

## EUROTUNNEL/SEAFRANCE MERGER INQUIRY REMITTAL

### PRELIMINARY RESPONSE OF GROUPE EUROTUNNEL S.A ("GET") TO THE COMMENTS OF DFDS A/S ("DFDS") ON THE REMITTED JURISDICTIONAL QUESTION

#### 1. INTRODUCTION

1.1 In this submission, GET responds to what it has identified as the central points raised in the submission by DFDS on the remitted jurisdictional question dated 22 January 2014 (the "DFDS Submission")<sup>1</sup>.

1.2 By way of overview:

1.2.1 The correct legal issue to be addressed is simple: **precisely what over-and-above bare assets was acquired by GET, and whether/how this put GET in a different position from one where it only acquired bare assets.** DFDS has identified this correctly in paragraph 2.6. However, despite its lengthy submission, DFDS has not in any way sought to answer that issue. Since DFDS' submission was evidently prepared very carefully, GET submits that **DFDS' omission even to attempt to address the core legal issue indicates that GET acquired bare assets and not an enterprise.**

1.2.2 The Vessels were bare assets. The fact that they may have been in a state of "hot lay-by" when sold defines the nature of the assets that were sold, but it does not alter the basic point that they were simply bare assets that GET acquired.

1.2.3 DFDS emphasises that the ex-SeaFrance crew did not require "*the usual period of training/familiarisation*"<sup>2</sup>. In its submission, DFDS does not specify or estimate the actual period that would be required, although it implies that the period is significant. In fact, it is very short: the SCOP has identified<sup>3</sup> that even staff with no prior maritime experience required only a week of training before they could work on the Vessels.

1.2.4 DFDS contends that by acquiring the Vessels and some of the ex-SeaFrance staff, GET/SCOP obtained a financial benefit of around €10m. This is not factually correct: the ex-employees were not transferred from SeaFrance; those which were employed (and a large number were not employed) were recruited out of unemployment by the SCOP and neither GET nor SCOP knew whether the sums would be paid until much later. Moreover, even if it were factually correct, it is not relevant: the potential payment of the employee indemnity does not inform the question of whether there has been a transfer of an enterprise; it concerns a financial benefit. Whilst finance is essential to run a business, it does not in any way define the business because it is pre-eminently fungible. For this reason, the obtaining of a financial benefit is not mentioned in any relevant guidance or decisions as an indicator that an enterprise has been transferred. In addition, the payment, which was finally made in January 2013, was outside of the relevant period for consideration by the CC.

1.2.5 DFDS has overlooked entirely the magnitude and intensity of the work needed (and also the amount of time taken), especially in relation to the

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<sup>1</sup> GET does not seek to address in full all of the arguments in the DFDS Submission, a number of which are incorrect and/or irrelevant. If the CC intends to rely in its analysis on any point made by DFDS which is not specifically challenged in this submission, GET requests that the CC identify the point to GET so that it can make submissions on it.

<sup>2</sup> See paragraphs 2.7(b) and 3.12 of the DFDS Submission

<sup>3</sup> See the submission by SCOP on the remitted jurisdictional question dated 24 January 2014 (the "SCOP Submission") paragraphs 4.51 and 4.52

Vessels and the IT systems acquired from the SeaFrance liquidator, in order for MFL to be capable of beginning commercial operations. Equally, DFDS has overlooked what GET did not acquire: the customer database acquired was incomplete and effectively useless, no customer or supplier contracts were acquired, no berthing slots were acquired, and no staff were acquired.

1.2.6 Much of the DFDS Submission relies upon an analogy which DFDS seeks to draw with its own acquisition of Norfolkline. However, **the analogy with Norfolkline is irrelevant and does not inform the discussion**. This is because **Norfolkline was acquired by DFDS as a going concern** with the intention that it would be progressively integrated into DFDS. By contrast, the SeaFrance business had ceased to operate 9 months before it was possible to launch MFL. Moreover, the acquisition which enabled GET to launch the MFL business was expressed to be a purchase of assets from a liquidator rather than the purchase of an ongoing business from its owners.

1.3 For the reasons outlined in this submission, GET considers that the DFDS Submission is of no assistance on the fundamental legal question of jurisdiction.

## 2. THE LEGAL FRAMEWORK

2.1 In paragraph 2.6 of the DFDS Submission, DFDS quotes the Tribunal's judgment that:

*"The key to distinguishing between "bare assets" and an "enterprise" lies in:*

- (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."*<sup>4</sup>

2.2 Despite filing a very detailed submission, including extensive consideration of French appeal cases, DFDS does not attempt to answer the question posed by the Tribunal. Its omission to do so is a telling indicator that GET in fact acquired bare assets and not an enterprise.

2.3 DFDS instead focuses its fire power on a different issue<sup>5</sup>, namely whether the assets bought by GET may be more valuable combined, than if they had been acquired separately. This is an entirely separate consideration to the one formulated by the Tribunal (see above). By way of analogy, in the context of the rail sector, railway track, ballast and sleepers are more valuable when combined than they are separate, but buying all three together does not amount to the transfer of an enterprise: they are simply three "bare assets". **The question posed by the Tribunal was: what, over-and-above those "bare assets" was acquired that places the acquirer in a different position from a buyer of the assets? In the present case, there was nothing and DFDS is not able to maintain even an arguable case to the contrary.** As such, the entirety of DFDS's argumentation, in sections 2 and 3 of the DFDS Submission, is irrelevant because it does not address the essential issue identified by the Tribunal.

2.4 In section 3 below, GET addresses points made in, and following the same order adopted by DFDS in, sections 2 and 3 of the DFDS Submission.

## 3. COMPONENTS OF THE ACQUIRED ENTERPRISE

*Vessels*

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<sup>4</sup> Judgment, paragraph 105.

<sup>5</sup> DFDS Submission paragraph 2.7

- 3.1 The vessels acquired by GET were bare assets. The fact that they may have been in a state of "hot lay-by" defines the nature of the assets that were sold, but does not alter the basic point that they were assets. For example, some suppliers may sell equipment on a "plug and play" or "turnkey" basis (i.e. the equipment can simply be plugged in to existing systems in order to be fit for use); however, buying such assets does not involve a transfer of an enterprise any more than buying equipment which requires adaptation to, or combination with, other assets before it is fit for use.
- 3.2 It is also incorrect to state that the Vessels "*could be brought into operation very swiftly following their acquisition*"<sup>6</sup>. In fact, it took 1.5 months of intensive work post-acquisition before the Vessels were operational, and significant work needed to be undertaken to them in the meantime, along with other essential steps (e.g. acquiring necessary safety and other certificates, berthing slots, insurance cover etc), all of which are described at paragraph 4.7 to 4.9 of the SCOP Submission. Further detail on precisely what this work entailed can be obtained from SCOP. As GET has noted in previous submissions, throughout both the original CC merger inquiry and the remittal, it took the SCOP 1.5 months to bring the Vessels into operational use, which in no circumstances can be described as "*almost immediately*", and in fact is the same amount of time as the upper limit of DFDS' estimate for vessels being taken out of cold lay-by<sup>7</sup>.
- 3.3 GET considers that the liquidator's decision to keep the Vessels in a state of hot lay-by was driven by two considerations. The first was to try to maximise the resale value of the Vessels as assets, because by the time of the liquidator's appointment the Vessels were to be sold as assets rather than as part of an ongoing business. The second was the requirement of the Calais Port Authority that the Vessels be capable of being moved at very short notice<sup>8</sup>. Neither consideration is however relevant to the question of precisely what over-and-above bare assets GET acquired and how this put GET in a different position from acquiring the assets.
- 3.4 Similarly, the fact that the Vessels had previously been used on the Short Sea is not determinative of whether GET acquired an enterprise. After all, DFDS had itself chartered both the *Molière* (which of course was previously used by SeaFrance) and the *Barfleur* (which had been used on the Western Channel, but which was quickly adapted for use on the Short Sea), but that does not mean that those ferries consisted of anything more than bare assets when acquired by DFDS. Indeed, Stena RoRo made a credible bid for the Vessels, even though it intended to use them on routes other than the Short Sea, thus undermining DFDS' statement that the value of Vessels was tied to their use on the Short Sea<sup>9</sup>.
- 3.5 The quote from M Gounon at paragraph 3.8 of the DFDS Submission is inaccurately portrayed by DFDS. In commenting that GET "*don't see ourselves as a new player on the market*", M Gounon was referring to the fact that Eurotunnel had for several years been providing cross-Channel passenger and freight transport services. Neither that comment, nor M Gounon noting that the Vessels have been used on the Dover-Calais route, supports DFDS's claim "*that GET saw itself as continuing SeaFrance's former operations on the route*"<sup>10</sup>. Emulating SeaFrance's failed business with its difficult reputation is the last thing that GET or any sensible buyer would have wished to do.

#### Crew

- 3.6 DFDS emphasises that the ex-SeaFrance crew did not require "*the usual period of training/familiarisation*" (paragraphs 2.7(b) and 3.12 of the DFDS Submission). The

<sup>6</sup> DFDS Submission paragraph 2.7(a)

<sup>7</sup> DFDS Submission paragraph 3.2

<sup>8</sup> See GET's response dated 5 February 2014 to the CC's questions of 22 January 2014 ("GET's 5 February Response"), addressing question 8

<sup>9</sup> DFDS submission paragraph 3.7

<sup>10</sup> DFDS Submission paragraph 3.8

actual period of normal training and familiarisation is never specified or estimated, but DFDS implies that it is significant. In fact, it is very short: see the SCOP Submission<sup>11</sup>, which states that this training can be completed in "*around a week*" for someone with no prior maritime experience. Once this is understood, DFDS's point falls away. Most employers run much longer induction periods for new staff, even those with prior relevant experience. For example, for lateral hires (i.e. recruits with prior legal experience) law firms can spend a week simply on familiarisation with IT systems and buildings.

- 3.7 GET also wishes to emphasise that the Tribunal did not in fact conclude that "*it is indeed of great advantage to have a crew that is familiar with a particular vessel...in terms of facilitating the swift and efficient commencement of operations*"<sup>12</sup>. The Tribunal simply posed the question as to whether it might be an advantage, and, as noted above, the evidence clearly indicates that it was not an advantage on the facts of this case.
- 3.8 DFDS contends<sup>13</sup> that by acquiring the vessels and some of the ex-SeaFrance staff, GET/SCOP obtained a financial benefit of around €10m. Even if this were correct factually (which it is not: the ex-employees were not transferred from SeaFrance, those which were employed were recruited from unemployment by the SCOP and GET/SCOP did not know whether the sums would be paid until 23 January 2013, which is outside the relevant period for consideration by the CC) it does not go to the issue of enterprise because it concerns finance, not the nature of the business itself. Of course, every business needs finance in order to function, but finance is wholly fungible and does not define the nature of an enterprise. A customer purchasing three ships would typically obtain a financial (volume) discount from its supplier, but that discount does not convert the purchase of three bare assets into the transfer of an enterprise. For this reason, the obtaining of a financial benefit is not mentioned in any relevant guidance or decisions as an indicator that an enterprise has been transferred.
- 3.9 Further, SCOP has noted the uncertainty surrounding whether the employee indemnity would be paid by SNCF and the fact that this was irrelevant to the SCOP's choice of which employees were hired<sup>14</sup>. These points are evidenced by the fact that SCOP did not simply employ every available ex-SeaFrance employee in respect of whom it considered the indemnity to be payable; instead it undertook a formal recruitment procedure, as a result of which a significant number of ex-SeaFrance were not employed by SCOP, whilst a comparable number of non ex-SeaFrance employees were employed. As noted above, and as previously outlined by SCOP<sup>15</sup>, at the points in time when GET acquired the Vessels and when SCOP was recruiting staff, there was considerable doubt as to whether the indemnity would be paid. The matter was only resolved, by judgment of the Paris Commercial Court, on 23 January 2013, which falls well outside the relevant period to be considered by the CC. For these reasons, the employee indemnity is not a relevant consideration to the issue of whether an enterprise was acquired by GET.
- 3.10 DFDS has commented that the social plan envisaged "*the €25,000 payments would be available only in the event that the ex-SeaFrance vessels were subsequently used for similar operations ("une exploitation similaire") run by an enterprise in which the employees in question had a direct interest*"<sup>16</sup>. However, this comment adds nothing because "une exploitation similaire" merely envisages the Vessels being used on a ferry operation that is similar to that of SeaFrance (e.g. between Dover and Calais); the social plan does not require or envisage that the Vessels would be used to reactivate the already-dormant SeaFrance business. The Tribunal has in this context very clearly noted that it is insufficient if the "*acquiring entity reconstructs a business*

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<sup>11</sup> SCOP submission paragraphs 4.50 to 4.52

<sup>12</sup> DFDS Submission paragraph 3.11

<sup>13</sup> DFDS Submission paragraphs 3.13 and 3.14

<sup>14</sup> SCOP Submission paragraphs 4.12 to 4.47

<sup>15</sup> SCOP Submission, paragraphs 4.31 – 4.32.

<sup>16</sup> DFDS Submission paragraph 3.15

that was once conducted by a different entity, even if the assets of that entity were used to do so"<sup>17</sup>.

#### *SeaFrance brand and domain name*

- 3.11 DFDS claims that “the acquired IT systems and infrastructure and associated marketing and customer communication tools would in practice have been of enormous significance in terms of MFL’s ability to ‘hit the ground running’ and to continue to extract value from the SeaFrance brand”<sup>18</sup>. As explained in GET’s responses dated 10 February 2014 to the CC’s questions of 3 February 2014 (“GET’s 10 February Response”) and dated 5 February to the CC’s questions of 22 January 2014 (“GET’s 5 February Response”), this is simply not the case. GET bid for and acquired the IT systems “sight unseen” and, on this basis, doubts whether DFDS was granted access to them (in which case, it is difficult to understand how DFDS can give evidence on this topic). In fact, the IT systems needed a great amount of work (which is still ongoing) to integrate them into a new environment with far better controls and the acquired SeaFrance brand was simply not exploited by MFL, which commenced operations under a new and entirely distinct brand.
- 3.12 GET now deals in turn with other points specifically raised in the DFDS Submission.
- 3.12.1 GET wished to purchase the SeaFrance brand as one of a collection of assets, in order to increase the attractiveness of its overall bid to the SeaFrance liquidator. However, the SeaFrance brand was not actively used by MFL other than to inform people of the disappearance of SeaFrance and there was no material residual goodwill in the SeaFrance brand<sup>19</sup>.
- 3.12.2 The comments of M Gounon discussed at paragraph 3.24 of the DFDS Submission indicate preliminary thinking on his behalf, before MFL began commercial operations, about whether GET might wish to use the SeaFrance brand at a future stage. However, MFL decided not to use the SeaFrance brand. This is in itself indicative of GET’s view that the SeaFrance brand was not of commercial value.
- 3.12.3 An important reason for the preservation of the SeaFrance brand by GET after its acquisition, outlined in GET’s 5 February Response<sup>20</sup>, is that of protecting any residual value in the eyes of a potential future purchaser. Should GET decide, at some point in the future, to sell the brand and domain name (as it is entitled to do), a potential purchaser would wish to ensure that GET had not allowed these to be used by a third party during GET’s ownership. This is an entirely separate issue from the practical use of the brand in relation to MFL’s operations however, and in no way implies that GET itself ascribed any value to the brand. This therefore cuts across the assertions at paragraph 3.2 of the DFDS Submission.
- 3.12.4 It has already been described in GET’s 5 February Response why, for a brief period, limited use was made of the SeaFrance domain site by MFL, until its own website became operational<sup>21</sup>. It is however entirely inaccurate and misleading for DFDS to claim that there was “an intentional blurring of any clear distinction between the SeaFrance and MFL operations”<sup>22</sup>. As GET has been at pains to point out throughout the CC’s merger inquiry, it considers the SeaFrance brand to have had a considerable amount of badwill attached to it in the context of cross-Channel ferry services and has therefore sought, through the MFL service, to offer an entirely different value proposition. From

<sup>17</sup> Tribunal judgment paragraph 106(b)(ii)

<sup>18</sup> DFDS Submission paragraph 3.17

<sup>19</sup> See GET’s 5 February Response, in particular addressing questions 24 to 26

<sup>20</sup> Ibid, in particular addressing question 26

<sup>21</sup> See response to Question 26 of GET’s 5 February Response

<sup>22</sup> DFDS Submission paragraphs 3.26 to 3.28

the commencement of its operations, the Vessels were operated by MFL under a new brand (not the SeaFrance brand) and it marketed its passenger and freight travel services to customers under the entirely new MFL brand. The practice of competitors bidding on AdWords<sup>23</sup> also does not indicate a continuation by MFL of the SeaFrance business, for the reasons explained previously in GET's 5 February Response<sup>24</sup>.

- 3.12.5 Furthermore, regardless of GET's own opinion on the value of the SeaFrance brand, the inescapable fact remains that, at the time MFL launched its operations, the SeaFrance brand had been out of circulation for 9 months (including over the peak summer period), meaning that any vestiges of goodwill which might feasibly be ascribed to the brand had been lost.
- 3.12.6 DFDS' experiences with the acquisition of Norfolkline<sup>25</sup> are of no insight or relevance to GET's acquisition of the ex-SeaFrance assets. The former involved DFDS's acquisition of an ongoing business whose commercial operations and brand were maintained for many months pending competition clearances and shareholder approval (the transaction was announced on 18 December 2009<sup>26</sup> and completion occurred on 12 July 2010<sup>27</sup>). In addition, in the case of Norfolkline, the vendor acquired a minority shareholding in DFDS, and therefore had a significant interest in ensuring an effective transfer of the Norfolkline business and goodwill to DFDS. By contrast, GET acquired from a liquidator a collection of bare assets that were out of operation for a total of 9 months between November 2012 and August 2013 and where there was no continuing business or goodwill to be moved across to the purchaser.
- 3.12.7 The data presented by DFDS about the ongoing value of the Norfolkline business in Annex 5 of the DFDS Submission in fact illustrate the clear contrast with the absence of such continuing goodwill from the SeaFrance business when GET acquired the Vessels. In short, DFDS's Norfolkline experience is the exact opposite of MFL's experience; from the outset MFL achieved very low levels of customer bookings (including minimal passenger bookings via the SeaFrance domain name<sup>28</sup>). Additionally, MFL informed customers through SeaFrance's old website that SF had been placed into liquidation but that a new operator had entered the market. Whilst MFL's overall bookings grew progressively over time from an extremely low start-point, commensurate with the development of the new MFL brand, the minimal number of bookings which can be attributed indirectly to this information rapidly dropped away entirely. Although a like-for-like comparison of the MFL and DFDS analytics data is not possible, given that the data is presented differently by GET and by DFDS, and also that both the volume of searches and the revenue derived from these is redacted by DFDS at Annex 5, it can be seen that DFDS was still deriving revenue and web traffic from the Norfolkline website over two years after it had acquired Norfolkline.

#### *IT infrastructure and marketing and customer communication tools*

- 3.13 It is simply factually incorrect for DFDS to claim that the "*IT-related components of the acquisition...was of specific, considerable, value to an acquirer commencing operations on the Dover-Calais route*"<sup>29</sup>. Likewise, it is factually incorrect for DFDS to state that "*MFL largely needed only to rebrand the customer-facing aspects (i.e. the*

<sup>23</sup> DFDS Submission paragraph 3.28

<sup>24</sup> GET's 5 February Response addressing question 26

<sup>25</sup> DFDS Submission paragraph 3.29

<sup>26</sup> <http://www.worldcargonews.com/htm/w20091218.940887.htm>

<sup>27</sup> <http://www.dfdsgroup.com/news/2010/20100712-3/>

<sup>28</sup> GET's 5 February Response addressing question 26

<sup>29</sup> DFDS Submission paragraph 3.30

"front pages"), whilst being able to retain the underlying machinery of the SeaFrance systems<sup>30</sup>. As noted above at paragraph 3.11, given that GET bid for and acquired the IT systems "sight unseen" and doubts whether DFDS was granted access to them, it is difficult for GET to understand how DFDS can consider that it has any basis to make these claims. GET therefore assumes that they must be based on mere speculation. In reality, it was necessary to integrate the systems into a much more controlled environment, with additional checks and controls, than the one which existed when they were operated by SeaFrance. The SeaFrance IT systems that GET bought required very considerable (and time-consuming) work and effort to be brought into operational use - it was simply not the case that the main task was the rebranding of the "front pages". The work required to prepare the systems for operation has already been well documented by GET<sup>31</sup>, as have the difficulties and expense encountered in relation to customers seeking to interconnect with the ex-SeaFrance systems acquired by GET, notwithstanding the previous connection between these customers and SeaFrance<sup>32</sup>.

#### 4. OTHER ISSUES OF POTENTIAL RELEVANCE TO THE REMITTED QUESTION

- 4.1 DFDS states<sup>33</sup> that GET's "aim was to acquire as many constituent elements as possible of the ex-SeaFrance operation and to get the business up and running as soon as feasible". This is correct: as a new entrant to the cross-Channel ferry sector, GET had no experience of operating ferries and therefore required all assets necessary to launch a new business. Given that it wished to launch its new business and start generating revenue as quickly as possible, it was natural that GET would favour acquiring more assets rather than fewer when these were available from one source (the liquidator of SeaFrance), especially when doing so involved little additional expenditure. Further, as previously explained, GET offered to acquire the full package of assets on offer from the SeaFrance liquidator because GET believed that the liquidator would favour an offer which enabled it to sell all of the ex-SeaFrance assets. However, the inference which DFDS draws from its statement is incorrect: the assets acquired were available **as assets only** and the fact that GET acquired them together does not mean that GET acquired anything more than bare assets. It certainly does not indicate that GET continued the SeaFrance business. The very fact that, despite a deal being agreed on 11 June 2012 for GET to acquire the assets, it was unable to commence operations in time for any of the peak summer season, clearly demonstrates that a continuation of the SeaFrance business was an absolute impossibility.
- 4.2 Contrary to DFDS's statement, GET's offer to acquire assets from the liquidator was not conditional on GET's acquiring the UK lease and IT operations<sup>34</sup>. Similarly, GET's visit to the Whitfield offices in April 2012 to approach the managers of the SeaFrance UK operation was in order to assess the assets<sup>35</sup>, certain of which had already been publicly advertised for sale by that stage. DFDS's assumption that such activities "could...only have been aimed at further facilitating the 'carry across' of SeaFrance's former operations to MFL" is simply an incorrect assumption by DFDS. As DFDS itself concedes, "it does not have full visibility of the circumstances surrounding SeaFrance's UK business in the context of the liquidation process" and it has simply jumped to incorrect conclusions.
- 4.3 Furthermore, GET understands that, at the same time as GET became interested in the UK lease and IT operations, DFDS also displayed an interest in acquiring these. Indeed, this interest also extended as far as a site visit to the Whitfield offices, and meetings with SeaFrance Limited to discuss acquiring its assets and staff. By DFDS' (evidently flawed) reasoning, outlined above, this would suggest that DFDS itself was

<sup>30</sup> DFDS Submission paragraph 3.30(a)

<sup>31</sup> GET's 5 February Response addressing questions 25 and 27 and GET's 10 February Response in response to questions 1 to 4

<sup>32</sup> GET's 5 February Response addressing question 27(f)

<sup>33</sup> DFDS Submission paragraph 4.2

<sup>34</sup> DFDS Submission paragraph 4.4; addressed in GET's 10 February Response in response to question 11

<sup>35</sup> DFDS Submission paragraphs 4.4 (b) and 4.5; addressed in GET's 10 February Response in response to question 11

looking to facilitate the 'carry across' of SeaFrance's former operations to its own Short Sea operations (which include a substantial number of its former staff and one of the vessels it used to operate, the *Molière*).

4.4 In brief, section 4 of the DFDS Submission, discussing GET's offer to acquire assets of SeaFrance's UK subsidiary, is based on a fundamentally flawed understanding of the relevant facts. It is therefore incorrect and irrelevant to a consideration of precisely what over-and-above bare assets GET acquired, and whether – and if so, how – this put GET in a different position from one where it was simply acquiring bare assets.

## 5. CONCLUSION

5.1 The DFDS Submission addresses at length the irrelevant issue of whether the assets bought by GET may be more valuable combined, than if they had been acquired separately. It is however of no relevance to the correct legal question of identifying precisely what over-and-above bare assets GET acquired and how this put GET in a different position from simply acquiring bare assets.

5.2 Despite focusing on flawed and often irrelevant arguments and assertions, the DFDS Submission does not detract from the following facts, all of which indicate, both separately and together, that GET acquired only bare assets and not an enterprise:

5.2.1 The Vessels acquired were bare assets and the fact that they were in "hot layby" when sold is irrelevant;

5.2.2 GET/SCOP did not acquire any staff from SeaFrance;

5.2.3 At the time when SCOP was recruiting staff, there was no certainty that the employee indemnity would ever be paid in relation to ex-SeaFrance staff. In any case, the employee indemnity is irrelevant to the issue of whether an enterprise was acquired;

5.2.4 A great deal of time, effort and expense was required to ensure that the assets acquired, in particular the Vessels and the IT systems, could be used effectively as part of the new business, all of which has been ignored by DFDS; and

5.2.5 GET was not able to acquire a number of other key assets required to launch the MFL business, including berthing slots, customer contracts and supplier contracts. Again, all of this is ignored by DFDS.

5.3 Further, DFDS persists in drawing comparisons with its own acquisition of Norfolkline, an analogy which is entirely irrelevant, given that Norfolkline was acquired by DFDS as a going concern in order to integrate it into DFDS. This is an entirely different situation from GET's acquisition of bare assets, which had previously belonged to a company in liquidation and which were out of operation for 9 months.

5.4 As a result of the above, the conclusions which DFDS attempts to draw are, throughout, fatally undermined by virtue of being based upon fundamental factual misconceptions.

5.5 As noted at footnote 1, if there are any other specific points made in the DFDS Submission which the CC wish GET to address at this stage, GET would of course be willing to do so.

**14 February 2014**