensured that the arrangements with the SCOP concerned only the provision of services and not the provision of staff.

6.10 GET made reference in its offer to the liquidator for the Vessels to the fact that it would employ former SeaFrance employees. It is necessary when considering such comments to note that GET was involved in a competitive bidding process, and sought to make its bid as attractive as possible. Furthermore, the decision of the Paris Court envisages that GET would seek employees from the SCOP: the court noted in its minutes that job creation was *"a significant factor in the subjective assessment of the bids".* As a result, it is apparent that the jobs in which the liquidator was interested were those that would create employment in the Nord Pas de Calais region. This included both newly redundant SeaFrance staff, and also other unemployed workers, and therefore GET would have made much in its bid of its plans to re-employ a number of them.

6.11 Therefore, the former SeaFrance employees should not be considered to be part of the assets acquired by GET: the staff were not transferred as part of the acquisition

[19] CAT Judgment, paragraph 115

process[20]. In fact, the absence of a transfer of the SeaFrance employees to GET/MFL or to SCOP is a strong indicator against there being an enterprise acquired by GET[21].

6.12 In addition, DFDS stated in its response to the CC's Provisional Findings that it employed around 250 former SeaFrance employees, in addition to chartering the ex-*SeaFrance Moliere* which was the largest vessel in SeaFrance's fleet pre-liquidation. This is not however taken by the CC to be a sign of a business continuity between SeaFrance and DFDS. Precisely the same logic applies to SCOP's employment of ex-SeaFrance staff, even if it employs marginally more of these staff than DFDS.

6.13 Given the above, GET considers that there is no available evidence for a finding that "*there may have been a momentum or continuity in the combination between the vessels and workforce that takes this case over the line from an asset acquisition to the acquisition of an enterprise*"[22].

7. ANY PAYMENTS THAT MAY OR NOT HAVE BEEN RECEIVED OR DUE UNDER THE LIQUIDATION PLAN ARE IRRELEVANT TO GET'S ACQUISITION OF THE VESSELS

7.1 The CAT states in its judgment that GET/SCOP gained a benefit in employing former SeaFrance staff, and that this benefit was *"not insignificant".*[23]

7.2 These payments were to ensure that new jobs were provided to those persons made redundant during the liquidation of SeaFrance, according to the redundancy plan agreement. This redundancy plan under which the payment fell was named as PSE3. Under the terms of this plan a number of payments were outlined, including the following:

7.2.1 €25,000 per employee was available to any organisation, regardless of its legal form, which enabled the operation of the Vessels (so long as the bankruptcy judge's ruling allowed for this) and in which the affected employees had: (i) a direct interest (being participation in the capital); and (ii) an indirect interest (being a permanent contract of employment);

7.2.2 Approximately €3,600 per employee payable to companies (other than SNCF) who recruited a former SeaFrance employee on a permanent contract within the Calais area.

7.3 Therefore, it is evident that the PSE3 plan was entered into because the SeaFrance operation had ceased, and the plan was created to assist the former employees of SeaFrance. This is consistent with the SeaFrance operation having ceased.

7.4 Furthermore, it is by no means the case that all persons on behalf of whom such payments could be claimed were automatically employed to work for MFL: those who were employed were recruited following a transparent and open recruitment process, which employed persons who did and didn't benefit from the PSE3 payment.

7.5 In any event, the fact that payment was made by SNCF in respect of each ex-SeaFrance employee given a new job is simply irrelevant to the question of whether the assets acquired by GET were engaged in *"the activities, or part of the activities, of a business"*:

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[20] In this context, it should be noted that of the approximately 1200 members of staff previously employed by SeaFrance, about 300 are now understood to be employed by DFDS on the Short Sea.

[21] For example, paragraph 3.10 of OFT 527 on Mergers: Jurisdictional and procedural guidance, states, "the application of the TUPE regulations would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise".

[22] CAT judgment, paragraph 120

[23] CAT Judgment, paragraph 119

7.5.1 The sum of €25,000 per employee was available regardless of the job in which the ex-SeaFrance employees were employed; it was not dependent on their being employed by the SCOP, and was certainly not available only if the individuals were used in a continuation of the SeaFrance business.

7.5.2 Even if it might have been attractive to SCOP to hire ex-SeaFrance employees because of the payments available, that is not relevant to an appraisal of whether the SeaFrance business was continued by GET/MFL.

8. **NO CONTINUITY OF SEAFRANCE MANAGEMENT**

8.1 In a conscious decision by both GET and SCOP to achieve a clear separation of their new MFL business from the unsuccessful SeaFrance business, none of the ex-SeaFrance senior management was subsequently employed by either GET/MFL or SCOP. The senior management of the SCOP are Jean-Michel Giguet (the President of the SCOP) and Raphael Doutrebente (the deputy chief executive officer of the SCOP).

8.2 This situation is therefore the exact opposite of the situation arising under a “key personnel clause” in a usual business acquisition, where members of the target company's senior management are retained by the purchaser precisely to ensure the continued operation of the business. The fact that senior SeaFrance management was purposely excluded from positions within MFL and SCOP therefore demonstrates a 'clean break' from the SeaFrance business.

8.3 Equally, there is no continuity in the location from which the businesses are managed. the locations of the SeaFrance business and the MFL business are entirely different. SeaFrance was a Paris-based business, whereas MFL is based at Calais.

9. **NO CONTINUITY OF SEAFRANCE WAY OF DOING BUSINESS**

9.1 The absence of any industrial action by SCOP employees, despite facing an uncertain future, shows that the entire ethos of the MFL business and its relationship with SCOP is different from that of SeaFrance.

9.2 The SeaFrance business was plagued by regular and intense industrial action and further threats of the same by its staff. The MFL business, by contrast, has managed to navigate an exceptionally difficult time for it and the SCOP's staff, when at many times their jobs were under threat and their futures in jeopardy, without any hints of employee disturbance. This demonstrates an entirely different company ethos, and a different approach by management and employees, from that of SeaFrance, also indicating a 'clean break' that is inconsistent with the proposition that GET/MFL has acquired *"the activities, or part of the activities, of a* [i.e. the SeaFrance] *business"*.

10. **NO CONTINUITY OF BRANDING OR ACQUISITION OF GOODWILL**

10.1 GET has sought to distance itself from the operations of SeaFrance. The MFL business is not advertised or operated under the SeaFrance brand.

10.2 GET did acquire the web-addresses and domain names of SeaFrance as part of its purchase of the Vessels, but these were simply part of the package of assets bought from the liquidator and represented only 1.5% of the acquisition value. The only value of these assets was as redirection of previous customers, but GET has only received limited business as a result of traffic redirected from the website. If anything, due to the amount of badwill attached to the SeaFrance brand, this shows they had negligible commercial value.

10.3 GET did not acquire any goodwill from the Vessels: if anything, association with SeaFrance would have had negative connotations. The customer lists of SeaFrance which GET acquired as part of the transaction were also of negligible value (and GET

has previously provided the CC with evidence of the extremely limited returns from its promotional activities using those lists). The CC itself states that only 1,087 bookings were made as a result of GET contacting 316,949 contacts in the database, and this was in response to an offer by MFL for 1p journeys, where even the 1p charge was refunded to passengers using the Vessels. This is therefore hardly the rate of return of a useful marketing tool and likely no better than could be achieved by the use of an untargeted mailing list such as the electoral roll.

11. PARTICULAR SUITABILITY OF THE VESSELS FOR USE ON THE SHORT SEA

11.1 The CC has previously stated that the Vessels were built specifically for use on the Short Sea, and that this demonstrated business continuity. As GET has previously submitted, the fact that the Vessels were previously operated on the route does not prevent them from being used on other markets. In fact, the Paris Court decision indicates that other bidders for the Vessels, Stena and DFDS, stated they would not have operated them on the Short Sea. Furthermore, a tax charge would have been incurred by either of these bidders due to their reluctance to commit to operating the Vessels under the French flag, suggesting Stena and DFDS may have envisaged using the Vessels on a different route.

11.2 GET has also previously submitted how easily these types of Vessels are transferred between routes. The *Barfleur* and the *Molière* both have recently been operating on routes other than the Short Sea before returning to operation on the Short Sea. The *Barfleur* had previously been used by Brittany Ferries on the Western Channel but was then rented to DFDS which used it on the Short Sea. In October 2012, DFDS replaced the *Barfleur* with the Sea France *Molière*, which has been used on a wide variety of routes including in the Mediterranean.

11.3 Equally, the fact that the Vessels were able without substantive modification to be used on the Short Sea does not mean, given the circumstances of this case, that the activities of the SeaFrance business have in fact been continued by GET.

12. NO CONTINUITY OF CUSTOMER CONTRACTS

12.1 GET did not acquire from the Vessels any existing customer contracts. Freight customers typically enter into framework purchase agreements with their transport providers. No such freight framework purchase agreements transferred between SeaFrance and GET. During the long period of the Vessels' inactivity, SeaFrance's previous freight customers found alternative operators to use. As a result, when MFL started operations, it had no freight client base from which to start. Passenger customers tend to use ferry services substantially less frequently than freight customers, but equally, there were no pre-existing contracts or pattern of dealings with passenger customers.

12.2 The extremely low passenger and freight traffic levels of MFL after it began operations are in themselves cogent evidence that there was no transfer of the SeaFrance business and no continuation of its previous customer relationships. As stated above, in its first month of operation (August 2012), MFL had just [✂] freight vehicles and [✂] passenger vehicles. In its first three months of trading, MFL carried a total of only [✂] freight vehicles and [✂] passenger vehicles, and in the whole period from August 2012 to February 2013 (being its first seven months of business), MFL had just [✂] freight vehicles and [✂] passenger vehicles.

13. NO CONTINUITY OF ESSENTIAL SUPPLY CONTRACTS

13.1 In *AAH/Medicopharma* a gap in trading of four to five days was still a situation which amounted to a transfer of activities as: *"although AAH did not in terms acquire the depots as going concerns, in reality it obtained much of the benefit of so acquiring them"*. GET in contrast, did not obtain the benefit of obtaining the assets of SeaFrance: it still had to renegotiate its essential supply contracts.

13.2 There was no transfer of berthing slots between SeaFrance and GET for the Vessels in the ports at Dover and Calais. These harbour slots were required to be arranged directly between GET and the relevant harbour authorities: there was no novation or assignment of harbour slots in the acquisition of the Vessels. In fact, MFL had to dissociate itself from the tarnished reputation of the Vessels: irrespective of operator, the ports viewed the Vessels as entities in themselves and treated MFL with suspicion upon entry.

13.3 When it applied for such slots, GET attended the Port of Dover and gave a presentation on its plans. This presentation expressly shows that MFL was not being treated as a continuation of SeaFrance (the full presentation is attached as Annex 5 to this document): [✂]

13.4 As part of its application for the slots, GET was also required to produce a letter showing the Port of Dover that [✂] and was therefore an entirely new business. This letter confirmed that: [✂]. The letter is attached as Annex 6 to this document.

13.5 These factors show that MFL therefore had to begin from scratch the process of negotiating and securing harbour slots in its own name.

13.6 Similarly, GET had to arrange from scratch all the other supplies and inputs needed for the Vessels, including insurance, stock and fuel contracts, because they were not acquired or transferred with the Vessels.

13.7 An example of this occurred in July 2012 when [✂]. The letter from the liquidator is included as Annex 7 to this document.

14. THE PLACING OF THE VESSELS INTO "HOT LAYBY" DID NOT MEAN THAT "THERE STILL REMAINED THE EMBERS OF AN ENTERPRISE"[24] THAT WERE KEPT ALIVE

14.1 As discussed above, even following GET's purchase of the Vessels, there was still a 1.5 month gap before the Vessels were ready to be put into service: the state of 'hot lay-by' was not enough to keep the Vessels operations-ready.

14.2 As GET explained to the CC during its original inquiry, the Vessels remained in port following SeaFrance's insolvency and remained manned in case of an incident or bad weather. They had however lost the benefit of the maritime certification needed to carry customers and traffic.

14.3 Furthermore, there was a significant volume of work required by GET to get the Vessels ready for use: re-branding, flash-docking and certification visits were carried out concurrently, and yet even with working around the clock, it still took over six weeks for the Vessels to be ready for operation.

14.4 None of these factors suggest that GET was simply 'reigniting the embers' of the SeaFrance business: it had to arrange factors such as port slots, fuel supplies, onboard charts, insurance and crew. If it had been possible to do this work faster GET would have done so, especially given that this period of non-operation was the busiest of the year, being summer and coinciding with the London Olympics. Such a delay shows the necessity and volume of work required for the Vessels to be ready for operation, and equally undermines the proposition that there was a continuation of the SeaFrance business.

15. CONSIDERATIONS IDENTIFIED BY THE CAT

15.1 The CAT raised two areas which it indicated should be taken into account when considering whether the acquisition of the Vessels could have amounted to the

[24] CAT judgment, paragraph 105

acquisition of the activities of a business. The CAT states that GET/SCOP could have gained a benefit as a result of employing ex-SeaFrance employees (this being a *"not insignificant"* sum) and that these employees were *"persons fully familiar with both these particular Vessels and their intended operation."* The CAT states that this could have allowed MFL to begin operations quicker than if it had acquired Vessels and crew from other sources, and that *"there may have been a momentum or continuity in the combination between the vessels and workforce"*.[25]

15.2 GET does not agree with these points. It does not consider that the contribution made by the SCOP employees was significant (see section 7 above), and neither does it consider that there was a benefit in employing the ex-SeaFrance employees such that the SeaFrance business can be seen as being continued (see section 6 above).

16. CONCLUSION

16.1 GET/MFL did not continue the SeaFrance business, and the particular circumstances in this case, individually and even more so when the inter-related factors are all considered together, clearly indicate that GET did not acquire *"the activities, or part of the activities, of a business".*

16.2 When deciding whether, as a matter of law, it has jurisdiction, the CC should consider each of the factors on the issue of enterprise which have been identified by GET and the SCOP, both individually and in aggregate because the factors clearly inter-relate and mutually reinforce each other:

16.2.1 The extreme length of the period during which the assets it acquired were not used operationally (totalling 9 months) means that especially cogent and coherent evidence is required by the CC in order to justify the proposition that it did in fact acquire an enterprise;

16.2.2 The liquidation process imposed a requirement by the Paris Court on SeaFrance to cease carrying on any business. That requirement was observed because the ex-SeaFrance assets were not used for the carrying on of any business until they were sold to GET;

16.2.3 The period of non-operation is even more significant in view of the "context of the industry concerned": it coincided with the busiest time of year (being winter 2011/2012, Easter 2012 and the majority of Summer 2012);

16.2.4 The ex-SeaFrance personnel employed by SCOP were not selected merely because of their specific SeaFrance experience and knowhow (e.g. their prior knowledge of the Vessels or of SeaFrance's business). They were assessed according to their suitability for the role, a significant element of which was their availability in Calais at the relevant time;

16.2.5 The SeaFrance staff did not transfer across to GET or SCOP under TUPE or its French equivalent;

16.2.6 Any payments that may or not have been received or due under the liquidation plan are simply irrelevant to the question of whether the assets acquired by GET were engaged in the activities, or part of the activities, of a business;

16.2.7 There was no continuity between SeaFrance and MFL in the individuals holding management positions or the location from which the businesses were are managed;

16.2.8 There was no continuity of branding or acquisition of goodwill;

[25] CAT Judgment, paragraph 119-120

16.2.9 The Vessels are capable of being used elsewhere than on the Short Straits - these types of vessels are easily transferred between routes;

16.2.10 There was no continuity of customer contracts or essential supply contracts;

16.2.11 The placing of the vessels into 'hot-layby' was not enough to keep the vessels operation-ready.

23 January 2014

Annexes

Annex 1: Extract from GET's Initial Submission

Annex 2: GET's Enterprise Working Paper Response

Annex 3: Extract from GET's Response to the CC's Provisional Findings

Annex 4: Extract from Paris Court Judgment

Annex 5: GET Presentation to Port of Dover [✂]

Annex 6: Letter from BTSG (Liquidator) to GET regarding SeaFrance debts (French original and English translation) [✂]

Annex 7: Letter form BTSG (Liquidator) to GET regarding fuel suppliers (French original and English translation) [✂]

COMPLETED ACQUISITION BY GROUPE EUROTUNNEL SA

OF

CERTAIN ASSETS OF SEAFRANCE SA (IN LIQUIDATION)

INITIAL SUBMISSION

19 November 2012

4.

JURISDICTION

- *SeaFrance ceased trading on 16 November 2011, just over nine months before the date when GET began operating the acquired vessels (on 20 August 2012).*
- *The assets acquired by GET from the liquidator of SeaFrance were not sufficient to represent a business and had not been used in the activities of carrying on a business for the period of nine consecutive months preceding the Asset Acquisition.*
- *If considered as the acquisition of an "enterprise", it would not meet the UK turnover test but would satisfy the share of supply test (with an increment of below 1%).*

4.1 SeaFrance was put into official receivership by the Commercial Court of Paris ("**the Paris Court**") on 16 November 2011. From that date SeaFrance immediately, overnight and abruptly ceased all commercial activity and the Paris Court sought to find a purchaser for the ex-SeaFrance business as a going concern.

4.2 Before it ceased operating, the turnover achieved by SeaFrance attributable to the three Vessels acquired by GET was, on any conceivable basis of calculation, materially below £70 million. The methodology underlying that calculation was explained in section 5 of the informal submission dated 3 October 2012 from GET to the OFT ("**the OFT Submission**"). Equally, the turnover achieved by MFL since it began operating the Vessels is materially below £70 million. In paragraph 31 of the Decision, **the OFT accepted that the turnover test was not met in relation to the Asset Acquisition**.

4.3 The Asset Acquisition could therefore only be a relevant merger situation on the basis of the share of supply test. However, GET considers that **there is no relevant merger situation within the meaning of section 23 of the Enterprise Act 2002 ("EA02") in this case because the Vessels and other assets it acquired do not constitute an "*enterprise*" for the purposes of section 129(1) of the EA02**.

4.4 In a letter dated 31 October 2012, GET formally requested the CC to address as a preliminary issue, before undertaking an in-depth inquiry in relation to the Asset Acquisition, whether GET had acquired an "*enterprise*" in this case[1]. In a letter dated 8 November 2012, the CC replied to the effect that it would not address this as a preliminary issue.

4.5 GET will not contest further at this stage the CC's procedural decision on this issue, but GET continues to believe that there is a discrete preliminary issue of whether an "*enterprise*" has been acquired in this case.

4.6 Even if the CC is unwilling to postpone its full fact-finding investigation pending determination of the "*enterprise*" issue, GET requests that the CC, within its normal procedures, give early consideration to the "*enterprise*" issue on the basis that it is, logically, the first question to be considered by the CC. If the CC were, having done so, to be in favour of GET's arguments that no "*enterprise*" has been acquired, GET suggests that this would allow the CC to produce a shorter set of Provisional Findings and a briefer final decision, which would be likely to cut down the amount of work required for the CC and GET in this case.

4.7 This issue is further discussed in section 7 below, in the context of GET's commentary on the Decision.

7.

[1] The issue was also covered in detail in GET's response dated 10 October 2012 to the OFT Issues Paper dated 5 October 2012 ("the Issues Paper Response") and in previous submissions by GET to the OFT.

COMMENTS ON THE DECISION

7.1 In response to a request from the CC, this section sets out GET's views on certain aspects of the Decision, before considering in sections 8 to 12 below the questions that the CC will address as part of its investigation.

7.2 GET recognises that the CC will undertake its own detailed investigation in this case, including considering afresh the evidence and arguments put to the OFT as well as gathering and reviewing additional evidence. However, before considering the substantive issues in this case GET welcomes the opportunity to comment on a number of important aspects of the Decision and the background to it.

7.3 **No "*enterprise*" was acquired by GET**

7.4 A relevant merger situation within the meaning of section 23(1) EA02 arises where "*two or more enterprises have ceased to be distinct enterprises*". An "*enterprise*" is defined in section 129(1) of EA02 as "*the activities, or part of the activities, of a business*". The term "*business*" is itself defined in Section 129(1) as including "*any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge*".

7.5 In addressing the statutory question under section 35(1) EA02 of whether "*a relevant merger situation has been created*" the CC must therefore decide if an "*enterprise*" has been acquired, which in turn depends on whether there has been the transfer of a "*business*".

7.6 As noted above, the statutory definition of a "*business*" focuses on *activities*. Paragraphs 3.2.2 – 3.2.4 of the Joint Guidelines indicate that the CC will have regard to the substance of an arrangement, rather than merely its legal form. In determining the issue, these guidelines indicate that the CC will take account of the following components when considering whether a purchaser has acquired an "*enterprise*":

7.6.1 Assets and records needed to carry on the business.

7.6.2 Benefit of existing contracts and goodwill.

7.6.3 Transfer of physical assets, and in particular whether they "*enable a particular business activity to be continued*".

7.6.4 The fact that the business acquired may no longer be trading does not in itself prevent the business from being an enterprise for the purposes of the EA02.

7.7 These aspects are each considered below in detail in the specific context of the Asset Acquisition.

7.8 **Nature of the assets acquired by GET**

7.9 Under the legal documentation to give effect to the Asset Acquisition, GET did not receive from the liquidator any warranties as to the state of the assets acquired or even as to existence of certain assets and GET had no recourse if those assets were missing. In the Asset Acquisition, GET acquired from the liquidator of SeaFrance the collection of bare assets listed below:

7.9.1 the three Vessels,

7.9.2 the SeaFrance logos, brand and the trade name,

7.9.3 certain computer software, websites and domain names, IT systems, hardware and office equipment, and

7.9.4 an inventory of technical and spare parts.

7.10 **Whether GET acquired assets that enabled a business activity to be continued**

7.11 The assets acquired from the liquidator were not enough on their own to run a business. As a result, MFL needed to procure additional business-critical resources, services and facilities from third parties in order to commence business using the Vessels, as described below.

7.11.1 **The Vessels could not simply be operated in the state that they were acquired by GET.** Because the Vessels had not been operational since November 2011 before they could begin operating they had to undergo a process of so-called "*flash docking*", to be checked for seaworthiness and to allow other checks to be performed on them. [REDACTED].

7.11.2 Although GET had acquired the Vessels it had not acquired the essential inputs needed to operate them. Before the Vessels could begin operating, GET needed to arrange fuel supply contracts and acquire maps, charts and stock for them.

7.11.3 GET did not acquire with the Vessels, and it had 72 hours in which separately to arrange, suitable insurance cover.

7.11.4 **GET did not acquire with the Vessels the harbour slots (and related access rights)** in the ports at Dover and Calais which are needed for the Vessels and customers to berth, load and unload. These harbour slots had to be arranged directly by GET with the relevant harbour authorities.

7.11.5 As part of the Asset Acquisition, GET did not acquire office space or property from which MFL could carry on business.

7.11.6 **GET did not acquire from the liquidator the people or capability to staff, operate and maintain the Vessels. These are instead separately contracted** from and provided by the SCOP to MFL (see below).

7.11.7 **GET did not acquire with the Vessels the benefit of existing contracts and it did not acquire, in any meaningful sense, goodwill**.

7.11.8 **MFL does not itself have (and did not acquire from the liquidator) the ability, resources or capability to price, market and sell passenger tickets for transport** on the Vessels. These services are provided on MFL's behalf by the SCOP (and its subsidiary, DCF).

7.11.9 **MFL does not itself have (and did not acquire from the liquidator) the corporate support services** needed for it to function, including legal, invoicing, credit control, IT and HR services, all of which are provided by GET's central corporate function.

7.12 The Decision states that "*the vessels acquired enable the activity of operating a ferry business*"[2]. The Vessels however are just one element of a much broader collection of assets, services and support (see above) all of which are essential to operate a ferry business that were not acquired by GET as part of the Asset Acquisition.

7.13 **In brief, the Vessels and other assets purchased as part of the Asset Acquisition on their own were not sufficient to enable the activity of operating a ferry business. Without these additional elements the Vessels could not be used to operate a ferry business.** The reference in the Decision to these as "*normal commercial matters of an ongoing nature, not one-off activities to get a business up*

[2] Decision paragraph 13

and running"[3] ignores the reality that the Vessels could not set up or operate without these essential inputs and also does not acknowledge the extent to which the Vessels needed additional one-off works before they could be used operationally.

7.14 Customer records needed to carry on the business

7.15 The assets acquired by GET include various databases and files, including details of what may be SeaFrance's old clients, but what would more likely have been potential sales prospects. GET considers that the database of ex-SeaFrance customer details is of limited commercial value for the following reasons.

7.15.1 **The records and databases had not been used or maintained for nine months prior to MFL commencing operations, during which period the data had ceased to be up to date and relevant** (see paragraph 7.22 below, re continuity of service).

7.15.2 All ex-SeaFrance freight customers, who had already moved to using alternative suppliers, would be readily identifiable by monitoring freight movements harbour-side and would in any event need to be won-over by MFL through individual negotiations. MFL has not used the details of freight customers acquired via the liquidator in order to try and market and sell the operations of MFL. It has instead identified from scratch, using public sources, potential freight customers which it has contacted on an individual basis.

7.15.3 In respect of ex-SeaFrance passengers, GET considers that **the database is of limited value because they had already moved to alternative suppliers** and for MFL to contact them as a new operator with a new brand has proven to be as successful as cold-calling any potential ferry passenger. [REDACTED]. This in itself illustrates the very limited value attributable to the database included in the acquired assets,

7.15.4 In a separate and subsequent transaction, on 1 August 2012 the liquidator sold to GET the customer records and other harbour side assets in Dover of SeaFrance UK Limited for €[REDACTED]. These assets included a portakabin which was subsequently sold for about €[REDACTED]. Before selling these assets to GET, the liquidator of SeaFrance had publicly advertised them for sale to third parties to try and maximise the proceeds received. The total value of the consideration payable by GET, of which most was attributable to the portakabin, following the liquidator's public tender process self-evidently negates the comment in the Decision[4] that the customer records "*have substantive value in them*".

7.15.5 In GET's opinion, the commercial value in the customer records is at best trivial, and certainly not enough for them to represent a meaningful part of a business. The customer records are of no material assistance to MFL in starting its operations from scratch.

7.16 Benefit of existing contracts

7.17 As part of the Asset Acquisition, GET has not acquired the benefit of any ongoing contracts with customers or suppliers. All such contracts terminated when SeaFrance entered liquidation and had to be negotiated from scratch.

7.18 Benefit of Goodwill

[3] Decision paragraph 19
[4] Decision paragraph 27

7.19 Goodwill was one of the collection of assets purchased by GET as part of the Asset Acquisition. The liquidation process however means that assets are simply bundled-up to be advertised for sale, as part of the liquidator's attempt to maximise the sale proceeds. It does not mean that there was any, or a material value, associated to goodwill, and no separate value for goodwill was identified in the Paris Court's June 2012 judgment.

7.20 In GET's opinion, there is no goodwill in the SeaFrance brand, which is why the new MFL brand is being used. The SeaFrance brand is not being used by MFL because, in GET's opinion for reasons attributable to its previous poor management, the brand is considered to have negative connotations (in terms of unreliability and service delivery) for consumers. The Decision refers to the fact that the www.SeaFrance.co.uk website redirects visitors to MFL's website. The website merely informs visitors that SeaFrance has ceased operating and that the ferries have been acquired by a new operator, MFL; this does not however indicate that there was material goodwill in the SeaFrance brand. In fact, it is little different to the common commercial practice of companies bidding on website searches to ensure that a customer conducting a website search is directed to their, rather than to a competitor's website.

7.21 Staff

7.22 MFL has sub-contracted the maritime operations to an independent company, the SCOP, which started as a cooperative of some of the ex-Seafrance employees. The SCOP has sourced its employees from the local recruitment pool through an open and rigorous recruitment exercise aimed at finding best local staff ideally with experience but most particularly willing to work on a new maritime operation with a totally different ethos to SeaFrance. This resulted in quite a few applicants who were ex-SeaFrance employees being declined positions. Currently, MFL and the SCOP together employ [REDACTED] staff[5], broken down as follows:

7.22.1 [REDACTED] staff are employed by MFL, of whom [REDACTED] were previously SeaFrance employees ([REDACTED] working in each of the sales and accounts teams of MFL), and

7.22.2 [REDACTED] staff are employed by the SCOP, of whom [REDACTED] were previously SeaFrance employees.

7.23 Neither the SCOP nor MFL have employed any of the staff previously employed by SeaFrance (being approx. 70 in number) in its corporate support services, providing central support in relation to IT, HR, sales, credit control and finance etc. teams.

7.24 In GET's opinion, **it is simply wrong for the OFT therefore to conclude in the Decision[6] that "*the [ex-SeaFrance] staff have, in effect, transferred to Eurotunnel*"**. The substance of the arrangement[7] is that independently of, but concurrently with, its negotiations to acquire the Vessels and other assets from the liquidator, GET negotiated an arrangement to procure from the SCOP the necessary operational, maintenance and sales services. Then, in turn, the SCOP itself conducted a recruitment exercise to find the necessary staff, rather than the ex-SeaFrance employees being transferred across to GET. Given that the SCOP needed to find individuals trained to operate the Vessels in an area of France where SeaFrance had been based and where unemployment is high, it is unsurprising that a number of ex-SeaFrance employees were in fact hired by the SCOP.

[5] To provide context, immediately before its liquidation SeaFrance had employed 865 staff.
[6] Decision paragraph 22
[7] In contrast to that described in paragraph 24 of the Decision

7.25 The May 1992 decision of the Monopolies and Mergers Commission ("**MMC**") in *AAH/Medicopharma,* cited by the OFT in the Decision[8], in fact merely supports GET's argument on the susbstance of the case.

7.25.1 In *AAH/Medicopharma* on 3 November 1991 two companies, jointly referred to as Medicopharma UK, resolved to cease trading and on the same day the companies' stock and other assets (including leases) were transferred to AAH Holdings plc pursuant to arrangements entered into between them. The ex-Medicopharma staff were asked to report to their previous places of work (since acquired by AAH) on 4 November (i.e. the next day) and AAH staff began operating fully the depots it had acquired on 7 and 8 November (i.e. 4 or 5 days later)[9]. Further, under the contractual arrangements, part of the consideration provided by AAH to Medicopharma UK's parent company took account of the costs arising from the termination of employment of Medicopharma's employees[10].

7.25.2 By contrast, in this case;

(a) SeaFrance entered into liquidation in January 2012 and completion of the sale to GET occurred in June 2012 – i.e. a much greater delay than in AAH/Medicopharma where the arrangements occurred within a week.

(b) There was no arrangement under which SeaFrance agreed to transfer its assets, staff or business to GET. There was instead an arm's-length sale process subsequently conducted by an entirely independent entity, the liquidator, who owed his duty to maximise value on the sale to the Paris Court.

(c) In AAH/Medicopharma the MMC noted that "*overwhelmingly*" the ex-Medicopharma UK staff would turn up for work the following day at their previous place of employment, and in fact they did so[11]. By contrast, in the current case, the SCOP initiated a fresh recruitment exercise that led to less than half of the staff employed by SeaFrance immediately prior to its liquidation (in January 2012) being subsequently hired following completion of the Asset Acquisition (in June 2012) by the SCOP on behalf of MFL.

7.26 Continuity of service

7.27 **GET bought assets from a liquidator that had not been used for the provision of ferry services for 7.5 months at the time of the Asset Acquisition**. None of the acquired Vessels were ready for use commercially for a further 1.5 months after the Asset Acquisition. Consequently, there was a total of 9 months for which the Vessels were not operational prior to their being used by MFL (rather than the period of 6 months focused on in the Decision[12]). In this context, GET considers that **compelling evidence was required to demonstrate that it may be the case that the activities of a *business* have been transferred to GET. In GET's opinion, there was no such compelling evidence provided in the Decision and there is none available.**

7.28 The Decision admitted that "*regularity of custom is relevant for assessing whether the period of closure has meant that goodwill has wholly or in part been dissipated*"; but it then concluded that "*the goodwill has not dissipated as a result of the cessation of trading*"[13]. However, about [REDACTED]% of the turnover generated by SeaFrance from the Vessels had been attributable to freight customers who would purchase

[8] AAH Holdings plc/Medicopharma NV cited in Decision paragraph 25
[9] See AAH/Medicopharma Decision paragraph 6.88
[10] See AAH/Medicopharma Decision paragraphs 6.54-6.55
[11] See AAH/Medicopharma Decision paragraph 6.88
[12] Decision paragraph 18

transport services regularly (often daily, or at least several times per week) from a transport provider. Further, as noted by GET in paragraph 21 of its Issues Paper Response, SeaFrance's cessation of business without prior notice in November 2011:

7.28.1 occurred at the busiest time of the year for freight companies (i.e. in the immediate run-up to Christmas, which is also the period when freight companies negotiate prices for the following calendar year with providers of transport services on the cross-Channel route), and

7.28.2 lasted for such a period of time that passenger customers missed the chance to use the Vessels at the peak passenger transport periods (i.e. Christmas, Easter and the Summer holiday period until 20 August 2012 when MFL began operating).

7.29 It is therefore inconceivable for the OFT to conclude that the circumstances and duration of SeaFrance's cessation of operations meant that "*the goodwill has not dissipated as a result of the cessation of trading*". **The circumstances and duration meant that all SeaFrance goodwill had evaporated long before the Asset Acquisition**.

7.30 GET also rejects completely the suggestion in the Decision[14] that there was continuing goodwill "*dependant on the routes travelled on, familiarity with the crew and/or vessels and so on*". In GET's opinion, freight customers and passengers do not determine which transport operator to use because of the identity of the ferries or in the anticipation that they will meet individual ferry crew members on their journey. Equally, any customer preference for travelling on an individual route is entirely separate from the Vessels themselves. **In GET's opinion, these suggestions in the Decision arise from a lack of understanding about the nature of ferry operations on the Short Sea.**

7.31 **<u>OFT changed its central theory of harm from the Issues Paper</u>**

7.31.1 The horizontal theory of harm that was put to GET in the Issues Paper was that the "*merger*" created a high combined market share and involved SeaFrance's closest competitor in circumstances where the *low levels of capacity utilisation by ferry operators* created a realistic prospect that a ferry operator would leave the Dover/Calais route, which would leave only two operators on that route and would enable the remaining competitors to raise their prices: see the Issues Paper at paragraphs 94-97.

7.31.2 This was the case that GET believed it had to meet and sought to meet.

7.31.3 **In the Decision the OFT <u>completely reversed</u> itself on this point: instead of focusing on the *low* levels of capacity utilisation (i.e. the high level of spare capacity) the OFT referred the case to the CC because it was *unlikely that there was sufficient spare capacity*** to defeat a price rise by GET: see the Decision at paragraphs 108 and 166.

7.31.4 The OFT did not put this analysis to GET. Had it done so, GET would have proposed following the normal course of using critical loss analysis to analyse the argument and would have argued that "*the likely level of spare capacity relative to Eurotunnel's sales volumes*" makes no economic sense. If the OFT believed that spare capacity is "*not sufficient to defeat a price rise by Eurotunnel*" it should have compared the level of spare capacity with a critical loss threshold. Comparing spare capacity with GET's sales volumes provides no information about whether that capacity is sufficient to defeat a price increase.

[13] Decision paragraph 18
[14] Decision paragraph 18

GET-SEAFRANCE MERGER INQUIRY

WORKING PAPER: THE CONCEPT OF ENTERPRISE

GET RESPONSES TO WORKING PAPER

Introduction			
1.	In the context of a completed merger, the CC must decide (a) Whether the transaction has resulted in the creation of a relevant merger situation (and whether that situation occurred within four months of the reference to the CC); and (b) If so, whether the creation of that situation has resulted in or may be expected to result in a SLC within any market or markets in the UK for goods or services.		
2.	If the answer to those questions is yes, the CC must then go on to consider appropriate remedial action[1]		
3.	The concept of a relevant merger situation has two principal elements set out in sections 23 and 26 of the Act. First, the transaction structure must involve "enterprises ceasing to be distinct" and second the transaction must have a sufficient nexus within the UK to merit investigation. This second element applies if either the "turnover test"[2] or the "share of supply test"[3] is satisfied.		
4.	This paper deals with the concept of enterprise for the purposes of sections 23 and 26 of the Act		

[1] Section 35(3) of the Act
[2] Section 28 of the Act
[3] Section 23(3) and (4) of the Act

Enterprise			
5.	The Act defines *"enterprise"* as *"the activities or part of the activities of a business". "Business"* is defined as *"including a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge".*[4] *"Activities"* is not defined by the Act.		GET notes that the definition of an "enterprise" focuses on whether the activities of a business were undertaken. However, GET does not consider that this working paper satisfactorily deals with why the CC believes that "activities of a business" were being undertaken by the assets at the time that they were acquired by GET.
6.	In considering whether the acquisition by GET of certain assets of the former SeaFrance business (the Transaction) involves the acquisition of an enterprise, this paper describes: (a) The overview of the Transaction and what was acquired by GET; (b) The implication of the fact that the assets were not trading at the time of the acquisition; (i) The similarity between the MyFerryLink operations using the assets acquired in the transaction and the former SeaFrance operations; (ii) Employees and the relationship with the SCOP; (iii) The period of time since the business was last trading (the Relevant Period); (iv) The extent and cost of the actions that would be required in order to reactivate the business as a trading entity; (v) The extent to which customers would regard the business operated by MyFerryLink as, in substance, continuing from		

[4] Section 129(1) and (3) of the Act

	the SeaFrance business; and (vi) Whether despite the fact that the SeaFrance business was not trading at the time of the acquisition, goodwill or other benefits beyond the physical assets and/or the site themselves could be said to be attached to the business and part of the sale. (c) The value of the bid.		
Transaction overview			
7.	Following a period in court-ordered administration, commencing 30 June 2010, the French Commercial Court of Paris (the Court) ordered SeaFrance's liquidation on 16 November 2011, at which point its ferry service, which operated between Dover and Calais, ceased operating. On 11 June 2012, GET was declared successful in its bid to acquire certain assets of the former SeaFrance business. The Transaction was completed on 2 July 2012[5].		
8.	The assets purchased by GET in the Transaction included three ferry vessels (one freight and two freight/passenger vessels), SeaFrance logos, brand and the trade name, computer software, websites and domain names, IT systems, customer records and the inventory of technical and spare parts as well as IT hardware and office equipment (the Transferred Assets).		
9.	The vessels were hired to a Société Cooperative et Participative, formed by approximately 350 ex-SeaFrance employees, known as the ~~SeaFrance~~ SCOP SeaFrance (SCOP) under a bare boat charter. The SeaFrance SCOP in turn provides ferry operation services to MyFerryLink (a subsidiary of GET), which "~~commercializes~~markets/sells" the ferry operations. MyFerryLink recommenced operation of two of the vessels, *Rodin* and *Berlioz* (passenger and freight), on the Dover to Calais route on 20 August 2012. On 3 December 2012, it was		The information in relation to the *Nord Pas-de-Calais* is not accurate. The *Nord Pas-de-Calais* has not yet entered service on a day to day basis and is still being held as reserve cover. It entered service on 28 November 2012 making four rotations (eight crossings) per day to provide operational cover for each

[5] Letter to GET from BTSG, 2 July 2012, Appendix 1(e)

	reported that after minor renovations, the *Nord-Pas-de-Calais* had joined the MyFerryLink fleet operating a freight only service on the same route.[6] It is currently only providing reserve cover for the *Rodin* and *Berlioz* when they undergo routine maintenance however, and will not enter into service on a permanent basis until February 2013.		of the other two ships in turn, whilst they underwent routine maintenance, but it has not operated apart from to provide reserve cover for the other two vessels. It is currently intended that the *Nord Pas-de-Calais* will enter service on a permanent basis alongside the other two ships from February 2013.
No Longer Trading Assets			
10.	GET submits that the Transaction is outside the jurisdiction of the Act because the Transferred Assets do not constitute an "enterprise" for the purposes of the Act. Therefore, it cannot be said that two enterprises have ceased to be distinct as a result of the Transaction.[7]		
11.	GET asserts that the Transferred Assets could not be considered an enterprise ~~primarily~~ because SeaFrance had gone into liquidation rather than temporarily ceasing trading in an administration process, and because of the length of time that had passed between when SeaFrance ceased trading on 16 November 2011 and the resumption of ferry operations on 20 August 2012 some nine months later.[8] It also submits that a number of factors that would indicate that an enterprise was acquired were not present in this case; in particular that there was no transfer of staff[9] or of customer contracts[10], and that additional works and services were needed to the acquired vessels before they could become operational.		The reasons for the extra 1.5 months between completion of the transaction as noted in the OFT reference decision and the resumption of ferry operations has been well-documented in GET's submissions to date – this period of time was necessary in order to prepare the vessels for operations, acquire harbour slots and certificates etc. As well as no transfer of staff or of customer contracts, there was also no acquisition of goodwill, as there was no goodwill attached to the former SeaFrance assets. GET submits that it acquired a GET acquired a collection of assets, consisting of the vessels and a mixture of tangible and intangible assets,

[6] Report in Transport Logistique http://www.wk-transport-logistique.fr/actualites/detail/60535/un-troisieme-navire-pour-my-ferry-link.html
[7] Initial Submission, paragraph 2.2
[8] The OFT in its reference decision focused on the period between activities ceasing and the completion of the transaction on 2 July 2012, a period of 7.5 months.
[9] Initial Submission, paragraphs 7.11.6 and 7.21-7.25
[10] Initial Submission, paragraph 7.11.7 and 7.16

			which were not sufficient to operate a ferry business, from the liquidator of an entity that had not traded for 7.5 months before GET acquired the assets.
12.	GET submits that, inter alia, as SeaFrance had ceased trading, and that it did not buy the SeaFrance business as a going concern, it cannot be considered to have acquired an enterprise.[11]		
13.	The Act provides no guidance for determining when a no longer trading asset is to be considered an enterprise. Nevertheless, the Act does not require that the activities which form the subject of the inquiry be generating turnover at the time of the acquisition.[12] As a result, the fact that assets are not trading at the time of the acquisition is not sufficient to exclude jurisdiction.		
14.	Previous MMC reports have considered this issue. In the *Stagecoach/Lancaster*[13] merger, the MMC stated that: We believe that one of the intentions and purposes of the Act is to enable the MMC to consider commercial realities and results and not merely the results of legally enforceable agreements and arrangements (a point also made in the AAH report, paragraph 6.69). It is, we believe, our duty to look at substance, not form.		This principle, encapsulated in the Joint Guidelines, has been well-noted by GET in its submissions (see Initial Submission, paragraph 7.6). GET goes on to describe factors that the CC will take into account when deciding whether or not a purchaser has acquired an enterprise, including: • assets and records needed to carry on the business; • benefit of existing contracts and goodwill; and • transfer of physical assets, and in particular whether they "enable a particular business activity to be continued".

[11] Letter from Pinsent Masons dated 31 October 2012, paragraph 1.7
[12] For the purposes of the Act, when considering the turnover test the relevant turnover is the turnover for the business year preceding the date when the enterprises ceased to be distinct, or such earlier date as the decision-making authority considers appropriate Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370.
[13] *Stagecoach Holdings PLC/Lancaster City Transport*, Cm. 2423 (December 1993), para. 6.21.

		• The fact that the business acquired may no longer be trading does not in itself prevent the business from being an enterprise for the purposes of the EA02. GET deals with each of these issues in the Initial Submission, and it is on the basis of the application of these principles that GET submits that no enterprise has been acquired. In respect of assets and records needed to carry on the business, GET only acquired the three Vessels, the SeaFrance logos, brand and the trade name, and certain computer software, websites and domain names, IT systems, hardware and office equipment and an inventory of technical and spare parts GET bought the assets such as the ex-SeaFrance database "sight unseen" without having been able to inspect them to assess their true value. In respect of the benefit of existing contracts and goodwill, no such benefit was transferred to GET – the acquisition was from liquidation so only assets and no benefits or debts of SeaFrance SA were acquired. In respect of the transfer of physical assets and in particular whether they "enabled a particular business activity to be continued", as transferred, the assets alone could not in themselves allow a ferry service to be started.

15.	The decision in *AAH Holdings/Medicopharma* reinforces that the cessation of trade is not decisive in itself. The MMC stated[14] that: We accept that if~~s~~ a company has decided to cease to trade, this decision, and whether and to what extent it has been given effect, is a relevant factor in considering whether the activities or part of the activities of a business which the company previously carried on have been brought under common ownership or common control with enterprises of another. Another such factor is what the company in fact transferred. However, we consider that the mere fact that a company has made the decision to cease to trade, or even has ceased to trade, and is thus not actively carrying on its business as before does not mean that its business or part of ~~the activities of the business~~it cannot be transferred as a going concern or that the activities or part of the activities of its business cannot be brought under the common ownership or common control with enterprises of another.		GET does not submit that simply because SeaFrance was no longer trading when GET acquired certain of its assets this means that GET did not acquire an enterprise; this is one of the many factors which, when combined, indicate that GET did not acquire an enterprise. Therefore GET's position is entirely in keeping with the principle expressed in *AAH Holdings/ Medicopharma*, even if the very different facts mean that the cases are not comparable. The period of cessation of trading in the immediate case (nine months) is much greater than that in the *AAH Holdings/ Medicopharma* case, where the acquisition involved a company in administration rather than liquidation and the time period was only a matter of weeks. It is also clear from *AAH Holdings/Medicopharma* that the companies involved in that case were seeking to avoid the application of the merger control rules through in effect temporarily suspending a business, which is not the case for GET where SeaFrance had permanently ceased business for a much longer period of time and its assets were sold by a court-appointed liquidator. In the case of GET it should also be noted that, unlike *AAH Holdings*, the assets were sold to GET by a Court, rather than by the parent company of SeaFrance. This accentuates the proposition that the SeaFrance business had permanently ceased and its assets were being distributed.

[14] *AAH Holdings/Medicopharma* Cm 1950 (May 1992) para 6.77. In this case Medicopharma ceased trading immediately prior to the transaction.

			GET submits that the CC should take account of all the surrounding circumstances of the acquisition, including the circumstances underlying and the duration of cessation of the prior business; the motivation of the entities involved, and whether the suspension was genuine or contrived to try and avoid application of the merger control rules. GET submits that if all of the prevailing circumstances and factors are taken into account, it is clear that the current case is totally different to *AAH Holdings* and the principles ;laid down at the time by the MMC.
16.	Where the business is no longer trading, additional factors should also be considered. The following factors (which include those listed in the OFT's jurisdictional guidance) appear to be relevant: (a) The similarity between the MyFerryLink operations using the assets acquired in the transaction and the former SeaFrance operations; (b) Employees and the relationship with the SCOP; (c) The period of time since the business was last trading (the Relevant Period); (d) The extent and cost of the actions that would be required in order to reactivate the business as a trading entity; (e) The extent to which customers would regard the business operated by MyFerryLink as, in substance, continuing from the SeaFrance business; and (f) Whether despite the fact that the SeaFrance business was not trading at the time of the acquisition, goodwill or other benefits beyond the physical assets and/or the site themselves could be said to be		As noted above, GET also submits that it is important to take account of the circumstances of the sale, in the sense of whether the parties to the transaction are seeking actively to avoid the application of the merger control rules.

	attached to the business and part of the sale. Each of these is considered below.		
Similarity between MyFerryLink operations using the acquired assets and the former SeaFrance operations			
17.	Two of the vessels (the Rodin and Berlioz) are sister ships built specifically to operate the cross-Channel route[15] and all three vessels acquired had previously operated on the short-sea route. The OFT's reference decision notes that two of the vessels purchased are especially suited to the short sea route because they are fitted with double ramps that enable vehicle loading on two levels. The OFT considered that the vessels would enable the activity of operating a ferry business and that these specific vessels enable the operation of short sea ferry crossings in particular.[16]		In relation to the specifications of the *Rodin* and the *Berlioz*, it should be noted that the vessels are described as being especially constructed for the 'liaison transmanche' i.e. not necessarily the Short Sea but on any route between the UK and Continental Europe, including the Channel, as the current wording suggests. The fact that the vessels have previously been operated on the Short Sea (and that they had specially fitted ramps for use here) did not hinder them from being used on other cross-Channel routes and markets, or even elsewhere in the world, and in fact the Court decision states that both Stena and DFDS had indicated that they would not operate the vessels on the same route as SeaFrance. The vessels were therefore in no way tied to the Short Sea. This proposition is reinforced by the fact that, as the CC has noted in its working paper on the transaction and rationale, neither of the other potential purchasers (Stena nor DFDS) assured the Court that the vessels would continue to use the French flag. This was an important point to the liquidator because failure to continue using the French flag would trigger a tax charge of about €35 million, and

[15] Court order liquidator's opinion
[16] OFT reference decision paragraph 13.

		therefore was a material consideration in the Court's evaluation of the bids it received for the vessels. Their failure to provide such reassurance to the Court (which would have been to the substantial financial benefit of their bid) suggests that DFDS and Stena might have used the vessels on other routes. Further, Stena has itself expressly told the CC in its submission of 29 November 2012 that it would not have used the Rodin on the Short Sea but would have either sold it or "sought to charter it to another ferry operator **around the world**" (emphasis added). The ease with which vessels are able to move between the Short Sea and other routes has been demonstrated time and again, most recently with the *Barfleur* and the *Molière*. The Barfleur had been used by Brittany Ferries on the Western Channel but was then rented to DFDS which used it on the Short Sea. In October 2012, DFDS replaced the Barfleur with the SeaFrance Moliere, which has been used on a wide variety of routes including in the Mediterranean. Given Stena's comment, the failure to affirm future use of the French flag by DFDS and Stena, and the evident transfer of ferries from the Short Sea route to other routes (including to the Mediterranean) GET submits that there is no basis for the CC to conclude that the vessels could only be used on the Short Sea, or even for concluding that the vessels could only be used on cross-Channel routes.

18.	Although the MyFerryLink operations are on a smaller scale at present compared with those of SeaFrance (having three rather than four vessels), they operate the acquired vessels on the same route as SeaFrance and have plans for [✂] crossings in the first year of operation. As of November 2012, MyFerryLink are offering 8 crossings per day in each direction on the short sea route.	Confidential information not in the public domain	As explained above in response to paragraph 9, MFL is currently only operating two vessels at any one time. By contrast, immediately before ceasing business SeaFrance had used four vessels. This represents a material difference between the operations of MFL and SeaFrance.
19.	In this regard, the smaller scale of the operations does not preclude this being considered as the transfer of an enterprise – an enterprise is defined in the Act as the activities, or part of the activities of a business.		
20.	Although on a smaller scale, the nature of the services offered by MyFerryLink is substantially the same as those offered previously by SeaFrance: both freight and passenger ferry services are being offered; those services are offered on the same routes as were operated by SeaFrance and use the same vessels as were operated by SeaFrance.		GET does not agree that the nature of the services offered by MFL is "substantially the same" as that offered previously by SeaFrance. For example, not all of the ex-SeaFrance vessels are operated by MFL, meaning that MFL has fewer rotations than SeaFrance. The nature of MFL's services are no more similar to those of SeaFrance than other ferry operators on the Short Sea. MFL is also operating using different branding and trademarks to SeaFrance, its management is different, and its service proposition is different to that of SeaFrance (now focusing on a high quality service offering whereas SeaFrance was offering a "cheap and cheerful" service).
21.	In addition, as a result of the arrangements with SCOP, there is a large degree of commonality between the staff of MyFerryLink and the staff of the former SeaFrance operations (see below).		Some employees of SCOP/MFL had previously worked for SeaFrance. However, the management of MFL and the SCOP is different, and the process by which the ex-SeaFrance employees have been hired is not consistent with those employees having been transferred to GET as part of an overall

			acquisition of a business. GET has already, in its submissions to the CC, noted the separation between MFL and the SCOP. This is discussed in more depth below.
Employees and the relationship with SCOP			
22.	MyFerryLink operates services with the use of ex-SeaFrance staff supplied by SCOP. The SCOP recruited its employees following an arm's-length recruitment exercise that was not limited to ex-SeaFrance employees, but was instead open to all individuals. The SCOP then supplies MFL with a certain number of ferry crossings p.a. (and the SCOP itself assumes responsibility for sourcing the personnel to operate and maintain the acquired vessels in order to ensure the frequency and quality of crossings which it has contracted to provide to MFL). Consequently, there is no contract between GET and the SCOP for the provision of employees, there is instead a contract to provide ferry crossings. GET claims therefore, that it did not acquire any SeaFrance employees and that this means that it did not acquire an enterprise.		GET would like to clarify that the fact that GET did not acquire any staff as part of the assets it acquired is one of the many factors indicating that it did not acquire an enterprise, not the sole reason, as the CC's statement here appears to imply. It should also be noted that the arrangement between GET and the SCOP is one of an arm's-length subcontract arrangement. If commercially that arrangement should fail, then GET can terminate its arrangement with the SCOP. The contract was established on the basis that, if GET were to do so, then it would have no legal responsibility for SCOP's employees and would have no TUPE-equivalent obligations in relation to them. This is because of a French penal law notion of "délit de marchandage" which makes it a criminal offence to "buy staff" otherwise than from a temporary workers' agency. If a contract can be analysed as merely the provision of staff with no services, skills or tools etc., then not only will a criminal offence have been committed but also, as under English law, the staff might be able to claim that they are, in fact, employees of the

			customer company. GET has therefore ensured that the arrangements with the SCOP concern only the provision of services and not the provision of staff i.e. the level of service to be provided is specified but the determination of staffing levels is not. This is therefore strongly indicative of the SCOP's employees not having been transferred to GET as part of the acquisition of the vessels.
23.	As stated above, "enterprise" is given a broad meaning because the intent and purpose of the Act is to enable to the consideration of commercial realities and results and not merely the results of legally enforceable agreements and arrangements.		
24.	When a company is liquidated, the employees are made redundant which severs the legal link between the employees and the liquidated business. Although in certain circumstances the TUPE regulations may apply, that was not the case here.		
25.	We are concerned with whether the commercial realty of the arrangements now operating between GET, SCOP and MyFerryLink is such that this indicates continuity between the SeaFrance business and the MyFerryLink business.		
26.	GET's initial submission states that: The substance of the arrangement is that independently of, but concurrently with, its negotiations to acquire the Vessels and other assets from the liquidator, GET negotiated an arrangement to procure from the SCOP the necessary operational, maintenance and sales services. Then, in turn, the SCOP itself conducted a recruitment exercise to find the necessary staff, rather than the ex-SeaFrance employees being transferred across to GET. Given that the SCOP needed to find individuals trained to operate the vessels in an area of France where SeaFrance had been based and where unemployment is high, it is unsurprising that a number of ex-SeaFrance employees were in fact hired by the		

	SCOP.		
27.	However, this description is difficult to reconcile with statements in GET's offer to the French liquidator, the description in GET's internal documents and statements made publicly and the description of the liquidation process in the Court order.		As stated below in response to paragraph 29, a "partnership" with a strategic supplier does not indicate a joint enterprise. Eurotunnel, for example, works on a partnership basis with a number of its key suppliers.
28.	We understand that SCOP was established with a view to acquiring the SeaFrance business and that it had participated in an unsuccessful bid to acquire the business out of administration.		
29.	[✂]	Confidential – from a private bid document which is not publicly available	It is necessary, when considering the comments made by GET in its offer to the Liquidator, to bear in mind that GET was bidding in a competitive process and was therefore seeking to make its bid as attractive as possible to the Liquidator. The decision of the French Court envisages that GET would seek employees via the SCOP. Although not a condition of the sale, the French court noted in its minutes that job creation was a "significant factor in the subjective assessment" of the bids. It stands to reason that the Liquidator would have been interested in is the fate of the ex-SeaFrance employees who became unemployed when SeaFrance went into liquidation, and it is therefore to be expected that GET would have made much in its bid of its plans to re-employ them. Given that the SCOP needed to find individuals trained to operate the vessels in an area of France where SeaFrance had been based and where unemployment is high, it is predictable that a number of ex-SeaFrance

		employees would be hired by the SCOP (and this was in fact the case). GET was also working "sight-unseen" in relation to many of the assets it acquired. It therefore had a limited amount of information in relation to (a) the SeaFrance operations, and (b) how feasible it might be to create a ferry business out of the assets it wished to acquire. In actual fact, far fewer employees have been employed by the SCOP than was envisaged during the bid process. As concerns GET's relationship with the SCOP, GET has freely acknowledged in previous submissions to both the CC and the OFT that it relies heavily on the SCOP for the day-to-day running of the ferry business, for the simple reason that it did not acquire the assets necessary for it to do so itself. Again, it is understandable that, in its bid, GET would have emphasised its future links with the SCOP, as this would be likely to reassure the Liquidator that GET, which had no ferry-operating experience, would have access to the experience and knowhow to make a success of the acquisition. The close relationship with the SCOP does not necessarily mean however that GET's acquisition amounted to an "enterprise". One point to note in relation to point (d) is that the phrase translated as 'rekindle' in French reads 'faire renaître', literally 'cause to be reborn'. This therefore supports GET's argument that the assets it acquired were

			effectively dead and needed to be brought back to life. It should also be noted that the quotation referred to stated that GET was working to "rekindle the **operations**" (emphasis added) and not the **business** of SeaFrance.
30.	The Court order approving GET as the acquirer of the SeaFrance assets makes repeated reference to the arrangement with SCOP and in particular states: However, Eurotunnel said in its bid that the ships would remain under the French flag and that 535 former SeaFrance employees would be hired by an operating company under the project. The ships would be purchased by a special purpose company and leased to an operating company supported by a previously existing SCOP [workers' productive cooperative under French law] without any performance guarantee being provided. While job creation is not a criterion established for the sole realization of assets in liquidation, it remains a significant factor in the subjective assessment.		As stated above, far fewer employees have been employed by the SCOP than was envisaged during the bid process. As noted above, because the SCOP needed to find individuals trained to operate the vessels in an area of France where SeaFrance had been based and where unemployment is high, it is predictable that a number of ex-SeaFrance employees would be hired by the SCOP. This does not however mean that the SCOP's employees transferred to GET as part of the latter's acquisition of a business.
31.	The director of MyFerryLink is quoted as saying that €8-10 million of "job protection" payments" for the employment of 350-400 ex-SeaFrance staff from the SeaFrance liquidators were "an integral part of the company's business plan from the outset." [17]		GET does not refute this statement but fails to see how MFL's expectation that "job protection" payments, will be paid to its supplier the SCOP, which is according to prior agreement with SNCF, can be said to indicate that GET acquired an enterprise. Furthermore, GET considers that the term "job protection" payments is a bad translation by the press. The context of these payments has already been explained by GET, but they do not "protect" jobs; rather, they ensure that new

[17] *My Ferry Link running out of cash?,* 24 October 2012, Lloyds Loading List.com. Available at: http://www.lloydsloadinglist.com/freight-directory/searcharticle.htm?articleID=20017999032&highlight=true&keywords=Groupe+Eurotunnel&phrase

			jobs are provided to those made redundant during the liquidation of SeaFrance. In fact, as stated above, far fewer employees have been employed by the SCOP than was envisaged during the bid process. Those who were employed were employed following a transparent and open recruitment process.
32.	[✂]	Internal documents which are not publicly available – contain commercially sensitive information	Because operating ferries was outside GET's normal commercial experience, it obviously needed to procure the staffing in order to operate and maintain the vessels it was looking to acquire and the SCOP was the obvious source to try and find those individuals. GET did also consider other suppliers, including for example ww.vships.com.
33.	[✂]	Privileged – correspondence from external legal counsel	
34.	[✂]	Agreement between two private entities – contains commercially sensitive information	This is an incorrect quotation from, and interpretation of the effect of, these contract terms. Clause 7.1 states that, in consideration for MFL's undertakings, the SCOP will perform the services and will not sell them to the market in its own name. MFL is the entity which takes the commercial risk and which buys the entire crossing capacity. It is therefore normal that the SCOP cannot also sell space on the crossings for which it is

		being paid fully by MFL. A cruise operator who sub-contracted its maritime operations to a service company would not expect that maritime services company to start selling places on the cruise. Additionally, clause 7.2 does not prevent the SCOP from carrying out similar activities for other customers on the cross-Channel market. Furthermore, GET submits that, contrary to the CC's opinion, the contractual terms and the sums of money involved in the bareboat charters and the commercialisation arrangements show clearly that SCOP and MFL operate on arms' length terms. It is essential to see this arrangement in context. GET had bought the vessels but lacked the resources or personnel to operate and maintain the vessels, and therefore needed to source these from a third party (here the SCOP) on a subcontract basis. In this context, it is entirely understandable that as the owner of the vessels GET did not wish to allow its services subcontractor to provide equivalent services at the same time to a competitor of MFL. This arrangement does not however mean that the SCOP is not operating on an independent arm's-length basis. As highlighted above through the example of the cruise operator, such an arrangement would be entirely normal where a subcontractor is providing services of an

			important and commercially sensitive nature.
35.	In paragraph 7.2218 of its submission to the CC, GET states that one of the reasons why the arrangement with SCOP does not amount to a transfer of the SeaFrance staff is because SCOP embarked upon an "open and rigorous recruitment exercise" and did not simply re-hire the SeaFrance staff.		The SCOP was also keen to recruit those willing to work on a new maritime operation with an entirely different ethos to SeaFrance.
36.	However, the fact that employees were hired through an open process does not prevent there being sufficient continuity between the services offered before and after the acquisition. This can be seen in the *Stagecoach Holdings/Lancaster City Transport* merger[18]where although there was no direct transfer of staff, Stagecoach subsequently employed some of the former Lancaster City Transport drivers as part of an open recruitment process.		The facts of the *Stagecoach Holdings/Lancaster* case were very different however, in that there was no lengthy break in operations in relation to the assets involved; the company which owned the assets simply stopped operating the assets one day, and the next day the purchaser commenced operating them. In this case, there was a delay of about nine months between SeaFrance ceasing business and its employees being made redundant and MFL beginning operations. This is therefore not a comparable case.
37.	[✂]	Internal document which is not publicly available – contains commercially sensitive information	As SCOP was unable to raise the capital required, GET built a structure which enabled GET to achieve its business aim whilst still having access to the resources of the SCOP through an arm's-length supply arrangement.
38.	[✂]	Internal document which is not publicly available – contains	It stands to reason that, given the close working relationship between the SCOP and MFL, MFL will be affected by the financial position of its principal services supplier, the SCOP. Any business which works very closely

[18] *Stagecoach Holdings PLC/Lancaster City Transport*, Cm. 2423 (December 1993)

		commercially sensitive information	alongside another business and whose success depends on the success of that business will face a similar situation but this does not necessarily mean that the businesses are not independent entities. For example, a manufacturer who sells a majority of its products to one customer may feel a responsibility to assist the customer financially e.g. by extending periods for payment, allowing a build-up of credit if the customer faces difficulties which threaten the supplier's business as well as the customer's. This is precisely how Eurotunnel sought to be treated by its own major suppliers while it was in safeguard proceedings from insolvency in 2007.
39.	Overall, in this instance arrangements that were integral to the transaction were put in place as a result of which a large proportion of the ex-SeaFrance employees are now employed in providing ferry services on the same route and using the same vessels as were formerly used by SeaFrance.		
The period of time since the business was last trading			
40.	GET contends that the Relevant Period was sufficient to constitute a break in trade significant enough to render the Transaction a sale of assets only.		
41.	However, the particular facts of the case must be taken into account and not just the duration of the interruption.		
42.	Bankruptcy proceedings were commenced in 2010 and on 28 April 2010 SeaFrance was placed under the protection of the Court. The safeguard procedure was converted to receivership on 30 June 2010 and the administrators began a sales process for SeaFrance. Following a failed attempt to obtain a satisfactory bid for the business, the Court on 16 November 2011 ordered that SeaFrance be liquidated but that SeaFrance could continue its		The important point to draw out here is that, although the Court ordered on 16 November 2011 that SeaFrance *could* continue its operations, in fact SeaFrance *did not*, and therefore SeaFrance stopped operating on 16

	activities (business continuity being ordered to enable the submission of revised offers for the business). On 9 January 2012, the Court terminated the business continuity. In practice, however, SeaFrance had ceased operating ferry services on 16 November 2011.		November 2011.
43.	Immediately prior to liquidation, SeaFrance had operated four ferries – the *Molière*, *Berlioz*, *Rodin* and *Nord-Pas-de-Calais*. Upon entering liquidation, the *Molière* (which had been hired by SeaFrance) was returned to its owners and it did not form part of the sale ordered by the Court.		GET acquired only three of the vessels (of which only two have been used operationally as part of MFL's day-to-day fleet), with the fourth vessel being chartered to DFDS.
44.	GET submitted its bid for the SeaFrance assets on 4 May 2012 [✂]	Confidential information – not in the public domain	
45.	The Paris Commercial Court declared GET as the transferee of the SeaFrance assets in a judgment on 11 June 2012. Completion of the transaction took place on 2 July 2012 and MyFerryLink commenced ferry services on 20 August 2012 (just over two months after it was approved as the purchaser and just over one month after completion).		The date when GET commenced operations was of course about nine months after SeaFrance ceased operating.
46.	During the period from 2 July to 20 August, GET undertook start-up activities, which it described as acquiring the other assets, services and elements needed to operate the vessels and negotiating with the SCOP for the provision of services and flash- docking of the vessels to make them operational.[19] [✂] **[Question for GET - There is a discrepancy in the dates mentioned in the documents. One of the versions of contract for sub-hire and commercialization is dated 29 June but refers to the bare boat charters and a memorandum of understanding as having been entered into between the parties on 2 July 2012 We also have a version dated 18 July 2012. The versions of the bare boat charter that we have received were signed on 29 June 2012. Please provide clarification of the actual chronology and an explanation for the reasons for the discrepancy in**	Information comes from documents which are commercially sensitive and not in public domain	Although the arrangements with the SCOP were an important part of GET's bid for the vessels, it was obviously not clear to GET at the time when it was liaising with the SCOP prior to submitting its bid that it would be successful in acquiring the vessels. It would therefore not have been in a position at this point to negotiate in relation to provision of services and flash-docking. Furthermore, as mentioned above, pre-acquisition GET was also limited in the amount of information it held in relation to the assets it acquired, which is another reason why it was only able to

[19] Initial submission, paragraph 5.1.8

	dates in these documents]		negotiate with the SCOP once it had acquired the assets. GET only acquired access to the vessels and other assets it had purchased with effect from 2 July 2012, and even at this point, obtaining physical access to these proved difficult. Furthermore, GET was only able to begin operating (and seeking to sell transport services on) the vessels at a later date, once they were seaworthy. **Response to specific question: [To follow]**
47.	GET's submission maintains that the nine month period between SeaFrance ceasing operations and MyFerryLink commencing operations means that no enterprise was acquired, amongst other reasons. [✂]	Information comes from bid document which is commercially sensitive and not in public domain	Please see comments below.
48.	[✂]	Information comes from internal GET document which is commercially sensitive and not in public domain	It stands to reason that the GET Board would want to acquire "the assets required for operations" as this would make the subsequent start-up of the business as smooth and successful as possible. However, this was not the commercial reality of the acquisition, which was that the assets acquired were in no way sufficient to operate a ferry business. As mentioned above, GET acquired the assets "sight unseen", meaning that it did not have the opportunity to inspect the assets to assess their true value. For example, customer lists which GET might have thought would be of some value in fact

			turned out to be worthless. It must be remembered that, at this stage, GET did not have a great deal of information in relation to the assets it hoped to acquire, and therefore that even though it wished to acquire "the assets required for operations", its desire was not based on what was actually feasible, especially given the long period of time for which the assets had been out of operation.
49.	In addition, the offer by GET to the French Liquidator describes the offer as the [resumption]/[takeover][20] of SeaFrance's operations".		This statement was made as part of trying to persuade the Court to approve GET's bid. It does not equate to GET having acquired something amounting to an enterprise, nor does it correspond to the post-Transaction reality, which is that MFL has been operated as a start-up from scratch using different branding – and is clearly not presented by MFL externally or internally as a continuation of the SeaFrance business.
50.	The Court which ordered the sale of the SeaFrance assets to GET commented that the ships had been maintained in a state of "hot lay-by"[21] – this minimum operating mode preserves the ships organs by running the engines regularly and conducting all operations required to retain most of the ships certificates. This was seen as a way of encouraging higher bids as the designated broker had confirmed that complete shut-down of a ship would cause irreversible damage that would result in greatly reducing its market value. **[Question for GET: please explain what certificates are required to operate ferry services, what is required to obtain those certificates and the circumstances that would lead to the certificates lapsing].**		Although the court may have stated that the vessels were in 'hot lay-by', this is very different from their being used on the sea every day and undergoing routine maintenance. The fact that the ships required 1.5 months to become operational after the date of acquisition indicates that the state of 'hot lay-by' was not enough to keep the vessels operations-ready. Further, the vessels themselves were not sufficient to represent a business because there were additional essential elements

[20] The word used is "reprise" this can be translated in a number of ways but the sense is of resumption or continuation
[21] Hot lay-by is the term used in the translation used to describe ships that have ceased operations but are being kept in a state in which operations could resume.

		needed before they could become operational, including personnel. As explained during the Hearing on 17 January 2013, the vessels remained in Calais port after SeaFrance's insolvency, and were required to be able to leave the dock at very short notice, particularly in the case of an incident or bad weather. For this they needed to be manned. However, they had lost all certification to carry passengers and traffic, which involved round-the-clock work and visits to re-obtain. **Response to specific questions:** **The necessary certificates are as follows:** • **Acte de francisation** • **Titles and certificates delivered in relation to the LL 66 (Load Lines 66), the SOLAS (Safety of Life at Sea), convention and the Marpol (Martitime pollution) convention** • **Document of compliance (International Safety management)** • **Class certification (Bureau Véritas)** • **Certificate of conformity with STCW (Standard of Training and Certification and Watchkeeping for Seafarers)** • **Insurance certificates (Body and Motors, Protection and Indemnity)**
51. In approving the GET bid, the Court commented that a quick sale would provide		The Court's opinion does not necessarily reflect the reality of the situation. It is

	for resuming the ships' operation starting the following season.		understandable that the Court was anxious to have the vessels back on the market, but it did not necessarily have the expertise to judge whether or not this was feasible. The reference would also simply encompass a comment from the judge of the obvious, that the sooner GET had the vessels the sooner it could move towards starting to operate a ferry business.
52.	The decision of the French Competition Authority (which has not been challenged by GET) states at paragraph 6: This constitutes a concentration transaction, insofar as these assets will enable Eurotunnel to achieve a given turnover. This is particularly true of the ships, but also of the other tangible and intangible assets such as the trademark (even if it is not used, to the extent that no competitors may use it), the customer files or internet sites and the domain names. In addition, it is clear from the terms of Eurotunnel's acquisition offer that "the Eurotunnel group wished ... to present a global and indivisible offer for both the ships and other tangible and intangible assets that it offered to acquire, in the context of an industrial project" and that "the proposed project will ensure continuity of (SeaFrance's) services by taking over the interrupted interoperability agreements". Eurotunnel therefore did not want to create a new maritime business, but to take over SeaFrance's business by acquiring all of the assets necessary to re-launch it. For example, the Internet site http://www.seafrance.com is still active and links to MFL's website, where reservations can be made.		It was GET's desire to be declared the winning bidder. It therefore made sense for GET to submit a bid which was as close as possible to what the Liquidator wanted – the disposal of as many as possible of the assets formerly belonging to SeaFrance – in order to be seen as having most attractive bid. GET did not challenge the French Competition Authority's view on this point because it was unwilling to be the subject of concurrent in-depth merger investigations at the same time by the CC and in France.
53.	Thus, it appears that notwithstanding the period when services were interrupted, GET presented its bid as a continuation of at least part of the activities of SeaFrance and that its bid was perceived in this way by the Court and the French Competition Authority. The arrangements with SCOP were an integral part of the bid by GET and the formal agreements were entered into shortly after the court order and (subject to clarification of the correct dates of the contracts) shortly after completion of the transfer.		However GET may have presented its bid to try and be the successful bidder, it simply does not reflect the commercial reality of the acquisition to state that the assets which GET acquired, and the arrangements which it had tentatively discussed with the SCOP, were sufficient to allow it to continue, even in part, the activities of the former SeaFrance, an

			entity that had ceased operating over seven months previously. Therefore, there was no acquisition of an enterprise.
The extent and cost of the actions required in order for MyFerry Link to become operational			
54.	[✂]	Information comes from internal GET document which is commercially sensitive and not in public domain	This statement repeats the one at paragraph 48 above, and GET therefore repeats its response above.
55.	As indicated above, although a period of nine months passed between operations ceasing and ~~being recommenced by~~ MyFerryLink beginning operations, it is notable that the period between GET acquiring the assets and operations commencing was less than two months and that the vessels had been maintained in a condition to enable operations to resume with limited disruption during the period prior to GET's acquisition.		The fact that it took less than two months post-acquisition for MFL to become functional does not show that the vessels had been kept in a condition which meant that they could resume operations with limited disruption post-acquisition so much as it does the low barriers to entry in the market and how quickly and easily a new operator can enter into the market. Further, MFL did not recommence the SeaFrance operations; it began a new ferry service under a new brand using two of the four vessels which SeaFrance had previously owned.
56.	It is also relevant that as noted above, two of the vessels (the Rodin and Berlioz) are sister ships built specifically to operate the cross-Channel route and so it was possible to restart operations using those vessels without any need for adaptation.		It is not clear to GET that vessels from other routes would have required such adaptation. The introduction in recent times of both the *Molière* and the *Barfleur* onto the Short Sea shows the ease with which ferries are able to

			move across routes and markets. Please see the above comments in response to paragraph 17.
57.	GET's initial submission states that Transferred Assets would not have enabled a business activity to be continued as it needed to procure additional business critical resources, services and third parties in order to commence business using the vessels. GET said[22] that the vessels could not be operated in the state they were acquired and had to undergo a process of flash-docking to be checked for sea-worthiness and to allow other checks to be performed on them. [✂]	Commercially sensitive information	GET considers that the magnitude of the works needed indicate that the work required on the vessels was not of a trivial nature.
58.	However, during this time, the vessels would have been rebranded, which would have been necessary if GET had acquired SeaFrance as a going concern but had decided to operate under the MyFerryLink brand. [✂]	Information comes from bid document which is commercially sensitive and not in public domain	In order to maximise efficiency, the re-branding was carried out at the same time as the flash-docking and certification visits. Regardless of how much time it might have taken to carry out re-branding on its own, the fact remains that there was a significant amount of work to be done in order to bring the vessels up to operating standard. The Vessels required refitting and considerable expenditure (€10 million) with flash docking to bring into them into service. GET also had to arrange support and essentials for ferry operation, such as port slots and related rights, fuel supplies, onboard charts and other supplies including legally required insurance (which had to put in place 72 hours from completion), and maritime and shore-based crew. Had the vessels in fact been operations-ready (as would have been the case if GET had been acquiring an enterprise), GET would have lost no time in launching them onto the

[22] Initial submission paragraph 7.11

		market, even if this had meant doing so under the old SeaFrance branding, in order not to miss the vital Summer holiday traffic, especially during the Olympics period. The fact that it did not shows therefore how much work needed to be done to the vessels before they could be operated. The fact that GET acknowledged in its bid that significant investment in the vessels was needed does not take away from the fact that the vessels were not operations-ready; it rather shows that GET was aware of how much work needed to be done before the vessels would be ready to operate. It also indicates that there is a clear break between MFL's operations and those of SeaFrance, because different branding was used by MFL and a rebranding exercise was necessary.
59. It is therefore not clear that at least some of this expenditure would not also have been required had GET acquired SeaFrance as a going concern.		It is difficult to follow this point given the comments above, all of which argue in the opposite direction. - The works were needed to the vessels because they could not be operated. - GET needed to procure personnel to operate and maintain the vessels from the SCOP because the vessels did not include the staff. - the CC has not commented on the fact that the vessels were not accompanied by the customer contracts, goodwill, fuel supply

			arrangements, insurance, port access rights and other elements that were all needed – and which GET procured after the acquisition – before the vessels could be operated.
60.	**[Questions for GET – we have been provided with a schedule of works on the vessels (2012 CA Technical expert report CA 11 avril.doc). Please clarify how much of the work described in this schedule would have been required on any change of ownership irrespective of the period of interruption of service. What significance did the duration of the period during which the vessels were in hot lay-by have on the amount of work required? What checks/remedial work would typically be required as part of the normal maintenance of certification process of the vessels? To what extent is the work carried out attributable to the normal maintenance of certification, re-branding and compliance with environmental obligations?]**		**Response to specific question:** **The placing of the vessels into dry dock was necessary for the completion of the Hull Dry Dock Survey, the obligatory inspection of the propellers etc. (and various apparatus), statutory obligatory inspections by Bureau Véritas (compulsory statutory visit in order to obtain all certificates to allow the ship to navigate in compliance and French and international regulations).**
61.	Other elements that GET has identified as being required to operate the business and which were not acquired as part of the Transaction are: fuel supply contracts, maps, charts and stock; insurance; harbour slots; office space; staff; customer contracts/goodwill (see below); marketing and sales capability; and corporate support services.		
62.	As regards the contracts referred to above (fuel, insurance), any transaction structured as an asset acquisition as opposed to a share acquisition would have similar issues. As the legal entity that is the party to the contract is not being transferred, the contract cannot form part of the Transaction unless novated to allow the contractual obligations to be transferred to a new party, which would require the consent of the contractual counterparty, or assigned (and unless the contract permitted assignment without prior consent, the consent of the contractual counterparty would also be required in such a case).		GET notes the comment that "any transaction structured as an asset acquisition as opposed to a share acquisition would have similar issues". It would be normal in an assets purchase for the purchaser (likely in conjunction with the vendor) to arrange for the novation or assignment to the purchaser of the existing customer and supply contracts, harbour slots, insurance and other policies,

		marketing and sales functions etc. However, in this case, there was **no novation or assignment** of those functions or contracts because the SeaFrance business had gone into liquidation, and all such arrangements had then terminated. Consequently, MFL had to begin from scratch the process of negotiating and securing new such arrangements and facilities. GET believes that the CC's comments in fact highlight clearly why the Transaction **is** qualitatively different to a normal assets purchase arrangement, and why in this case there was no business or "enterprise" that was acquired by GET.
63. The absence of office premises would seem unlikely to indicate that the Transaction should not be regarded as an enterprise given that office space is readily available and that in many mergers or businesses that are not outlet based, office space is often rationalized following the merger. Similarly, it is common for corporate services to be provided centrally and for this to be an area of rationalization following a merger. GET's submission focuses on the fact that MyFerryLink did not already have such services. However, it acknowledges that MyFerryLink obtains this from GET's central corporate function.[23]		It is not merely the fact that the acquisition did not include office space or corporate services which leads GET to argue that it did not acquire an enterprise; these are merely <u>two of many</u> factors which mean that this was not the case. For example, ex-SeaFrance staff sought to impede MFL's access to operational office space at Calais and GET had to resort to the Liquidator to resolve the situation. The absence from the Transaction of the central corporate services is however, in GET's opinion, another reason why it did not consider the assets that were acquired to be sufficient to represent a business.

[23] Initial Submission, paragraph 7.11.9

64.	[✂]	Information comes from private correspondence between harbour boards and GET	GET agrees that MFL would need harbour slots to operate (in the same way that SeaFrance had needed such slots). As mentioned above, GET considers that the Transaction is qualitatively different to a usual assets or share acquisition (and therefore not the acquisition of an enterprise) because there was **no novation or assignment** of harbour slots in this case. In respect of how the vessels were viewed in the maritime world, MFL in fact had to spend time dissociating itself from the tarnished reputation which had attached itself to the vessels. Irrespective of the operator, the ports view the vessels as entities in themselves and treated MFL with suspicion upon its entry. MFL had to begin from scratch the process of negotiating and securing harbour slots in its own name. GET believes that the CC's comments in fact highlight clearly why the Transaction is qualitatively different to a normal assets purchase arrangement, and why in this case there was no business or "enterprise" that was acquired by GET.
The extent to which customers would regard the MyFerryLink business as, in substance, continuing from the SeaFrance business			
Customer contracts and lists			
65.	GET draws attention to the fact that no customer contracts were transferred.		
66.	The importance of customer contracts is a matter of fact and degree and will vary from case to case.		

67.	As SeaFrance had entered into liquidation, the legal entity with which customers contracted was not transferred and customer contracts did not form part of the Transaction. Nevertheless, because of the nature of the contracts routinely formed between ferry operators and freight and passenger customers, the transfer of such contracts would not be determinative.		It is correct to note that passenger customers tend to use ferry services for less than one return trip per year and do not enter into contracts with ferry companies. However, the situation is very different for freight customers, who would typically enter into framework purchase arrangements on an annual basis with their transport providers. The framework arrangement would provide details of the price and credit terms agreed on the basis of certain volume levels. No such arrangements entered into by SeaFrance passed to MFL, for the simple reason that all such freight arrangements terminated when SeaFrance went into liquidation. It should also be noted that the period during which SeaFrance was in liquidation and no commercial activities were undertaken using the acquired assets covered the busiest travel times of the year for freight customers (i.e. December 2011) and for passenger customers (i.e. Christmas 2011, and the Half Term, Easter and Summer periods in 2012). Further, because prices and framework supply arrangements are negotiated annually with freight customers in Winter, the ex-SeaFrance assets could not be used as the basis for supply negotiations with customers in Winter 2011 which meant that when it acquired access to the vessels MFL was unable actively to win-over freight customers until Winter 2012, which was the next annual

			negotiation phase. Given the above, no passenger of freight customer goodwill or business transferred to MFL as part of the latter's acquiring the vessels and other assets. MFL's poor traffic figures since it started in August 2012 speak volumes about the effect of the nine-month break in operations of the vessels (over the busy Christmas and summer periods) as during this time both passenger and freight customers found alternative operators to use. This meant therefore that when MFL started up it had no client base at all from which to start, a situation which certainly would not have been the case had current customer contracts from a recently-operating business been included in the acquisition.
68.	We have been told that freight customers routinely enter into long term (12 month) contracts with several crossing operators[24], but do so with all or many of the operators offering short sea crossings. Whilst the frequency of crossings of freight users is high, it is customary for them to only decide which operator to use upon arrival at the port[25], although volume discounts and over riders set out in the contracts may have some bearing on their choice in situations where timing is not the primary consideration and we will be considering the implications of this in more depth during our investigation. **[Question for GET: please describe the steps have you taken to put contractual arrangements in place with freight companies? How has this been affected by customers' pre-existing contractual arrangements with other suppliers?]**		The OFT decision has been misquoted here by the CC. What the OFT decision in fact says is that: "freight customers do not book shipments with a particular operator, but rather, arrive in port and take the next available departure". This does not mean that they will only choose which operator to sail with at arrival, but rather that they will not book a precise crossing. Freight companies each have preferred partners with whom they have contracts, but there are no barriers to switching.

[24] Initial Submission, paragraph 10.8~~7~~ and Response to CC's Market Questionnaire, p.10.
[25] OFT reference decision, paragraph 71.

		However, as mentioned above, freight customers, would typically enter into framework purchase arrangements on an annual basis with their transport providers. No such arrangements entered into by SeaFrance passed to MFL, for the simple reason that all such freight arrangements terminated when SeaFrance went into liquidation. MFL has faced material difficulties in trying to persuade freight customers to use it rather than P&O or DFDS on the Short Sea in Winter 2011 because the latter agreed rebate and discount arrangements with their freight customers which depend on volumes of business those customers place with P&O or DFDS, respectively – and those arrangements will typically not expire until the 2013 pricing negotiations are concluded. Consequently, despite acquiring the ex-SeaFrance vessels and other assets, who had previously used SeaFrance.MFL has not enjoyed the benefit of goodwill or business from freight customers. GET submits that this is one reason as to why it has not acquired a business that could be regarded as an enterprise. **Response to specific question:** **The MFL freight salesforce has met potential customers, agreed a process where possible and signed the customers up to contracts where the obligations are one-sided (i.e. MFL has obligations to provide a service to the customer but the**

			customer has no volume obligations towards MFL). As previously stated, MFL found this process very difficult in late 2012 and are still finding it to be so, as freight companies often feel bound to other ferry operators due to their more extensive route services.
69.	Passenger customers use the service much more infrequently and would not be expected to enter into contracts with ferry companies for repeat travel.		However, the period during which SeaFrance was in liquidation and no commercial activities were undertaken using the acquired assets covered the busiest travel times of the year for passenger customers (i.e. Christmas 2011, and the Half Term, Easter and Summer periods in 2012). Consequently, the assets acquired by MFL were not used during the main sales opportunities for passenger business in the period November 2011 – Autumn 2012. Consequently, no passenger goodwill or business transferred to MFL as part of the latter's acquiring the vessels and other assets.
70.	Because of the relative infrequency of use by passengers, the Relevant Period may not have been long enough for it to be regarded as a break in service sufficient to mean that any commercial value attached to the customer relationship has dissipated completely. **[Question for GET – please provide information on the frequency with which passenger customers repeatedly use ferry services on the short-sea route]**		As mentioned above in the response to paragraph 68, the Relevant Period covered the busiest times of the year for ferries – Christmas, Easter and the Summer holidays, which exacerbated the effects of the already significant break in service and dissipation of commercial value attached to the customer relationship. The fact that MFL has achieved a minimal market share since it started operations is entirely consistent with MFL being a new start-up operation, beginning from scratch. It is entirely inconsistent with the suggestion that MFL is simply a continuation

		of SeaFrance. Furthermore, the nature of SeaFrance's exit – its abruptness, preceded by months of disruption due to strikes, meant that there was very little commercial value attached to the customer relationship in the first place. This is evidenced by the fact that, despite acquiring the SeaFrance trademarks, MFL has sought to distance itself from that brand. It is also evidenced by the low traffic figures MFL has endured on both the freight and the passenger side, since it started operations. MFL is a new brand with no visibility and will therefore not attract even the infrequent traveller. this is therefore a key issue for MFL at the moment. **Response to specific question:** **GET has no specific details on the frequency with which passenger customers use ferries. However, during the Site Visit, GET submitted to the CC a pie chart indicating that over the period 2007-2011:** **- 61.2% of Eurotunnel's customers used the service once;** **16.1% of its customers used it twice;** **14.4% of its customers used it 3-5 times;** **8.2% of its customers used it 6-50 times;**

		and **0.2% of its customers used it 3-5 times more than 50 times.** **GET considers that over half of those customers who have only used Eurotunnel once, travel to France at least 2-3 times per year.** **During the Site Visit, Get also provided the CC with a chart showing that of Eurotunnel customers travelling to France;** **- 73% had used P&O** **- 58% had used Eurostar** **- 43% had used Brittany Ferries** **- 36% had used British Airways** **- 32% had used Easyjet** **- 27% had used Ryanair** **- 21% had used Norfolkline** **- 16% had used DFDS Seaways** **GET does not have additional data for frequency of ferry use by passengers.**

71.	GET told us that since trading, MyFerryLink has carried approximately [✂] cars and [✂] lorries[26].	Commercially sensitive data not in public domain	
72.	GET states that the acquisition of the customer lists was of little, to no value because they had not been maintained throughout the Relevant Period and the customers on those lists had already moved on to other service providers.[27]		GET bought these assets from the liquidator on a "sight unseen" basis. Since MFL has been able to inspect and try to use these assets, it has quickly appreciated that they are of no commercial value, as discussed below.
73.	However, the Transaction did include the acquisition of those customer lists and these were listed specifically in the offer made by GET and in the Court order. This suggests that this information was believed by GET to have some intrinsic value.		As mentioned above, at the time when GET bid for the assets, it had no opportunity to inspect them so did not know what they consisted of; GET bought them on a "sight unseen" basis. Even if GET believed at the time it made the bid that they might have some value, this was not borne out in practice, as evidenced by its attempt to stimulate business, described at paragraphs 74-76 below. Furthermore, GET paid only €1,800,000 for IT systems, software and data files (including customer lists), which is less than 3% of the acquisition value.
74.	In paragraph 7.1514.3 of its submission to the CC, GET describes contacting via email the [✂] contacts listed on the acquired database.	Commercially sensitive data not in public domain	
75.	GET details an exercise carried out by MyFerryLink in which it offered a free day trip to (a) ex-SeaFrance customers as detailed on the customer list, (b) French nationals through an advert in the local French press and (c) by virtue of an		

[26] Initial submission paragraph 5.5 – dated 19 November 2012.
[27] Initial submission paragraph 7.1514

	advert placed on the social media website, Facebook.		
76.	[✂]	Commercially sensitive information not in public domain	
77.	Without being aware of the number of people targeted by the advert in the local French press and on Facebook, and the extent to which those individuals overlapped with those on the customer lists, it is difficult to draw any conclusions from these figures other than that the use of the customer lists did succeed in attracting some customers to this trip.		The local press and other entities through which the offer was promoted were, in the UK, the KM Group (generating 290 bookings), and in France, the Nord Littoral and La Voix du Nord, as well as through Facebook (generating 446 bookings). It was also highlighted in Polish press, generating 22 bookings. In any commercial sense the level of passenger take-up from MFL using the acquired database (351 bookings from 316,949 customers – a success rate of 0.1%) is *de minimis*, and can in no way be portrayed as achieving anything even approaching success.
78.	This suggests that the customer lists did retain some commercial value by the time that services resumed.		The success rate in relation to ex-SeaFrance customers for this exercise translates as 0.1%. This demonstrates very clearly the negligible commercial value the customer lists retained.
Can other, non-physical assets such as goodwill be said to form part of the Transaction			
79.	The SeaFrance web-addresses and domain names and customer lists all formed part of the Transferred Assets, indicating that they had an inherent commercial value to GET. This is reinforced by the fact that the leading ferry operator, P & O also attempted to purchase these particular assets for [ ]. The		GET has already discussed, in the response to paragraph 73 above, its position in relation to the potential commercial value of the customer lists. In respect of the web-

	acquisition of these assets by GET meant that they were not available for exploitation by others.		addresses and domain names, it notes that the price which it paid for branding and domain names represented only 1.5% of the acquisition value. Furthermore, had these been of real commercial value, they would have been used by MFL. In reality, the amount of bad will attached to the SeaFrance brand was such that they had negligible commercial value. As a result, MFL has made no commercial use of the SeaFrance brand name and has actively sought to distance itself from the SeaFrance brand.
80.	Since MyFerryLink has recommenced trading operations, the SeaFrance website has been used to redirect customers to the MyFerryLink website. GET's offer to the French liquidator, included €1 million attributable to the acquisition of the trade and domain names. This, combined with its continued use, would indicate some inherent commercial value in the goodwill attaching to the SeaFrance brand. **[Question for GET – please provide details of the numbers redirected from the SeaFrance websites]**		As stated in response to paragraph 79 above, the price paid for these represented only 1.5% of the acquisition price. In respect of goodwill, GET repeats its point made in paragraph 79 above. **Response to specific question:** **The SeaFrance webpage is an information page to re-direct those seeking the previous alternative to the two large ferry operators. MFL is not in a position to monitor redirections and has only noticed that hits to the SeaFrance webpage are low and have dropped away significantly since October 2012. GET considers that the domain names are not worth even the minimal price paid for them but, given that they have been paid for, it would be nonsensical for them not to be used.**
81.	At the time of writing, My~~f~~FerryLink are still using the SeaFrance web-address to redirect customers to their site, over 12 months since SeaFrance ceased to		As explained above, passenger customers use ferries very infrequently and the link is

	trade. Its continued use would indicate that GET believe that even now, some goodwill remains and also, that the Relevant Period was not sufficient to constitute a complete break in continuity of service in the eyes of passenger customers.		therefore maintained for their information purposes.
The value of the bid			
82.	The nature of GET's bid may be indicative that an enterprise was obtained and not merely assets. In *Stagecoach/Lancaster* the MMCC considered the fact that Stagecoach was willing to pay a higher price than any other bidders as an indication that it was acquiring an enterprise.[28]		GET considers this to be an extremely arbitrary approach to the issue of enterprise. As stated above, GET took part in a competitive bid process and in order to win this process GET needed to submit the highest bid. There is no evidential or legal reason for concluding that submitting the highest bid to the liquidator, means that the acquired assets were used to conduct the activities of a business at the time of GET's acquisition – especially when the acquired assets had not been used commercially for the period of over seven months before the acquisition. GET would also point out that the amount it paid for the acquired assets was materially below the average valuation of the assets (€121 million) given by the expert appointed by the Paris Court. By the CC's own logic, because GET paid materially less than €121 million to purchase the assets from the Paris Court, this would in fact suggest that GET did **not** acquire an enterprise.

[28] *Stage Coach Holdings Ltd/Lancaster City Council,* Cm 2423 (Dec 1993)

83.	In *AAH* the MMC concluded that although AAH had not acquired the assets as a going concern, they had in reality obtained much of the benefit of so acquiring them.[29]		In *AAH*, AAH had existing relationships with many of Medico's suppliers, which was not the case here. There was also a transfer of goodwill and staff etc. Furthermore, as already stated, the time period for which the assets were not used in *AAH* was substantially lower than in this case. GET would also note that the facts of the AAH case suggest that the parties involved had sought to structure their transaction in such a way as to avoid the application of the merger control rules, by trying artificially to create a temporary break in the continuity of the acquired enterprise. It is however clear from the facts of the AAH case that the reality of the situation was that the activities of a business were undertaken immediately before and after the acquisition. In the AAH case, the interruption to the business lasted one day. It is also clear from AAH that the sale and purchase arrangement took place between the target's parent and the purchaser. In this case, however, the acquired ex-SeaFrance assets had not been used in any commercial operations for the continuous period of over seven months immediately preceding the date of the acquisition. In this case, consistent with the reality that there was a fundamental and long-standing interruption to the activities which SeaFrance had undertaken, the ex-SeaFrance assets were sold by the liquidator appointed by the Paris Court whose job it was to split up and sell the

[29] *AAH Holdings/Medicopharma* Cm 1950 (May 1992)

			ex-SeaFrance assets in whatever manner would maximise the sale proceeds. The liquidator had no responsibility for trying to maintain continuity of business activities and did not seek to do so, instead conducting a closed bid process for the assets as a whole and individually.
84.	The OFT's reference decision notes that GET paid at total consideration for the Transferred Assets of €65 million of which the three former SeaFrance vessels accounted for almost 95 per cent of the purchase price.[30]		It is GET's submission that this figure shows that there was very little commercial value attached to the remaining assets. Equally, this fact alone does not indicate that the acquired assets were used to conduct the activities of a business at the time of GET's acquisition – which is the relevant legal issue when considering whether GET acquired an enterprise.
85.	Whilst the value of GET's bid was not significantly higher than the next highest bid, it was the highest bidder, it was the only bidder willing to bid for the totality of the Transferred Assets and was the only bidder not already operating ferry services. This may indicate that although it was not formally buying the business as a going concern, it recognized that is was obtaining much of the benefit of a going concern business and was accordingly willing to pay more than those who were interested only in assets.		Again, as stated above at paragraph 52, GET was competing in a bid process which it was seeking to win, and it therefore made sense for GET to submit a bid which was as close as possible to what the Liquidator wanted – the disposal of all assets formerly belonging to SeaFrance – in order to be seen as having most attractive bid. Furthermore, as it did not already operate ferry services, GET was under more pressure to put forward a credible bid in order to be taken seriously, which meant bidding for non-ferry assets as well, even if, as turned out to be the case, many of these assets were of extremely limited commercial value. GET bid

[30] OFT reference decision paragraph 13.

		what it considered to be the appropriate price for the collection of assets, but this collection was still not enough on its own to operate the MFL business. The fact that GET's bid was highest is irrelevant to the issue of whether the acquired assets were used to conduct the activities of a business at the time of GET's acquisition – which is the relevant legal issue when considering whether GET acquired an enterprise. GET considers that there is no evidential or legal basis (and that none has been put forward by the CC) for the CC's statement that the fact of GET submitting the highest bid means "it recognized that is was obtaining much of the benefit of a going concern business and was accordingly willing to pay more than those who were interested only in assets".
Current view on "enterprise"		
86. On balance, our current thinking is that the acquisition of the Transferred Assets by GET, together with the arrangements with SCOP, which are an integral part of the Transaction, are sufficient to constitute an enterprise, notwithstanding the interruption of services during the liquidation process.		The relevant legal issue when considering whether GET acquired an enterprise is whether it acquired "the activities of a business". GET considers that the CC has failed to demonstrate why GET acquired "the activities of a business". Further, GET considers that the two cases put forward by the CC on this question are irrelevant to the facts of this case. GET disagrees with the CC's current thinking

		for the reasons set out above, and in previous submissions.

GROUPE EUROTUNNEL S.A. MERGER INQUIRY

RESPONSE BY GROUPE EUROTUNNEL S.A. TO THE

COMPETITION COMMISSION'S PROVISIONAL FINDINGS

Executive Summary

- **The provisional findings do not take account of important new developments**:
  - **DFDS has recently stated clearly that it will not exit the Dover-Calais route, undermining** a fundamental part of the CC's reasoning.
  - There are reliable reports that **P&O has already reduced the number of its ferries on the Short Sea** from 6 (on the basis of which the PFs were prepared) to 5. It is therefore no longer sustainable for the CC to argue that P&O would not reduce capacity on the Dover-Calais route.

- **The CC's provisional findings depend on numerous hypothetical propositions all being satisfied simultaneously**. Even if considered individually, these assumptions are wrong but the probability of all these assumptions occurring simultaneously is remote. Consequently, **the CC cannot meet the required standard of proof in order to establish an SLC**.

- **A divestment remedy would remove capacity from the Short Sea imminently, reducing the frequency of crossings and almost certainly leading to higher prices in the short term.** The anti-competitive effects incorrectly envisaged in the provisional findings are not due to occur for several years. The CC should present convincing evidence to justify taking such an approach, but has not done so.

- The CC's analysis does not acknowledge that **customers have not opposed the transaction in response to a very wide market test**.

- The CC's approach creates an **important conflict with a judgment of the Paris Court** and does not address the fundamental legal obstacles created by that Court's judgment to the CC's proposed course of action.

- The CC's approach is **inconsistent with a decision on the same markets already taken by the French Competition Authority** ("**FCA**"). The CC is not bound to mirror the FCA's conclusions but the CC has failed to address the substantive reasons why the FCA cleared the merger.

- **The CC's approach towards the counterfactual is so hypothetical as to be inappropriate**. None of the CC's three possible counterfactual approaches can justify an SLC finding to the required standard of proof. The only appropriate counterfactual is the situation existing immediately prior to GET's acquisition.

- As explained below, GET believes that **further economic analysis points firmly against an SLC**.

4. ENTERPRISE

4.1 Section 129(1) of the Act defines "enterprise" as "*the activities or part of the activities of a business*". Section 129 does not define "enterprise" in terms of a collection of assets from which a business can be conducted; it instead considers the issue in terms of activities already being undertaken, which are then acquired.

4.2 The Vessels and other acquired assets had not been used in any commercial operations for over 7.5 months before the Acquisition and a further 1.5 months then elapsed before MFL was able to begin operations using the Vessels. GET does not disagree with the CC's comment that, "*the question of whether any given combination of assets constitutes an 'enterprise' is an economic assessment, requiring the balancing of competing factors in the context of the industry concerned*"[23]. GET considers however that **the reality of MFL's progress from starting operations is not consistent with the proposition that GET acquired an enterprise (in the sense of GET acquiring the existing "activities of a business"**).

4.3 By contrast, GET considers that MFL's slow progress from scratch indicates that no "enterprise" (in the sense of section 129 of the Act) was acquired by GET. Instead, GET purchased a collection of bare assets, using which MFL then began to commence a business from scratch.

4.4 In this sense, GET considers that the two cases put forward by the CC[24] are wholly distinguishable because in both of them the interruption to the business was so brief (1 day each case) that in reality there were pre-existing activities (i.e. a pre-merger business) that continued and which was acquired in its substantive pre-merger state by the purchaser.

4.5 In GET's case, however, the business of SeaFrance using the Vessels had terminated permanently[25], and commercial activities using the Vessels were not undertaken for 9 months, such that the customers had all switched to alternative service providers pre-Acquisition. In this sense, no "activities of a business" were acquired by GET. The CC has itself effectively acknowledged that this is the case because it agrees continuation of the SeaFrance business cannot be a relevant counterfactual – "*the Court ordered the liquidation of SeaFrance on 16 November 2011 and terminated the business continuity provision on 9 January 2012*" (emphasis added).

4.6 **GET also considers that the CC has mischaracterised the relationship between GET and the SCOP** by saying that they "*acted together during the bidding period to secure control of the liquidation assets*"[26]. GET submitted a bid on its own and in its own name (rather than a joint bid with the SCOP) to the liquidator for the Vessels and other assets of SeaFrance. Before doing so, GET had discussions with the SCOP about the extent to which the SCOP might operate and maintain the Vessels on GET's behalf, but the SCOP was also solicited by other bidders (although DFDS did not pursue intensively contacts with the SCOP).

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[23] PFs paragraph 4.13
[24] PFs paragraph 4.12 and footnote 88
[25] PFs paragraph 5.8(a)
[26] PFs paragraph 4.24(a)

CLERK'S OFFICE OF THE PARIS COMMERCIAL COURT
1 QUAI DE LA CORSE 75198 PARIS CEDEX 04

Bankruptcy Proceedings Department

SA [a public limited company under French law] GROUPE EUROTUNNEL (GET SA)
3 rue La Boétie
75008 Paris

Order Notification No.: 2012035500

Case: SA à Directoire [a public limited company under French law with a board of directors] SEAFRANCE
1 AVENUE DE FLANDRE 75019 PARIS
Court Clerk No.: P201001398
Notification Date: June 11th, 2012

ORDER NOTIFICATION

I am writing to inform you of the Order delivered by the Court Receiver.
Sincerely,

THE CLERK

If you intend to appeal this Order, such appeal must be brought before the Court of Appeals in accordance with Articles R. 642-37-1 and R. 642-37-3 of the French Commercial Code. The appeal must be brought before the Paris Court of Appeals, 34 quai des Orfèvres, 75055 Paris Cedex 01.

French Commercial Code
Article R. 642-37-1. - An appeal against a Court Receiver's Order delivered pursuant to Article L.642-18 shall be brought before the Court of Appeals.

Article R. 642-37-3. - An Order delivered pursuant to Article L. 642-19 must be, under the Court Clerk's responsibility, notified to the debtor and communicated by letter to the auditors. Appeals of such decisions must be brought before the Court of Appeals.

Article R. 661-3. - Unless otherwise specified, the appeals deadline for parties shall be ten days following notification of a decision delivered pursuant to an ad hoc, conciliation, safeguard, recovery, or liquidation mandate (...)

Article R. 662-1. - Unless otherwise specified in the present Book: 1 French Civil Procedure Code rules shall apply in matters governed by Book VI of the legislative part of the present Code.

EXERPT FROM THE PARIS COMMERCIAL COURT MINUTES

1DP/2012/07/02/39
SUBMISSION No.: D2012070239
ROLL No.: 2012035500
CIVIL TRIAL No.: P201001398
DATE: May 30th, 2012
RQVEN09: Request for Sale 2009
CLAIMANT(S):
SCP [private professional company under French law] B. T. S. G. in the person of Mr. Gorrias, 1 place Boieldieu 75002 Paris
DEFENDANT(S):
Mr. Pierre Fa
10 RUE DUROC 75007 PARIS
SA à Directoire [public limited company under French law with a board of directors] SEAFRANCE
1 AVENUE DE FLANDRE 75019 PARIS
COURT RECEIVER: Mr. Roger Agniel
Liquidator's judicial representative:
SCP [private professional company under French law] B. T. S. G. in the person of Mr. Gorrias in the case:
SA à Directoire [public limited company under French law with a board of directors] SEAFRANCE
Legal representative: Mr. Pierre Fa - 10 RUE DUROC 75007 PARIS

CERTIFIED COPY

EXERPT FROM THE PARIS COMMERCIAL COURT MINUTES

Submission No.: D2012075975
Court Clerk No.: P201001398
Role No.: 2012035500
Court Receiver: Mr. Roger Agniel
Liquidator's judicial representative: SCP [private professional company under French law] B. T. S. G. in the person of Mr. Gorrias
Case: SA à Directoire [public limited company under French law with a board of directors] SEAFRANCE
Order Filing OFFICIAL MINUTES

On this 11th day of June in the year 2012 a Request and Order for Sale 2009 by the Court Receiver in the abovementioned case has been submitted to be recorded in the Court Clerk Office's Official Minutes.

Therefore the present minutes have been drafted.

Prepared in Paris on June 11th, 2012.

CERTIFIED COPY

Court Ordered Liquidation – 2012035500
SA [public limited company under French law] SEAFRANCE
Court Clerk No.: P201001398
Mr. Roger Agniel COURT RECEIVER SCP [private professional company under French law] Becheret – Thierry – Senechal – Gorrias Stéphane Gorrias
LEGAL REPRESENTATIVE

Paris, May 29th, 2012,
To Mr. Roger Agniel, Court Receiver for the Court Ordered Liquidation of SA [public limited company under French law] SeaFrance, whose business is "Maritime Transporter" and whose registered office is at 1, avenue de Flandre in PARIS (75019).

THE UNDERSIGNED
SCP [private professional company under French law] Becheret-Thierry-Senechal-Gorrias, Legal Representatives inscribed upon the National List, residing at 1, Place Boieldieu in Paris (75002).
Mr. Stéphane Gorrias, acting as Liquidator of SA [public limited company under French law] SeaFrance,
Appointed as such by judgment of the Commercial Court of Paris dated November 16th, 2011 having ordered the liquidation of SA [public limited company under French law] SeaFrance,

I am writing to inform you, Mr. Court Receiver,

1. Summary of Bankruptcy Proceedings
In the judgment delivered on April 28th, 2010, SeaFrance was placed under the protection of the Commercial Court as part of a safeguard procedure. Mr. Badillet was appointed as Court Receiver, SCP [private professional company under French law] Thevenot & Perdereau in the person of Mr. Thevenot and SELARL [limited liability professional practice under French law] FHB in the person of Mr. Hess as Court Administrators, and SCP [private professional company under French law] BTSG in the person of Mr. Gorrias as Legal Representative. The observation period expired on September 15th, 2010.
By judgment of the Commercial Court of Paris dated June 30th, 2010, the safeguard procedure was converted into a receivership. Mr. Agniel was appointed as Court Receiver, replacing Mr. Badillet.
Given the firm's situation, a business continuity solution for SeaFrance was sought by drafting a New Industrial Project (NIP). In order to provide for financing of its business, SeaFrance and the court administrators sought financial support from SNCF. Following authorization by the European Commission, SNCF's financing of SeaFrance in the form of a rescue package was implemented allowing the firm to cover its cash requirements pending a restructuring plan submitted for authorization by the European Commission.
Meanwhile, in July 2010, SeaFrance's court administrators began searching for buyers for its ships, contracts, and staff as part of a plan to sell the firm. The

offers received in late July 2010 by the court administrators, however, were not deemed serious by them and therefore were not presented to the Court.
Lastly, in order to increase the chances of finding the best solution for the firm's future, tender proceedings were undertaken in late September 2010 by SNCF Participations, the sole owner of SeaFrance, with a view towards identifying potential purchasers of its shares in SeaFrance, with concern for finding a credible industrial alternative for the company. Failing an admissible, firm, and attractive offer, the process of selling SeaFrance and its subsidiaries undertaken in September 2010 by SNCF Participations was suspended in early 2011.

Based on this observation and given the progress achieved in implementing the New Industrial Plan (NIP) and the associated Employment Safeguard Plan (ESP), a request for SeaFrance's recapitalization in the amount of €223 million, providing for financing the NIP, was submitted by France to the European Commission in February 2011.
On June 22nd, 2011, the European Commission expressed significant reservations regarding the request for state aid's compatibility with regulations. The NIP was amended incorporating a plan for additional savings and a permanent layoff project providing for eliminating approximately 200 additional positions.
Meanwhile, given the European Commission's concerns regarding the request for restructuring aid, which jeopardized the chances of implementing this modified Plan, in July 2011, the court administrators began new tender procedures for taking over the firm with a transfer plan.
On October 24th, 2011, the European Commission issued a negative opinion regarding the request for restructuring aid for SeaFrance, making it impossible to implement the modified NIP.
Therefore, during the hearing on October 25th, 2011 examining the possible outcomes of the insolvency proceedings, the Paris Commercial Court:
• noted the withdrawal of the SeaFrance recovery plan given the European Commission's decision dated October 24th, 2011;
• reviewed the two takeover bids supported respectively by certain employees of SeaFrance through a SCOP [workers' productive cooperative under French law] and by the DFDS & LDA consortium.
During the deliberations on November 16th, 2011, the Commercial Court held that the substantive requirements were not met in order to retain one of these offers.
It was particularly stressed that the sale price offered by the best bid was "only €5 million, whereas the market value of the ships is about €50 to €60 million, according to the lowest estimates cited during the hearing."
Therefore, in a decision dated November 16th, 2011, the Paris Commercial Court ordered the liquidation with SA SeaFrance continuing its activities.
Business continuity was decided in order to provide for the submission of satisfactory offers with a new deadline of December 12th, 2011.
January 9th, 2012, under the framework of SeaFrance's continued activity while undergoing court ordered liquidation, the Court considered the SCOP's [workers' productive cooperative under French law] bid, which had been maintained and

revised by filing a new package with the Commercial Court on January 6th, 2012. Nevertheless, the Court held that the substantive conditions had still not been met to retain this bid particularly due to the fact that the bid price was €1.

In this judgment the Court Receiver reported to the Court stating that: "The end of the temporary business continuity is not the end of the road. As soon as the decision is delivered, the liquidator, under the control of the Court Receiver and the Court, shall undertake all necessary discussions with interested partners. Clearly, there must be a compromise between the value of the assets, mostly ships, and maintaining employment contracts. The market is there; the ships are recent; and even the goodwill may eventually be sold. He assures that the procedural organs shall pay particular attention to the dramatic social aspects, and to this end, he knows that SNCF will do its duty with regards to its obligations to the Group and its ability to redeploy employees, under conditions to be negotiated. In all cases, the procedure must ensure three lines of action:
reclassifying own activities in a competent and competitive structure in the maritime industry retaining the value of the assets (rejecting speculative offers designed to make quick capital gains) a solution for all employees who do not find employment in their current domain, with compensation, training, business creation assistance, redeployment, and in every situation, full transparency regarding the actions taken."
The Paris Commercial Court, in its judgment dated January 9th, 2012 terminated the company's business continuity given the insufficiency of the only bid submitted.

2. Asset Realization
In accordance with the provisions of Article L 640-1 of the French Commercial Code, the bankruptcy procedure is intended to realize the debtor's assets through aggregate or separate transfer of his rights and property.
To do so, it is the liquidator's responsibility to preserve the creditors' mutual surety and realize the company's assets under the best possible conditions.
Article L 642-19 of the French Commercial Code provides that the Court Receiver shall either order the sale at public auction, or authorize, at the prices and conditions he determines, the sale in a private transaction of the debtor's other assets, i.e. property other than real estate.

a. Invitation to Tender for a Broker Regarding the Ships
The company's assets comprising the creditors' mutual surety mainly consist of three ships.
Given the specificity of such assets, the Court Receiver wished to be assisted by a person knowledgeable in this domain, in accordance with Articles L 641-11 and L 621-9 of the French Commercial Code,
Under these circumstances, the liquidator met with three shipbrokers working in France with regards to an appointment in accordance with the above provisions.
Before such appointment, it was decided to conduct an invitation to tender.
A schedule of conditions was developed in collaboration with SeaFrance's