Completed acquisition by Groupe Eurotunnel S.A. of certain assets of the former SeaFrance

SCOP Submission to CC on the Jurisdictional Question

1. Introduction and Executive Summary

1.1 This document sets out the SCOP's comments on the Jurisdictional Question, as defined in the Conduct of Remittal document, published by the Competition Commission ("CC") on 8 January 2014.

1.2 The SCOP notes that the CC will be considering the content of the parties' submissions (including oral representations made by the parties) to the Competition Appeal Tribunal (the "Tribunal") during the course of the appeal proceedings as further evidence on the Jurisdictional Question.[1] On this basis, this response does not seek to repeat the SCOP's previous submissions before the CC and the Tribunal on the Jurisdictional Question, but rather addresses the key issues emanating from the judgment of the Tribunal on 4 December 2013 (the "Judgment").

1.3 In its Judgment, the Tribunal remitted to the CC the question of whether Groupe Eurotunnel S.A. ("GET") / SCOP has acquired asset(s) or an "enterprise" within the meaning of the Enterprise Act 2002 (the "Act"). In summary:

- The Tribunal ruled that the meaning of the term "enterprise" for the purposes of the Act is a question of law, on which the CC possesses no margin of appreciation[2];

- An "Enterprise" is the activities, or part of the activities, of a business.[3] The acquisition of bare assets cannot amount to a relevant merger situation under the Act and therefore falls outside the CC's jurisdiction to review the transaction under merger provisions of the Act as a matter of law. Equally, the CC has no jurisdiction to review the creation of a new enterprise, the Tribunal noting that it is insufficient 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*"[4];

- The Tribunal has also clarified that the relevant period is between the date of the reference (29 October 2012) and the period beginning four months prior to that (29 June 2012), noting that "*transactions or arrangements pre-dating the section 24 period cannot be taken into account*"[5];

- The question for the CC is, therefore, taking into consideration those transactions and arrangements within the relevant period, did the transaction amount to the acquisition of an enterprise (i.e. were any activities acquired) or merely of assets? This requires the CC to consider:

    (i) what, over and above bare assets, the acquiring entity obtained; and

[1] Conduct of Remittal document, published on 8 January 2014, paragraph 4.
[2] Judgment, paragraphs 97-98.
[3] Judgment paragraph 102.
[4] Judgment, paragraph 106(b)(ii)
[5] Judgment, paragraph 66.

(ii) 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;

- The Tribunal identified a number of factors that point towards the transaction being "*no more than the acquisition of assets*",[6] and has remitted to the CC the "*question of whether Eurotunnel/SCOP acquired an asset or an enterprise*"[7]. The Tribunal also expressed its "*doubt whether, formulated as they are by the Commission, the acquisition of the vessels and the SeaFrance employees constituted anything more than an acquisition of assets*"[8];

- Consistent with these observations of the Tribunal, the CC should now find that the transaction did not involve the acquisition of activities and only of assets;

- The Tribunal identifies three factual issues which may merit further consideration by the CC in its remittal process:

(i) *Hot lay-by*: The vessels were bare assets following the complete cessation of SeaFrance services in November 2011 and remained so until put into use by MyFerryLink ("MFL") after carrying out further work. Placing the vessels into hot lay-by was the product of a pragmatic economic decision by the administrator to preserve the value in the assets. It was a decision taken by the administrator in November 2011, some eight months prior to the beginning of the relevant section 24 period. This decision does not mean that what was acquired amounted to an enterprise. It did not alter the fact that the vessels were assets; it simply meant that they were assets that could theoretically be put to use more quickly than otherwise. Further, and for the avoidance of doubt, there is no basis for concluding that an acquisition of the vessels alone could meet the statutory definition of an enterprise;

(ii) *Payments under the liquidation plan*: the SeaFrance workforce had been made redundant and their contracts of employment were terminated following the final judgment of the Paris Commercial Court in January 2012. Their activities operating cross channel ferry services were brought to an end. TUPE did not apply to them when MFL was established. Following completion of the acquisition of the vessels by GET, the SCOP commenced a comprehensive external recruitment drive. But this was not targeted exclusively at the former SeaFrance employees. The payments under the liquidation plan had no bearing on the recruitment decisions of the SCOP. In fact, at the time the SCOP was recruiting, there was considerable doubt as to whether the SCOP was entitled to the payments at all and ultimately the SCOP was forced to go to the Commercial Court in Paris to seek payment of the sums that it claimed. Furthermore, this uncertainty was not resolved until three months after the relevant section 24 period and the SCOP received no payments under the plan at all during the relevant period;

(iii) *Having a crew which is familiar with the vessels*: it makes no difference whether particular individuals are familiar with the vessels. Assuming that the operational crew (which can be distinguished from customer service crew) possess the necessary maritime skills and experience, they need only

[6] Judgment, paragraph 112. See also Judgment, paragraph 114.
[7] Judgment, paragraph 432.
[8] Judgment, paragraph 114.

undergo a ship familiarisation exercise, which lasts around two hours. There was no requirement in the recruitment process that applicants had previous experience of working on the vessels and the success of manning companies, such as V-Ships and Northern Marine Manning Services, illustrates the ease with which crew are able to move between vessels.

- In short, the SCOP provides operational expertise and manpower to GET under the terms of its contract with GET. The cross-channel ferry business operated by the SCOP as MFL was created as a new enterprise, using some of the assets and former employees of SeaFrance under new contracts of employment some nine months after SeaFrance ceased operations and fully eight months after SeaFrance was legally liquidated by the French court and "[*wound] down to such an extent that it cease[d] to be an enterprise*".[9]

2. Legal test to be addressed

2.1 In order for the CC properly to address the Jurisdictional Question, it is necessary first to consider the legal test that the CC must answer. In doing so, it is necessary to consider the relevant provisions of the Act in tandem with the relevant extracts of the Judgment.

2.2 Section 35(1) of the Act provides that the CC must first consider the question of "*whether a relevant merger situation has been created*"[10] before it considers "*whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services*".[11]

2.3 The SCOP reiterates the points raised in its letter of 17 December 2013 and its submission to the CC on 13 January 2014 that in circumstances where a finding that a decision maker has jurisdiction to make a decision has been quashed, there is no extant decision of any sort. Consequently, and in keeping with the requirements of section 35(1) of the Act, the CC must first form a decision on the Jurisdictional Question before it considers the substantive effect(s) of the arrangements in question. We would be highly concerned if the CC were proposing any other procedural course.

2.4 A relevant merger situation arises within the meaning of section 23(1) of the Act where "*two or more enterprises have ceased to be distinct enterprises*" and section 26(1) of the Act provides that "*any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control (whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control)*".

2.5 An "enterprise" is defined in section 129(1) of the Act as "*the activities, or part of the activities, of a business*". A "business" is defined by section 129(1) of the Act 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*".

2.6 The Act does not define "activities", but it is clear from the wording of the Act that in order for the merger control provisions of the Act to bite, there must be activities, or part of the activities, of a business. This was emphasised by the Tribunal in its judgment.[12]

[9] Judgment, paragraph 106(a).
[10] Section 35(1)(a) of the Act.
[11] Section 35(1)(b) of the Act.
[12] Judgment, paragraph 102.

2.7 The key question that the CC must address has been formulated by the Tribunal. In short, the CC must determine "*whether this is a case of two enterprises ceasing to be distinct within the meaning of section 26(1) of the Act, such that a relevant merger situation arises within the meaning of section 35(1)(a) of the Act*".[13] In particular, the Tribunal remitted to the CC the "*question of whether Eurotunnel/SCOP acquired an "asset" or an "enterprise"*".[14]

2.8 Fundamentally, the SCOP notes that the Tribunal has ruled that the meaning of "enterprise" is not simply a matter of fact and degree, but is a question of law[15] and that "*on this definitional question there is no margin of appreciation*".[16] In other words, the CC's power to review a transaction rests on the legal test set out in the Act being met: where the test is not met, the CC has no jurisdiction, as a matter of law, to consider the substantive question set out at section 35(1)(b) of the Act.

Relevant time period

2.9 Section 24 of the Act stipulates that a reference must be made to the CC within four months of the enterprises ceasing to be distinct. Applied to the present case, the Tribunal concluded that "*only transactions or arrangements concluded by the SCOP within the section 24 period can be relevant in determining whether a relevant merger situation has arisen…. Accordingly, it is necessary to consider the transactions or arrangements in which the SCOP participated between the date of the reference (29 October 2012) and the period beginning four months before that date (29 June 2012)*".[17] The Tribunal also stated that "*it is quite plain from the Act that – so far as acquiring entities are concerned – transactions or arrangements pre-dating the section 24 period cannot be taken into account. Paragraph 56 of the Commission's skeleton argument, quoted above, accepts this in terms*."[18]

3. No enterprise was acquired

3.1 The crucial question that the CC must answer in the remittal process is whether, as a matter of law, Eurotunnel/SCOP acquired an asset or an enterprise, i.e. the activities, or part of the activities of a business within the relevant time period between 29 June 2012 and 29 October 2012. In coming to its conclusion, the Tribunal set out in detail it's view of what the CC must determine in the present case by reference to the decision of the Monopolies and Mergers Commission ("MMC") in AAH/Medicopharma[19]:

> "*Essentially, the MMC was drawing 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 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.*
>
> *The question, then, is whether this difference is capable of constituting what would otherwise be bare assets into something that may properly be described as the*

[13] Judgment, paragraph 432.
[14] *Ibid*.
[15] Judgment, paragraph 97.
[16] Judgment, paragraph 98.
[17] Judgment, paragraph 67-68.
[18] Judgment, paragraph 66.
[19] AAH Holdings plc and Medicopharma NV: A report on the merger situation.

activities of a business. Inevitably, this is a question of fact and degree, and there will be no single criterion giving a clear answer. However, if a guiding principle is sought, then we consider that it lies in an understanding of what an enterprise – the activities or part of the activities of a business – does. An enterprise takes inputs (assets of all forms) and by combining them transforms those inputs into outputs that are provided for gain or reward. It thereby also may generate intangible but valuable assets such as know-how or goodwill. It is in this combination of assets that the essence of an enterprise lies. In those cases where the acquiring entity takes over the business of the acquired entity, the answer will be self-evident: the same enterprise is simply continuing, albeit under different ownership or control. The difficult case arises 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. 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."[20]

3.2 It is clear from this passage of the Tribunal's Judgment that what is required is for the CC to define or describe exactly what, over and above bare assets, the acquiring entity obtained and to ask itself whether and, if so, how this placed the acquirer in a different position than if it had simply gone into the market and acquired the assets. The SCOP considers that nothing more than assets was acquired in the present case and that although the Tribunal remitted the question to the CC, its specific findings strongly support that conclusion.[21]

No activities

3.3 The activities of SeaFrance involved the provision of passenger and transport services across the short sea. This was confirmed at the hearing by the CC.[22] It was placed into liquidation on 16 November 2011, after which its activities – i.e. its ferry services across the short sea – ceased operating. It is highly material that the SeaFrance business ceased trading long before the transaction took place. It is not simply background context. Indeed, the Tribunal Chairman queried "*if that is the business, how is it an activity, because nothing is happening for seven months?*".[23]

3.4 In reality, a new enterprise was created under an entirely new brand, MFL, albeit using some of the assets previously used by SeaFrance. GET did not acquire any activities within the normal sense of the word. It purchased a number of bare assets (the vessels) and subsequently concluded a contract for the services supplied by the SCOP and commenced operations under an entirely new brand, with new employees operating under new contracts of employment employed by its service provider (the SCOP). It then entered into an entirely fresh set of supplier and customer contracts.[24] The natural and obvious interpretation of these events is not that GET acquired the activities of SeaFrance, but that it acquired some of SeaFrance's vessels and used them to establish a new ferry operation of its own.

3.5 Prior to November 2011, there was a SeaFrance enterprise engaged in the provision of passenger and transport services across the short sea. However, following its liquidation in January 2012, it was completely wound down, to the point of extinction. Indeed, all

[20] Judgment, paragraph 105.
[21] Judgment, paragraphs 112 and 114.
[22] Transcript of Hearing, Day 2, page 78, lines 28-30.
[23] Transcript of Hearing, Day 2, page 78, lines 31-32.
[24] Initially, freight customers were slow to book with MFL, waiting to see whether MFL would be able to offer sufficient frequency of service and that MFL was committed to the route before tentatively trying out the new service. See paragraphs 2.5-2.6 of the SCOP's Response to CC's Provisional Findings.

activities ceased on 16 November 2011 when the Paris Commercial Court instigated the liquidation process that culminated on 9 January 2012. After a lengthy period of complete inactivity, its vessels were sold. Its staff had been made redundant some seven months before MFL's service began operating. There were no crossings for nine months between cessation of SeaFrance activities and MFL's launch. There were no existing contracts being performed. In other words, the former SeaFrance business was "[*wound] down to such an extent that it cease[d] to be an enterprise*".[25]

3.6 The Tribunal ruled that "*as regards the question of whether a relevant merger situation exists, the statutory test is not whether the acquiring entity is carrying out the same activity that was once carried out by the acquired entity, even with the same assets".*[26] It is clear, applying this logic, that the mere fact that in the past the activities of a business were carried on by SeaFrance does not lead to the conclusion that the activities later carried out by MFL (some nine months after the SeaFrance activities ceased on 16 November), were acquired from SeaFrance.

3.7 The Tribunal found "*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*."[27] The test is not whether 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*".[28] Therefore, even if the CC were to consider that the GET/SCOP operation of the vessels under the MFL brand "emulates" or "reconstructs" the business of the old SeaFrance business (which the SCOP does not accept and the CC did not find), even that is not a sufficient basis on which to conclude, as a matter of law, that the acquiring entity has acquired an enterprise. There must still be the acquisition of activities.[29]

3.8 On this basis, the SCOP considers that the arrangements in question do not meet the legal test of being an enterprise and, hence, no relevant merger situation has been created. Rather, what was acquired amounts to nothing more than the acquisition of bare assets. At most, GET constructed a new business using some of the assets formerly used by SeaFrance before it ceased all activities. The CC has not identified any respect in which GET acquired anything "over and above" a collection of assets so as to transform the acquisition into one of a business.

3.9 To be clear, we do not suggest that there needs to be continuous trading in order for the merger control rules to apply, but the bottom line is that under no rational approach can any permutation of assets purchased in the present case amount to the acquisition of an enterprise (i.e. activities) after a period of nine months of complete inactivity.

3.10 We note the point made by the OFT's Jurisdictional and Procedural Guidance (the "Guidance") that there may be a transfer of activities even if the business is no longer trading[30]. But even if there is no absolute rule in UK merger control that the business must be trading at the time of the transfer, the duration of the period of inactivity is a highly pertinent consideration. The Guidance explicitly recognises this point, stating that the OFT will consider: "*the period of time elapsed since the business was last trading"* and the

[25] Judgment, paragraph 106(a).
[26] Judgment, paragraph 106(b)(ii).
[27] Judgment, paragraph 106(b).
[28] Judgment, paragraph 106(b)(ii).
[29] Judgment, paragraph 102.
[30] Guidance, paragraph 3.11.

related issue of *"the extent to which customers would regard the acquiring business as, in substance, continuing from the acquired business*".[31]

3.11 The case law supports the Guidance insofar as it recognises that a gap in trading does not necessarily preclude the application of the merger control provisions under the Act. For example, in AAH/Medicopharma,[32] the MMC held that despite the fact that there had been a termination and gap in trading of four to five days, there was a situation that amounted to a transfer of activities, concluding that: "*In our view, however, although AAH did not in terms acquire the depots as going concerns, in reality it obtained much of the benefit of so acquiring them and it clearly acquired more than bare assets….*".[33]

3.12 While we do not dispute the findings of the MMC in AAH/Medicopharma, it is plainly an exceptional case and, crucially, there are two fundamental reasons why the facts of this case are materially different from the present case. The first is that AAH/Medicopharma involved a gap in trading of just four to five days, but this cannot be said to be authority for finding that there are "activities" in a set of circumstances in which there has been a gap in trading of some nine months.

3.13 The second reason why AAH/Medicopharma does not provide a credible authority is because the particular set of arrangements in that case were designed and entered into with the intention of circumventing the application of the UK merger control rules. At paragraph 6.98 of that decision, the MCC revealed that "*AAH told us that it was very conscious of the possibility of investigation by the competition authorities and tried to structure the arrangements so that they would not constitute a merger situation qualifying for investigation. Had it not been for these constraints, it would have wished to have acquired Medicopharma UK as a going concern*". There is no such anti-avoidance concern in the present case.

4. Acquisition of bare assets

4.1 In its Judgment, the Tribunal has clearly expressed its "*doubt whether, formulated as they are by the Commission, the acquisition of the vessels and the SeaFrance employees constituted anything more than an acquisition of assets*".[34] In particular, at paragraph 112, the Tribunal noted:

> "*There are a number of factors identified by the Commission that point towards this being no more than the acquisition of assets by Eurotunnel/SCOP. These are as follows:*
>
> *a) SeaFrance ceased its operations on 16 November and was actually prohibited from operating by the French Court on 9 January 2012 (see paragraph 3 above). Until Eurotunnel started its operations anew, in August 2012, no activity (as we have defined it) was carried on by SeaFrance. For the 71/2 months preceding the Acquisition, SeaFrance carried out no activity.*
>
> *b) SeaFrance's berthing slots in Dover and Calais were surrendered.*
>
> *c) SeaFrance's remaining workforce was dismissed and its vessels were placed into hot lay-by*."

[31] *Ibid*.
[32] AAH Holdings plc and Medicopharma NV: A report on the merger situation.
[33] AAH Holdings plc and Medicopharma NV: A report on the merger situation, paragraph 6.102.
[34] Judgment, paragraph 114.

4.2 The Judgment did, however, identify three factual issues which may merit further consideration. The first issue is the relevance of the fact that the vessels were in hot lay-by.[35] The second issue relates to the relevance of the payments under the liquidation plan.[36] The third issue relates to the significance of having a crew which is familiar with the vessels.[37]

4.3 We deal with each of these issues in turn below.

Issue One: Hot lay-by

4.4 At paragraph 114 of the Judgment, the Tribunal stated that it had "*some doubt whether, formulated as they are by the Commission, the acquisition of the vessels and the SeaFrance employees constituted anything more than an acquisition of assets … [the hot lay-by] had the effect of rendering it possible to bring these vessels into service quickly, but we doubt whether this is enough to turn these assets into an enterprise, at least without a more detailed explanation of the extent to which this expedited the return of the vessels into service*".

4.5 The CC recognised at paragraph 4.20 of its previous report that the decision to place the vessels in hot lay-by was a decision taken by the administrator to preserve the value of the assets in a sale and that the vessels were not in operation or 'operations-ready'. The *Rodin* and the *Berlioz* were placed in hot lay-by in Calais by the administrators on 16 November 2011, following cessation of the SeaFrance activities. The *Nord-pas-de-Calais* was transferred to Dunkirk.

4.6 The Commission will be aware from previous submissions, including the witness statement of Raphael Doutrebente appended to the SCOP's Notice of Application, that the physical state of the vessels and a wide range of other factors meant it was not possible to commence operations immediately following the acquisition. In any event, the fact that inactive assets could be brought back into service more quickly did not render them active. There is no basis upon which they could be said to be active or forming any part of the activities of a business.

4.7 The vessels had lost their navigation certificates and a significant amount of work was undertaken to bring the vessels up to an operational standard and to obtain the necessary equipment. This included procuring the requisite navigation certificates,[38] obtaining insurance covers, making the necessary declarations to the International Maritime Organisation, registering with the maritime authorities in the UK and France and negotiating with the Dover and Calais harbours to obtain permissions to operate and secure berthing slots. There were also no premises from which the business could operate and no IT systems or precedents.[39]

4.8 Equally, as no staff transferred with the assets, the SCOP had to undertake a separate, subsequent recruitment exercise from scratch in order to recruit sufficient personnel to create the minimum workforce necessary to operate the vessels (as considered further below).

4.9 In short, there is no evidence and no justification for concluding that the hot lay-by process had the purpose or effect of preserving the 'activities of a business' or that this process

[35] *Ibid*.
[36] Judgment, paragraph 119.
[37] Judgment, paragraph 120.
[38] See Annex 2 of the SCOP's Response to the CC's Provisional Findings.
[39] For further details, please see paragraph 28 of the Witness Statement of Raphael Doutrebente and paragraphs 2.7 to 2.9 of the SCOP's Response to the CC's Provisional Findings.

resulted in a significantly expedited return to service. The process was lengthy, uncertain and the product of a pragmatic economic decision by the administrator to preserve the value in the assets in view to making them more attractive to potential purchasers. However, maintaining the vessels for this purpose does not equate to ensuring a continuity of business activities. Further, placing the vessels into hot lay-by was a decision taken on 16 November 2011, nearly twelve months prior to the reference to the CC and entirely unconnected with the transaction that resulted in the acquisition of the assets by GET.

4.10 At the time of the acquisition of the vessels, there had been no activities for a period of seven and a half months. A period of hot lay-by does not change that fact. Consequently, even if the decision of the administrator to place the *Rodin* and the *Berlioz* into a hot lay-by process expedited the return of the vessels into service as compared to a cold shutdown, this would not suffice to turn a transfer of assets into the acquisition of an enterprise.[40]

4.11 For completeness, we would add that the acquisition of the vessels alone cannot meet the statutory definition of an enterprise, as by themselves they plainly constitute assets rather than activities.

Issue Two: Payments under the liquidation plan

4.12 The Tribunal found that it was "*difficult to see how these employees were "acquired" from SeaFrance at all*", noting that they had been "*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*".[41]

4.13 At the Hearing, the Tribunal Chairman expressed his view on the issue:

> "*As I see it, what happened was that the employees of SeaFrance became ex-employees of SeaFrance, they were unemployed, and all that the SCOP did was engage with them, initially as subscribers, and subsequently, once the vessels had been purchased and put into operation, employed them, or some of them. I am in some difficulty to understand what exactly it is that moved from SeaFrance to SCOP in terms of assets. There is no contract that was transferred. All that happened was that SCOP engaged people who happened to be, because the business went under, former employees of SeaFrance. That again seems to me to be a legal question not a factual question*."[42]

4.14 The SCOP agrees with this analysis and we share the Tribunal's view that it is difficult to see how the employees were "acquired" from SeaFrance at all. It is a fact that following the liquidation of SeaFrance, its remaining employees were made redundant, finding themselves out of work in an economically depressed area with little prospect of employment. There was no transfer of the workforce to a new employer. Instead, "*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".*[43]

4.15 There is also a fundamental, underlying legal question identified by the Tribunal which queries whether, as a matter of law, employees can be acquired at all. At paragraph 62 of the Judgment, the Tribunal stated that "*the SCOP is not necessarily the same thing as the former SeaFrance employees it (eventually) employed. It is perfectly possible to say that, just as Eurotunnel acquired the vessels, so too did the SCOP "acquire" the employees (if such terms can ever be appropriate when considering people)*" (emphasis added).

[40] Judgment, paragraph 114.
[41] Tribunal Judgment, paragraph 115.
[42] Transcript of Hearing, Day 2, page 75, lines 22-30.
[43] Tribunal Judgment, paragraph 115.

Similarly, at paragraph 113(b), "*the "acquisition" (if that term can be used) by SCOP of "those former SeaFrance employees who now comprise some three-quarters of the staff engaged in running the [MyFerry] service*" (emphasis added).

4.16 It is clear that the Tribunal is uneasy with the idea that for the purposes of a transaction, employees can be "acquired". Certainly, they may transfer under the TUPE Regulations,[44] which implement EU Directives and have the practical effect of transferring staff from one company to another in cases in which there is a continuity of business. But the SCOP took advice from French employment law specialists, [✂], that the relevant provisions of the French Labour Code (i.e. the French equivalent of TUPE) did not apply in this case, with the result that there would be no transfer of the collective agreements or the individual contracts of employment of the former SeaFrance employees.[45] This is indicative of a lack of continuity in the identity of the economic entity. It is also, as a matter of law, a definitive answer to the question of whether employees transferred to the SCOP.

4.17 The Guidance states that "*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*".[46] This makes perfect sense since the application of TUPE is intended to bite in the case of a "relevant transfer", which is defined as the "*transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity*".[47] We do not suggest that the activities need to be transferred wholesale in order for the Act to apply. This is plain from the case law (for example, the decisions of the OFT in *Cineworld* and *HMV/Zavvi*), but in those cases the labour force was transferred under the TUPE Regulations, which is not the case as regards the former SeaFrance employees.

4.18 Such an approach is consistent with the wording of the Act, which requires, in the case of a relevant merger situation, the existence of "*the activities, or part of the activities, of a business*". In either case, the concept of business continuity is paramount.[48] Yet the reverse, by implication, must also hold true. To the extent that TUPE (or in this case, its French equivalent) does not apply, this must act as a strong factor in favour of a finding that the business transferred does not constitute an enterprise. There is no continuity of business. The staff were simply made redundant with no material prospect or guarantee of future employment. Certainly their position was not that following their redundancy they formed any part of the activities of a business and certainly not the activities of the SeaFrance business of operating ferries on the short sea crossing.

PSE 3

4.19 The Tribunal identified the payments under the liquidation plan as an area for further consideration and queried whether, although it was unclear how much of a contribution the former SeaFrance employees actually made, the payments may have provided a reason for GET/SCOP to employee those former SeaFrance employees.

4.20 The payments were made under the *Plan de sauvegarde de l'emploi* which was negotiated between the liquidator and the SeaFrance works council as a result of the final judgment of the Paris Commercial Court of 9 January 2012 which formally liquidated SeaFrance, legally preventing it from continuing its operations. This is known as PSE3 to differentiate it from

[44] Transfer of Undertakings (Protection of Employees) Regulations 2006 (SI 2006/246).
[45] See paragraphs 21-24 of the Witness Statement of Raphael Doutrebente, describing how the relevant provisions of the French Labour Code were not applicable.
[46] Guidance, paragraph 3.10.
[47] Regulation 3(1)(a).
[48] See further paragraph 92 of the SCOP's Notice of Application to the Tribunal.

earlier plans negotiated as part of previous redundancy arrangements.[49] PSE3 was entered into on 23 January 2012 – one of the consequences of the 9 January judgment was that all SeaFrance employees were made redundant within [✂]. As with the hot lay-by issues discussed above, we note therefore that PSE3 was a consequent legal step taken by the liquidator imposing obligations on SNCF (SeaFrance's former owner). It has no connection to the transaction. It took place under the auspices of a French liquidation process some six months prior to the relevant section 24 period.[50]

4.21 Furthermore, it is noted that Article L.1233-61 of the French Labour Code requires that where a company with more than 50 employees wishes to dismiss ten or more of its employees within a 30-day period, the employer must establish in advance a *Plan de sauvegarde de l'emploi* (i.e. an 'employment safeguard plan') with a view to limiting the impact on the employees. This will include facilitating reassignment and job creation plans (including assistance to create new businesses).

4.22 French law also requires that an employment safeguard plan must be proportionate to the resources of the company (or the group to which it belongs). In this case, SeaFrance formed part of the SNCF group, the national rail operator in France. As a result, SNCF was required to provide significant resources, with French law imposing a significant obligation on it to reach a satisfactory settlement with the Unions through the final agreed plan.

4.23 Article L.1233-63 of the French Labour Code requires that the company consult and inform the relevant works council on the content of the proposed plan. Whilst the works council does not have a veto over the plan, it does have significant negotiating power as it can delay its adoption and implementation and may request modifications which the company must consider. Where the company rejects proposals of the works council, adequate reasons must be given in writing.

4.24 Turning to PSE3, it should be recalled that the SCOP was initially created by 14 former SeaFrance workers on 7 October 2011, before being formally registered as a non-trading entity on 29 December 2011. The purpose of the SCOP at the time of its creation was to make an offer to acquire the assets of the SeaFrance business and seek to secure employment for its subscribers. With that in mind the SCOP made bids on 20 October 2011 and 6 January 2012 to acquire the SeaFrance assets from the administrators. These bids were rejected.[51]

4.25 It follows that during the period of negotiation between the liquidator and the works council between the Paris Commercial Court judgments of 9 January 2012 and 23 January 2012, the works council would have been aware of the existence of the SCOP and that many of the (soon to be) former SeaFrance employees were subscribers to it. Against this background, [✂]:

(i) [✂]

(ii) [✂][52]

4.26 [✂]

4.27 [✂]

[49] [✂].
[50] Judgment, paragraph 66.
[51] See paragraphs 10-11 of the Witness Statement of Raphael Doutrebente.
[52] [✂]

4.28 In total, [✂] former SeaFrance employees were made redundant under PSE3. Of these, only [✂] were employed by the SCOP on permanent contracts within the relevant period and fell within the definition of relevant employees for the purposes [✂] of PSE3.

4.29 It should be noted that the payment due under [✂] PSE3 was not specific to the SCOP, to GET or to the entity that ultimately became MFL. Rather it was available to any entity that met the conditions of [✂].

4.30 In addition, there was considerable doubt as to whether the SCOP was entitled to the payment at all[✂].[53]

4.31 The Tribunal observes in paragraph 118 of the judgment that GET anticipated receiving €10 million from the SCOP. As we have noted above, the receipt of these benefits was not certain, and GET committed to acquiring the vessels without confirmation that the funds would be received. Had the funds not been forthcoming, GET would have needed to ensure that MFL was appropriately capitalised on some other basis.

4.32 Ultimately the SCOP was forced to return to the Paris Commercial Court to seek payment of the sums due to it under PSE3. This ruling was obtained on 23 January 2013. In other words, there can be no suggestion that the SCOP sought to undertake a recruitment exercise that focussed on favouring former SeaFrance employees under PSE3, given that there was considerable doubt as to whether the terms of PSE3 applied at all (and indeed the liquidator had stated its view that it did not). This was not resolved – and the SCOP did not receive any money – until some three months after the end of the relevant period following the judgement of the Paris Commercial Court on 23 January 2013.

4.33 It is hardly surprising that when advertising for new employees to staff a new ferry operation in Calais, SCOP found that a large number of applicants with suitable experience were former employees of SeaFrance. However, it was their experience and availability that provided a "cogent reason" to employ those individuals, not uncertain potential rights to claim a future redundancy benefit. In other words, there is absolutely no basis for concluding that the SCOP employed people according to their eligibility under PSE3. It should also be noted that PSE3 did not cover employees of SeaFrance that were employed by foreign subsidiaries such as SeaFranceLimited in the UK.

4.34 In any event, even if the PSE3 payments were regarded as a reason to employ ex-Sea France workers, it does not follow that GET acquired the activities of Sea France. Putting this analysis at its highest (which the SCOP does not accept), it involves GET or the SCOP receiving financial payments in the event that they reconstructed certain aspects of the way in which SeaFrance operated. As the Tribunal found, that does not meet the statutory test.

4.35 Finally, we note that negotiation of the PSE3 was a French employment law requirement, negotiated between the liquidator and the works council as a consequence of the liquidation ordered by the Paris Commercial Court on 9 January 2012 and was an arrangement that pre-dated the beginning of the section 24 period by some five months, taken by a third party unconnected to GET or the SCOP. It cannot therefore be taken into account by the CC in determining whether the transaction amounts to a relevant merger situation.[54]

4.36 We set out below more detail on the recruitment exercise in fact undertaken by the SCOP following the signing of its Commercialisation Agreement with GET and completion of GET's acquisition of the vessels.

[53] [✂]
[54] Judgment, paragraph 66.

Recruitment activities

4.37 Following acquisition of the vessels by GET and the entering into the Commercialisation Agreement with SCOP under which the SCOP agreed to operate the ferries, the SCOP was faced with the task of creating a new workforce with the required expertise to operate a cross-Channel ferry business.

4.38 To do this, the SCOP undertook a comprehensive and rigorous recruitment exercise. The recruitment process was open to anyone who wished to apply. It in no sense endeavoured to reconstruct SeaFrance.

4.39 Indeed, the SCOP was seeking to create a new entity, untarnished by the stigma of the former SeaFrance business, a business whose image had been tarnished by a series of strikes and, as a consequence of its liquidation, the immediate cancelling of many freight contracts with key customers. To illustrate this point, none of the former senior management positions at SeaFrance were retained by the SCOP. In addition, out of [✂] employees who entered into contracts of employment with the SCOP in the relevant period to work as captains, only [✂] had been previously employed by SeaFrance as captains.

4.40 Following the 11 June 2012 judgment of the Paris Commercial Court awarding the vessels to GET, the SCOP wrote to all of its subscribers inviting them to apply for a position in the new entity and asking them to provide details of their qualifications and experience in the form of CVs and motivation statements describing their motivations to work for the SCOP. At the same time, on 22 June 2012, the SCOP placed adverts in two specialised maritime recruitment websites: Mer et Marine and Click&Sea. Copies of those adverts are provided at Annex 4.

4.41 In other words, the SCOP did not target its recruitment at those former SeaFrance employees who fell under PSE3. Indeed, there is no evidence that the SCOP targeted its recruitment at former SeaFrance employees whether or not they fell within the scope of PSE3.

4.42 Following these adverts and its letter to its existing subscribers, the SCOP received a number of applications, including from both SCOP subscribers and outsiders. An interview process was subsequently conducted, with positions offered to those individuals who were deemed to be suitable to the job. A number of people did not accept the offers.

4.43 All employees had to undertake a probationary period of between [✂]. A number of individuals were let go at that point and/or decided to leave voluntarily.

4.44 The SCOP based its recruitment (and retention) decisions exclusively on the motivations and skills of the individuals concerned.

4.45 Of course it is unsurprising that applicants for a new ferry company in an economically deprived Channel port would be drawn heavily from former employees of a defunct ferry company which operated from the same location. But there is no evidence that the recruitment process was driven by PSE3 or that the process in any way points to the transfer of a business or indeed business activities. SeaFrance was liquidated, with all commercial activities ceasing as a matter of law in January 2012 (with services in fact having ceased from 16 November 2011). All employees were made redundant by the French Commercial Court as a matter of law and none transferred to the SCOP as a matter of law. The recruitment process was an independent exercise openly advertised to enable the creation of a new cross-Channel ferry operator and aimed at identifying prospective staff who had the right skills and motivation to ensure the long-term success of the SCOP.

4.46 It is also interesting to consider the position of DFDS. In its response to the CC's Provisional Findings published on 21 March 2013, DFDS estimated that it employed around 250 former SeaFrance employees. To the extent that those employees met the criteria of [✂] of PSE3, DFDS would have been entitled to receive the appropriate payment from the liquidation plan. By its own estimates, DFDS has employed almost [✂] as many former SeaFrance employees that may have qualified under PSE3 as the SCOP and also operates using one of SeaFrance's former vessels.

4.47 It is clear from the above that nothing in the terms of PSE3 or the SCOP's recruitment process alter the fact that no enterprise was acquired and hence the statutory test of section 26(1) is not satisfied.

Issue Three: Having a crew familiar with the vessels

4.48 The third issue identified by the Tribunal concerns the relevance of having a crew which is familiar with the vessels.[55]

4.49 In terms of the crew required to enable passenger operation, this divides broadly into operational crew (i.e. sailors required for safe operation of the vessel, navigation, mechanics, loading and unloading of vehicles, berthing etc) and customer service crew (i.e. cleaners, chefs, waiters, bar staff, customer service staff and shop assistants).

4.50 Clearly the operational staff require special training and experience as part of their remit in order to enable safe operation of the vessels. Customer service staff, however, have skills that are readily transferable from similar shore-bound activities. All staff must however meet certain international standards to enable them to work on passenger vessels. This will include basic SOLAS (Safety of Life at Sea) training, basic levels of physical fitness and training in various safety procedures such as fire, abandon ship procedure etc. For someone with no previous maritime experience (for example bar staff applying to work on a vessel), this training can be completed in around a week and hence is little or no barrier to recruitment.

4.51 Operational staff have particular expertise according to their role. However, the only additional requirement for being employed on a vessel for those employees with prior maritime experience is that they undertake a ship familiarisation procedure, which lasts around two hours. Much as with air crew, a mariner's training is not specific to a particular type of vessel (much less a specific vessel) and crew can readily move between vessels.

4.52 This is supported by the ease with which DFDS was able to transfer crew between the Deal Seaways (ex *Barfleur*) and the Dieppe Seaways (ex *Moliere*) when chartering new vessels for its Dover to Calais service. It is also supported by the existence of manning companies such as V-Ships and Northern Marine Manning Services. These companies specialise in supplying and training crew in the areas needed to effectively man ships. Had GET chosen to operate MFL using V-Ships, services could have commenced almost immediately once the vessels were operations ready as the crew would have required only the two-hour familiarisation process. Indeed, given the need for the SCOP to recruit new employees and since the SCOP only had sufficient personnel to operate two of the vessels just before the launch of the service on 20 August 2012 and all three vessels at full capacity in February 2013, far from having an advantage, there is compelling evidence that SCOP was at a disadvantage to operations under a manning company.

4.53 In other words, it made no material difference at all to whether or not the particular individuals were familiar with the vessels. Certainly, for the purposes of the recruitment

[55] Judgment, paragraph 120.

process their general qualifications and experience of working on ships was relevant, but the SCOP was not looking specifically for individuals who had previously worked on the *Rodin*, the *Berlioz* and/or *Nord-Pas-de-Calais*. In fact, out of the former SeaFrance employees who were assigned to specific vessels during their employment with SeaFrance and who were subsequently employed by the SCOP on a vessel in the relevant period, less than half are currently working for SCOP on the same vessel on which they worked on during their employment at SeaFrance. Furthermore, just under half of the SCOP's employees on the vessels employed in the relevant period are engaged in different jobs with different responsibilities than they had at SeaFrance.

4.54 In summary, there is simply no evidence to suggest that: (i) the period of hot lay-by; (ii) the payments under the liquidation plan; or (iii) having a crew which is familiar with the vessels, either in isolation or in tandem, can support a conclusion that what was acquired amounted to an enterprise rather than an acquisition of assets.

24 January 2014

RPC

SCOP Submission to CC on the Jurisdictional Question

Annex 1
[✂]

Annex 2
[✂]

Annex 3
[✂]

Annex 4
[✂]