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

SCOP Response to Provisional Findings following Remittal

1. Introduction

1.1 This response sets out the SCOP's comments on the CMA's Provisional Findings ("PFs"), published on 21 March 2014.[1] The SCOP has responded separately on the question of whether there has been a material change of circumstances for the purposes of section 41(3) of the Enterprise Act 2002 (the "Act") since the preparation of the CMA's original Report in June 2013 (the "Report").

1.2 In the main part of this submission, the SCOP makes a number of key points in relation to the PFs. This submission is accompanied by an Annex ("Annex A") which addresses additional examples of factual inaccuracies contained in the PFs and clear errors in the CMA's analysis and interpretation of the evidence.

2. Legal test to be addressed

2.1 It is clear under the Act that the question of whether the CMA has jurisdiction to consider a merger must be determined prior to and independently from the question of whether a transaction gives rise to a substantial lessening of competition ("SLC"). This was expressly confirmed by the Tribunal in its Judgment.

2.2 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)*".

2.3 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*".

2.4 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 a transfer or acquisition of the activities, or part of the activities, of a business. This was emphasised by the Tribunal in its Judgment.[2]

2.5 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 and that "*on this definitional question there is no margin of appreciation*".[3] In other words, the CMA'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 CMA has no jurisdiction, as a matter of law, to consider the substantive question set out at section 35(1)(b) of the Act.

[1] For convenience, all references in this submission are to the Competition and Markets Authority ("CMA").
[2] Tribunal Judgment, paragraph 102.
[3] Tribunal Judgment, paragraph 98.

2.6 The simplicity of this issue has been lost in the PFs, as the CMA instead seeks to build a highly complex and at times extremely tenuous argument that there is a sufficient connection between MFL and SeaFrance to enable it to scrutinise the merger.

2.7 In the SCOP's view, many of the points highlighted in the Annex and in the remainder of this submission do not represent a fair or tenable interpretation of the evidence and may be seen as demonstrating confirmation bias - that is, a tendency to confirm the CMA's previous finding that it has jurisdiction to consider the transaction and thus to find that the transaction gives rise to an SLC. In short, the SCOP is concerned that the CMA has approached the statutory test for jurisdiction in a manner which is intended to allow the CMA to scrutinise a transaction about which it already has strongly held views.

2.8 The CMA seeks to justify an expansive approach to the question of jurisdiction on the basis that there is otherwise a risk of gaming of the system and of avoidance. However, this reasoning does not stack up, because the CMA has rightly accepted that there is no question of the parties to the present transaction having sought to avoid merger control. The only question is whether the transaction in question is in substance a merger of existing businesses or not. There is no good reason for the CMA, in effect, to seek to expand its jurisdiction beyond that.

2.9 Part 3 of the Act must be interpreted and enforced strictly in accordance with its terms: the competition authorities can only investigate transactions that are "relevant merger situations" within the meaning of the Act. If they have concerns about effective competition in particular markets then they can use their powers under Part 4 (for example, "*where it appears that the structure of the market or the conduct of suppliers or customers is harming competition*"[4]).

3. Decision of the Tribunal

3.1 In its Judgment of 4 December 2013, the Tribunal unanimously quashed the Report, remitting to the CMA for reconsideration the question of whether the CMA has jurisdiction. This required the CMA to reconsider whether "*Eurotunnel/SCOP acquired an asset or an enterprise*"[5].

3.2 The Tribunal ruled that "*as regards the question of whether a relevant merger situation exists, the statutory test is <u>not</u> whether the acquiring entity is carrying out the <u>same</u> activity that was once carried out by the acquired entity, even with the same assets".*[6] Thus 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.

3.3 The Tribunal further 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*."[7] 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*".[8]

3.4 In the circumstances of the present case, the distinctions highlighted by the Tribunal are pertinent. The CMA has simply not engaged with them.

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[4] Overview of the Enterprise Act, OFT518, paragraph 5.1.
[5] Judgment, paragraph 432.
[6] Judgment, paragraph 106(b)(ii).
[7] Judgment, paragraph 106(b).
[8] Judgment, paragraph 106(b)(ii).

Section 24 relevant time period

3.5 In its Judgment, the Tribunal addressed the question of whether there were any statutory time limits which might "*limit consideration of arrangements or transactions entered into by the SCOP*".[9] Drawing on the CMA's own skeleton argument, the Tribunal stated that "w*hilst, no doubt, the Commission may look to prior events so as to understand transactions or arrangements concluded within the section 24 time frame, 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*"[10] (emphasis added).

3.6 What the Tribunal did not suggest was that the CMA could look at events subsequent to the relevant transactions and to reinterpret the nature of the transaction on that basis. Yet that is precisely what the CMA does, particularly in relation to PSE3. In relation to that part of its analysis, the CMA has in effect disregarded the terms of PSE3, and the SCOP's evidence as to what the position was at the time of the transaction, and has attached (in effect) decisive weight to a payment which was made in January 2013, outside the relevant period and following the issue of legal proceedings. There is no basis for that approach in either the Act or the Tribunal's ruling.

4. No "continuity or momentum" between SeaFrance and MFL

4.1 In its PFs, the CMA spends a very considerable amount of time (paragraphs 3.31-3.39) explaining the background to the transaction. This is clearly of importance as it reveals the extent to which the assets of the former SeaFrance business were fractured, the employees made redundant and the business of SeaFrance wound down to complete, legal liquidation.

4.2 The CMA notes that much of the period of inactivity was associated with the liquidation process. The SCOP notes and agrees with the CMA's point. The inevitable effect of that liquidation was a prolonged period of inactivity and, crucially, following the liquidation of SeaFrance, the sale of the ex SeaFrance assets through a sealed bid process, the outcome of which was fundamentally uncertain.

4.3 The CMA nevertheless arrives at the surprising conclusion that there was "*considerable continuity and momentum*"[11] over this period between the ending of SeaFrance's commercial operation overnight on 15/16 November and the launch of MFL services on 20 August 2012.

4.4 Notwithstanding the involved nature of the CMA's reasoning, this conclusion is ultimately unsubstantiated. The CMA identifies no continuity or momentum.

4.5 The failure of the SCOP's bids for the vessels, and the pursuit of an alternative strategy, does not demonstrate continuity or momentum, but precisely the opposite. Indeed, the CMA's repeated attempts to bolster its analysis with reference to the SCOP's previous failed bids (which were on a manifestly different basis from the GET bid that was accepted) might be suggestive of a jaundiced attitude and an overwhelming attempt to reach the same conclusion as before. Notably, the CMA has attached considerable weight to the failed bids made by the SCOP, whilst almost ignoring the range of other attempts to purchase the SeaFrance business or assets by others.

4.6 The CMA states that the eventual collaboration between GET and the SCOP "*addressed two main concerns flowing from the liquidation of SeaFrance: (a) payment of creditors; and*

[9] Tribunal Judgment, paragraph 65.
[10] Tribunal Judgment, paragraph 66.
[11] Provisional Findings, paragraph 3.53.

(b) ensuring employment for ex-SeaFrance workers".[12] The CMA's reasoning is flawed in both respects.

4.7 A liquidation process is designed to enable the liquidator to maximise the value of the assets for the benefit of the creditors of the company. The SeaFrance liquidation took place under Article L640-1 of the French Commercial Code which states clearly that the liquidation process brings the activities of the business 'to an end'.[13] Thus, as the CMA accepts, the liquidation occurred because it was not possible to sell the SeaFrance business as going concern. The consequences were that the employees were made redundant and that offers were now invited for the assets, not the business.

4.8 In other words, liquidation reflected the fact that there were no acceptable offers for the SeaFrance business, only for its assets. Indeed, the CMA goes on to conclude that the MFL business has proven viable precisely because of the differences between it and the SeaFrance business.

4.9 The liquidation in the present case was given effect through a sealed bid process. The liquidator's process was public and was open to anyone who wished to bid for the assets.[14] Such a process is fundamentally uncertain and inconsistent with any suggestion of continuity or momentum as regards a particular bid.

4.10 In the event, GET's bid succeeded because it offered the best price for the liquidation assets. It did not succeed because there was a concern to ensure employment for the workers. Indeed, the CMA has already found that the sale of the SeaFrance assets via the sealed bid process was not predicated on any link to the employees in any way. It is for precisely that reason that the CMA did not accept the SCOP's argument that its prohibition remedy is unlawful, because of its impact on the SCOP's workforce (being the issue underlying the SCOP's application for review under Ground 5).

4.11 Whilst it is true that "*the various schemes previously considered by the French Court had at their core the continuation of a ferry service and employment for SeaFrance employees*",[15] that process had failed and therefore the Court moved to liquidate SeaFrance. Thus, as the CMA itself recognises, efforts to achieve a solution which would have resulted in continuity of employment did not result in a "*viable solution*"[16]. In consequence, the French equivalent of TUPE did not apply, and any prospect of continuity of employment was lost.

4.12 Instead, the remaining staff were made redundant on two weeks' notice, with the exception of those retained at the liquidator's expense as part of the liquidation cell. These staff were retained by the liquidator with a view to maximising the value of the assets for the benefit of SeaFrance creditors.

4.13 At essentially the same time, some 250 former SeaFrance employees (many of whom were or had been subscribers of the SCOP) had been recruited by DFDS which launched its own service from Dover to Calais.[17]

4.14 It is difficult to understand how the CMA can conclude in these circumstances that continuity of employment was "safeguarded" by the SCOP. The CMA does not properly engage with the significance of the fact that the requirements of the French equivalent of TUPE were not met. The SCOP's members, the majority of whom were out of work for a

[12] Provisional Findings, paragraph 3.50.
[13] "*La procédure de liquidation judiciaire est destinée à mettre fin à l'activité de l'entreprise*".
[14] We note that there can be no suggestion that the process which was carried out by the liquidator was in some way designed or influenced by either GET or the SCOP.
[15] Provisional Findings, paragraph 3.50.
[16] *Ibid*.
[17] DFDS Comments on the CMA's provisional findings, published 21 March 2013, paragraph 3.4.

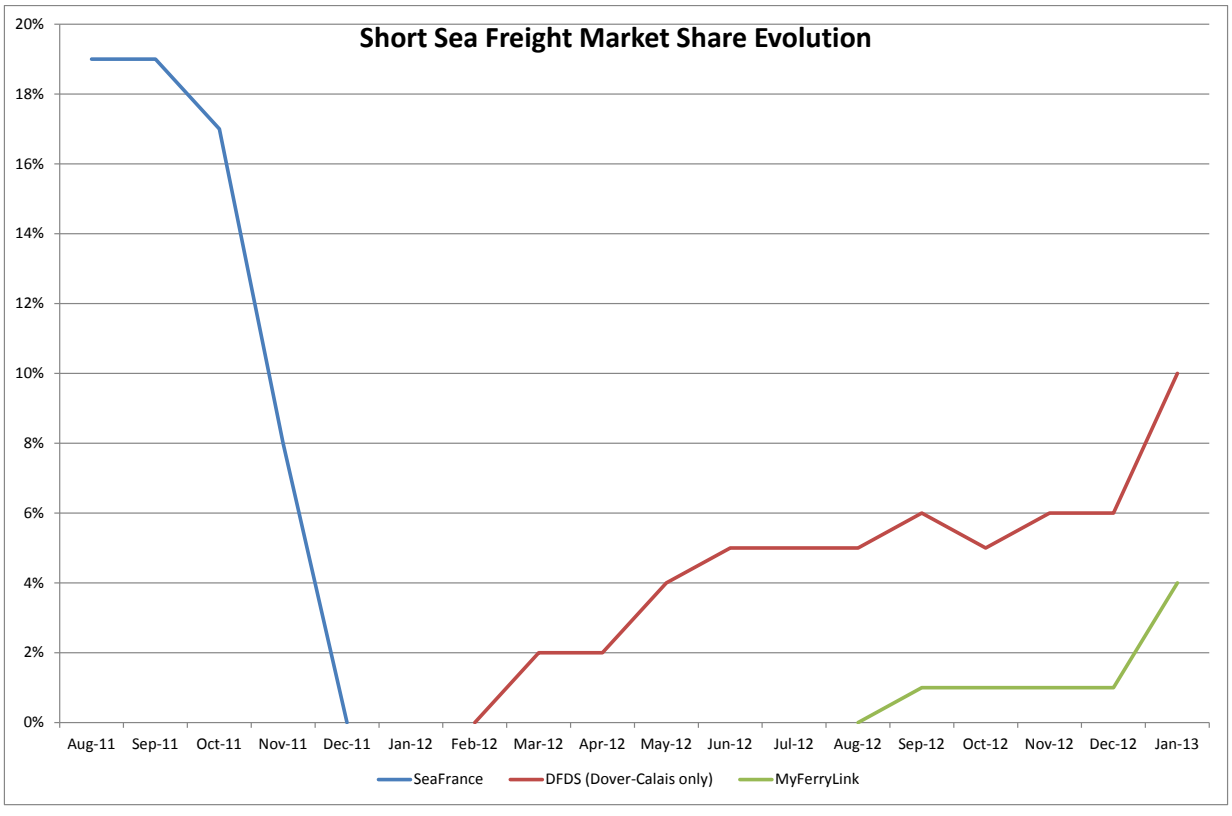
number of months, would certainly not have regarded their jobs as having been "safeguarded" during their lengthy period of unemployment. The sealed bid process did not guarantee their future employment. Others instead chose to work for DFDS.

4.15 There was of course a social imperative to see the former SeaFrance employees back in work and, as a matter of French labour law, SNCF was required to fulfil certain obligations to the employees who were being made redundant in the context of the liquidation.[18] However, the existence of these social measures does not demonstrate the aim of "business continuity",[19] as the CMA suggests.

4.16 The situation presented to customers in August 2012 when MFL launched its services was also not one of business continuity. Overnight on 15/16 November 2011, and without warning, all SeaFrance ferry services suddenly ceased. Customers were left stranded on the quayside with no thought as to how they would be transported or what, if any, arrangements would be made to refund pre-booked crossings. Clearly such a dramatic end to operations had a fundamental and profound impact on the goodwill in the brand and customers perceptions of SeaFrance.

4.17 The suggestion that there was continuity and momentum should be considered in light of the freight market share of SeaFrance on the Dover-Calais route in its final four months of trading when compared with with the freight market shares of DFDS and MFL following the launch of their respective services on the Dover-Calais route (see Figure 1 below).

Figure 1 (*Source: FreightStat/FerryStat)*



[18] As the SCOP has previously told the CMA, French labour law requires that where a company with more than 50 employees wishes to dismiss 10 or more of its employees within a 30-day period, the employer must establish in advance a Plan de sauvegarde de l'emploi with a view to limiting the impact on the employees. Further, mandatory redundancies which follow as a result of the liquidation are subject to Article L1233-58 of the French Labour Code, under which contracts of employment which link the employees with their employer are severed ("rompus") within 15 days of the judgment which brings to an end the activities of the business.

[19] Provisional Findings, paragraph 3.52.

4.18 In the period following their respective entries onto the Dover-Calais route, the freight market shares of both DFDS (for its Dover-Calais route) and MFL were substantially lower than that of SeaFrance when it was still operating and are consistent with the launch of new services. For example, in its first full month of trading, DFDS carried 7,008 freight units with one vessel on its Dover-Calais service, equating to a market share of 2% on the Short Sea.[20] In MFL's first full month of trading, despite operating two vessels, it carried just 1,431 freight units, equating to a market share of c.1%. This is in stark contrast to the 19% market share of SeaFrance in August 2011 when it carried 49,346 freight units. Even during November 2011, when SeaFrance traded only until 15/16 November, it carried 23,471 freight units. Clearly, following its exit from the marker on that date, the market share of SeaFrance reduced to zero.

4.19 We also note that the growth of DFDS occurred at a much more significant rate than that of MFL. For example, while DFDS carried 7,008 freight units in its first full month of trading on the Dover-Calais route with one vessel, it took MFL until January 2013 to carry in excess of 7,000 freight units in a calendar month with two vessels.

4.20 This market share data is impossible to reconcile with any suggestion of business continuity.

5. Former SeaFrance employees

5.1 We have addressed above the suggestion that the employment of the former SeaFrance workers was “safeguarded”. We now address the question of whether it can be said that the workforce “transferred”.

5.2 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*".[21]

5.3 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*."[22]

5.4 For reasons which have already been developed, the SCOP considers this to be an accurate reflection of the reality.

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[20] This does not include DFDS' market share that is attributable to its Dover-Dunkirk service. We note that DFDS has not simply transferred its traffic from its Dover-Dunkirk service onto its Dover-Calais route. Rather, DFDS has continued to perform strongly on both of its Short Sea routes. For 2013, its freight market share on the Short Sea that was attributable to its Dunkirk service was 13.9%, while its freight market share on its Dover-Calais service 9.8%. Together with its performance on the Newhaven-Dieppe route, DFDS had a combined market share on the Short Sea in 2013 of 24.8%. This is up from 20.2% in 2012. For further details, please see our response to the CMA in relation to material change of circumstances under section 41(3) of the Act (submitted on 4 April 2014).

[21] Tribunal Judgment, paragraph 115.

[22] Transcript of Hearing, Day 2, page 75, lines 22-30.

5.5 As a matter of fact, there was no transfer of the workforce. The French equivalent of TUPE did not apply and the employees were made redundant, their contracts terminated. The employees employed by the SCOP were recruited through a comprehensive and rigorous recruitment exercise, with the majority of staff engaged in the period between 2 July 2012 (completion of GET's acquisition of the assets) and 20 August 2012 (launch of MFL operations using the *Rodin* and the *Berlioz*). This recruitment process was open to anyone who wished to apply, and was focussed on ensuring that applicants had the right skills for the tasks. The recruitment process did not favour former SeaFrance employees or those individuals who were subscribers to the SCOP. Indeed, one of the aims was to create a new entity that was untarnished by the stigma of the former SeaFrance business, given the latter's history of strikes and the detrimental impact on its customers arising from its sudden cessation of all activities in November 2011. Successful applicants then had to undertake a probationary period of between two and four months (four months for the more senior officers).

5.6 The outcome of this process was not a transfer of the workforce. Prior to its liquidation, SeaFrance employed c.820 staff, all of whom were made redundant under the terms of PSE3. There was no guarantee that any of those individuals would obtain employment elsewhere in the future and, by 29 October 2012, the SCOP ultimately employed only around [✂] of those c.820 employees who had been made redundant. This is significantly less than half of those who had been made redundant under PSE3. Equally, less than half of the staff retained by the liquidator in the liquidation cell are now employed by the SCOP.[23]

5.7 In the circumstances, the CMA's reasoning as to how there was nevertheless a transfer of the workforce requires the most careful scrutiny. This reasoning turns on the operation of PSE3.

5.8 It is not correct, as the CMA asserts, that the indemnity of €25,000 per employee payable under article 3.3.3 of PSE3 was "*negotiated for the benefit of the SCOP and with the continuation of the SeaFrance business in mind*".[24]

5.9 First, this indemnity was negotiated by the SeaFrance works council and the liquidator and was for the benefit of <u>any</u> corporate entity in which employees have a direct interest (i.e. share of the equity capital) <u>and</u> an indirect interest (i.e. permanent employment contract).

5.10 Second, the statement that article 3.3.3 was negotiated with the "*continuation of the SeaFrance business in mind*" is also incorrect. The terms of the indemnity say no more than that there would need to be a "similar operation" to SeaFrance.

5.11 The uncertainty of this language is obvious, with the result that payments were made only in January 2013 (14 months after SeaFrance ceased operating, a year after the employees were made redundant and some six months after employment decisions had been made). But even put at its very highest, this language does not involve any requirement for continuity.

5.12 The objective of these payments was to improve the employment prospects of the redundant workforce. Hence, the sums were payable in a variety of circumstances, none of which require any form of business continuity. As the CMA will be aware, payments were also available under articles 3.3.1, 3.3.2, and 3.4 of PSE3, each of which are entirely unconnected to the operation of the vessels and were available to any entity independent of SNCF (and its subsidiaries) that took on a former SeaFrance employee under PSE3

[23] Only [✂] of the 190 former SeaFrance staff who were retained by the liquidator were subsequently employed by the SCOP.
[24] Provisional Findings, paragraph 3.100.

provided the business was in the local Calais region. In fact, article 3.3.1 included a payment of €10,000 to be offered to those who created or took at least a 50% share in a company within the EU within 12 months of being made redundant (this payment was enhanced if the business was within the local Calais region).[25] No business continuity is envisaged here.

5.13 Thus, whilst consideration was necessarily given as a matter of French labour law to the future employment prospects of the SeaFrance workforce, that is not the question. The question is - what is the relevance of PSE3 to the transaction which in fact took place?

5.14 In that regard, the CMA has simply ignored the SCOP's evidence that: (i) it did not act with reference to the availability of the indemnity; and (ii) indeed could not rely on the indemnity, given the uncertainty as to whether it was payable.

5.15 The SCOP does not accept that the extraordinarily tenuous analysis in paragraph 3.105 of the PFs is a plausible interpretation of the available evidence.

6. The Vessels

6.1 The CMA appears correctly to recognise that an acquisition of the vessels alone cannot meet the statutory definition of an enterprise, as by themselves they plainly constitute assets rather than activities (and the CMA has not consulted on any argument to the contrary).

6.2 A number of points in relation to the CMA's discussion of the vessels are contained in Annex A to this submission. A number of key points are made below.

Nature and availability of vessels

6.3 Clearly, the vessels were used previously for commercial operations by SeaFrance on the Dover-Calais route. As noted above however, the Tribunal made clear in its Judgment that 'emulating' or 'reconstructing' the previous business with the same assets will not be sufficient to confer jurisdiction upon the CMA. The CMA's efforts to tie the vessels to the route do not add any weight to the question of whether GET acquired assets or an enterprise.

6.4 We also note the CMA's view that "*there appears to be a limited number of suitable vessels*" to buy or charter for use on the Dover-Calais route.[26] Leaving aside the fact that the evidence points directly at the fact that other vessels are available to charter or buy for use on the route (as proven by the fact that in February 2012 DFDS was swiftly able to launch operations on the Dover-Calais route with one vessel (the *Norman Spirit*) and shortly thereafter doubled the size of its operations by chartering the *Barfleur* in April), the potential limited availability of alternative vessels does not of itself add any weight to question of whether GET acquired anything more than bare assets.

Period of hot lay-up

6.5 The CMA conclude that as a result of the period of hot lay-up the vessels "*could be put into service within a shorter time frame (and probably more cheaply) than if they had been laid up cold, but less quickly than if they had been fully operational*".[27] As the CMA is aware, it took a period of seven weeks of intense work (and substantial cost) in order for the vessels

[25] See further paragraphs 4.25-4.36 of the SCOP's Initial Submission to the CMA on Jurisdiction (24 January 2014).
[26] Provisional Findings, paragraph 3.140.
[27] Provisional Findings, paragraph 3.128.

to be brought up to operational standard.[28] The conclusion of the CC therefore belies the evidence given to it that ships in hot lay-up can normally be recommissioned in less than one week[29] (which is clearly substantially faster than 7 weeks).

6.6 The CMA accepts that the "*decision to maintain the relevant vessels in hot lay-up was based on a cost-benefit analysis, motivated primarily by a desire to preserve the value of the assets*".[30]

6.7 In other words, the CMA itself accepts that the decision to place the vessels in hot lay-up was taken by the liquidator with a view to preserving value in the assets.[31] It does not therefore serve the objective of achieving business continuity, as the CMA appears to suggest in paragraph 4.13 of the PFs.

Having a crew familiar with the vessels

6.8 The CMA conclude that having crew familiar with the vessels "*was a material advantage to GET/SCOP enabling it to restart operations quickly*"[32] and that "*acquiring crew for the vessels other than via the route actually used by MFL would not have been as easy as GET/SCOP anticipated*"[33]. The evidence simply does not support this conclusion. NMM clearly states "*there would be nothing particularly unique about putting together a crew to operate a ferry on the Dover-Calais route when compared with other short-sea ferry routes*"[34]. NMM also stated that it believed "*it would take about two to three weeks in total to supply the crew to the vessel and ensure that the ship was manned sufficiently and safely. This included both sourcing the crew and familiarization, which it said could take 10 to 15 days*"[35].

6.9 The CMA makes no comparison between the <u>total</u> of 10-15 days it would have taken NMM to supply a complete crew and the 7 weeks it took for the SCOP to recruit sufficient personnel just to operate the *Rodin* and the *Berlioz* on launch of MFL commercial services on 20 August 2012. In other words, on any basis, it took the SCOP nearly three times' longer to recruit the staff than would have been the case had GET sourced crew from NMM. There is no basis for the CMA to conclude, on the evidence and the facts, that having [70-80%] of the staff drawn from former SeaFrance employees conferred a "*material advantage*".[36]

7. Other Assets

7.1 As the CMA notes, as regards berthing slots, check-in booths and PECs, MFL took no "transfer" of existing rights, but had to reapply under its own name. This is strongly indicative of there being no transfer of any activities. A number of points in relation to the CMA's discussion of the other assets are contained in Annex A to this submission.

7.2 As regards the IT assets, the CMA formulates its own test, stating that "*the focus here is on the extent to which the asset in question was affected by the period of inactivity*".[37] The

[28] Even then, only temporary certification could be obtained and the SCOP did not obtain permanent certifications for the vessels until February 2013.
[29] Provisional Findings, Appendix C, paragraph 9.
[30] Provisional Findings, paragraph 3.128.
[31] As noted at paragraph 4.7 above, preservation of the value of the assets for the benefit of creditors is the primary responsibility of any liquidator.
[32] Provisional Findings, paragraph 3.156.
[33] Provisional Findings, paragraph 18.
[34] Provisional Findings, paragraph 3.155.
[35] Provisional Findings, paragraph 3.154.
[36] Provisional Findings, paragraph 3.156.
[37] Provisional Findings, paragraph 3.195.

CMA does not actually answer this question. In any event, the SCOP's evidence as regards the amount of work required in respect of the IT systems is not adequately reflected in the PFs.[38] Once that evidence is properly taken into account, it is clear that the IT assets were materially adversely affected by the period of inactivity.

8. Conclusion

8.1 For the reasons set out in this submission, the SCOP remains of the view that the acquisition of the vessels and certain other assets by GET does not meet the statutory definition of an 'enterprise'. As such, the SCOP considers that the CMA does not have jurisdiction to consider the transaction further.

9. Next steps

9.1 Given that the Tribunal quashed the CMA's finding of jurisdiction, the SCOP considers (for reasons previously stated) that the CMA's remitted analysis of the RMS question should be presented in a new report which sets out the CMA's findings as regards each element of that question. Although some of these elements were not the subject matter of the Tribunal proceedings and can therefore be carried over from the decision in the Report (for example the CMA's analysis of the "share of supply" test), others such as, inter alia, the finding of "material influence" and "associated persons" have been discussed and commented upon by the Tribunal at length. To the extent that the CMA's findings on these matters depart from its previously stated position, the CMA would need to consult on the same. The current administrative timetable would need to be extended to accommodate this.

10 April 2014

[38] See our comments in Annex A under paragraphs 3.196 and 3.197.

Annex A

PFs Paragraph	Extract	Comment
Footnote 19	*"MyFerryLink SAS (MFL) assumes the commercial risk for the operation, while the SCOP operates the ships and acts as a sales and marketing agent for MFL".*	This statement is not correct. As the SCOP has previously told the CMA, DCFL is responsible for the marketing and sales of passenger services (on behalf of MFL), while freight services are currently sold direct by MFL SAS.
2.39 – 2.40	"*According to the French Merger Guidelines, an undertaking is deemed to be an entity carrying out an economic activity, which appears not dissimilar from the concept of an enterprise in the UK, namely the activities, or part of the activities, of a business. Similarly, an economic activity involves offering goods or services on a market, while a business is defined as any undertaking in the course of which goods and services are supplied otherwise than free of charge (section 129 of the Act).* *Given the similarities between the French and UK regimes, in particular the approach to the undertaking/enterprise matter, it is interesting to note that the parties notified their transaction to the French Competition Authority. However, given that the legal frameworks are not identical and in light of the relatively high-level consideration given to this issue in the French Competition Authority's decision, we found that decision to be of limited assistance in addressing the asset/enterprise question generally and the points the CAT highlighted in its judgment more particularly*."	This information bears limited or no relevance to the question of whether GET/SCOP acquired assets or an enterprise. The fact that the French Competition Authority cleared the transaction is also of limited or no relevance. We note that the CMA dismissed the FCA's views on the transaction in the course of its first review of the transaction (see paragraph 8.75 of the Report).
3.20	"*In the context of proceedings before the French Court, various parties commented favourably on the intentions of the SCOP to ensure employment for the SeaFrance employees, but they also considered that the lack of financing was problematic, both in jeopardizing the goal of ensuring continued employment and in providing funds to pay the company's creditors. For example, the 'Juge Commissaire' stated that while the creation of the SCOP attracted a lot of sympathy, given that the lack of financing remained, its plan was not credible because it consisted simply of utilizing the capital in the vessels in order to maintain the status quo for some time. In addition, he said that the Court needed to consider its responsibility vis-à-vis the creditors*."	This paragraph does not correctly reflect the fact that, although there was a degree of sympathy for the SCOP's cause, responsibility to creditors was unambiguously paramount at all times. See page 18 of the 9 January judgment of the French court ("*the Court cannot hide that it has a responsibility to the creditors and that he [Gorrias] would be failing in his mission by dismissing any valuation of the assets in order to favour an adventure by the SeaFrance Cooperative Enterprise, however sympathetic he may be*".)

3.28	"*Ultimately, these three bids were all rejected and we do not consider them further here*."	The SCOP notes that the CMA has chosen not to set out the detail of the failed bids of DFDS-LDA, Stena RoRo AB and P&O because these bids were unsuccessful. However, both the fact and content of those bids (or some of them) plainly undermine the CMA's claim that there was momentum around the GET bid so as to create "continuity". The reality is that the vessels were sold through a sealed bid process which DFDS might well have won. The fact that it did not does not mean that there was a continuity of activities or employment. The SCOP also fails to understand why if these bids are not relevant, the details and circumstances of the SCOP's own failed bids are relevant to the question of whether what was acquired by GET / SCOP amounted to assets or an enterprise. The CMA makes repeated reference to SCOP's failed bids, made at a different time under entirely different circumstances, as somehow illuminating the nature of the transaction.
3.31	"*A quick sale would provide for resuming the ships' operating starting next season. The sale to GET of the vessels and assets was duly authorized. The acquisition completed on 2 July 2012. Operations on the Dover–Calais route recommenced on 20 August 2012 under the MyFerryLink brand*."	This extract is both unclear and misleading. As a matter of fact, services did not commence until the end of the summer season. This extract suggests that the entire sale process and the subsequent launch of MFL's operations on 20 August 2012 was swift. It was not. The SCOP considers that the Provisional Findings do not accurately portray the vast amount of work that had to be carried out by the SCOP before services could be commenced and this extract is one example of that wider concern. The SCOP has made detailed submissions to the CMA on the amount and cost of the work that had to be undertaken before services could commence under the MFL brand. Therefore we do not propose to repeat those submissions here. However, the SCOP would like to reiterate that in spite of the incentives to commence operations as quickly as possible in the summer of 2012, when the Olympics were taking place in London and when cross-channel traffic had been experiencing an increase in demand, the SCOP still could not commence operations until the end of the summer season, on 20 August 2012. We therefore do not understand the CMA's conclusions that "*a quick sale would provide for resuming the ships' operating starting next season".* The French court undertook a thorough and comprehensive

		process, under which it was open to anyone to bid for the assets.
3.46	"*We note, secondly, that a considerable portion of the period of inactivity (at least from 9 January 2012 until 2 July 2012) was due—directly or indirectly—to the requirements of the liquidator's sale process which followed on from the failure of the SCOP's two attempts to purchase the SeaFrance business as a going concern*."	In this paragraph, the CMA notes two key points concerning the liquidation – first, that there was a lengthy period of inactivity, and secondly, that the liquidation followed a failure to sell the business as a going concern. It is remarkable, that, rather than engage with the implications of either or both of those two points, the CMA instead chooses to make reference to the SCOP's earlier failed bids for the former SeaFrance business as in some way illuminating the nature of the transaction.
3.48 – 3.49	"*Fourth, while various transactions involving the parties were considered, they all had the aim of continuing SeaFrance's activities in some form and providing employment to SeaFrance employees. We noted that many of those involved in the various stages of the sale process—including the liquidator and the French Court—sought to ensure the re-employment of ex-SeaFrance staff in the Dover–Calais region, preferably on the SeaFrance vessels. One reflection of this is the successful negotiation by the SeaFrance works council of an indemnity payment—funded by SNCF—which was significantly higher in the event that the ex-SeaFrance staff were re-employed on the SeaFrance vessels used in a similar operation and which ultimately provided the SCOP with a substantial amount of working capital*. *Fifth, the SCOP was formed with the aim of providing employment for SeaFrance employees who were faced with redundancy. It made a determined attempt to acquire SeaFrance as a going concern when it was in administration. A second attempt (in which GET had some involvement) took place after SeaFrance's activities had ceased. Those attempts failed for two reasons: (a) the low bid of €1 was dis-advantageous to creditors and unacceptable in light of the perceived value of the assets; and (b) the lack of funds available to the SCOP meant that—although it wanted to use the acquired assets to provide employment for SeaFrance employees—its proposal to do so was not credible*."	Although this paragraph refers to "various transactions", the only transaction involving the parties was the bid ultimately accepted by the Paris Commercial Court in June 2012. Whilst the SCOP had made earlier, failed, attempts to acquire SeaFrance, these did not involve GET and were manifestly on a different basis. This extract also fails to adequately describe the difficulties that the SCOP experienced in obtaining payment of the funds falling due to it under PSE3. The historic reasons for the creation of the SCOP play no part in the assessment of whether the transaction involves the transfer of activities, as opposed to a collection of assets.
3.51	"*Continuity of employment was effectively safeguarded by the formation of the SCOP, which held the workforce together, and—to a lesser extent—due to the fact that a significant number of employees*	For the SCOP's comments on the question of continuity of employment, please see sections 4 and 5 of our response to the Provisional Findings.

	were involved in the lay-up of the vessels".	The SCOP also notes that it was not involved in the period of hot lay by.
3.59	*"We understand that in January 2012, when SeaFrance was liquidated, it employed around 820 individuals. Around this time, the SCOP had approximately 800 subscribers. As noted in paragraph 3.10 above:* *the purpose of the SCOP at the time of its creation was to make an offer to acquire the assets of the SeaFrance business (at that time in administration). In other words, the SCOP was created with the aim of securing employment for its subscribers, in particular by ensuring that the SeaFrance vessels continued to operate between Dover and Calais.* *The SCOP told us that all employees of the SCOP were also SCOP subscribers (although employees of DCFL are not SCOP subscribers)".*	At the time of its registration on 29 December 2011, the SCOP had 827 subscribers. Of these, [✂] were SeaFrance employees who were subsequently made redundant under PSE3. A further [✂] subscribers were drawn from interested and sympathetic parties unconnected to SeaFrance. It is not correct for the CC to insinuate a direct correlation between the 820 individuals who were made redundant under PSE3 and the fact that "*around this time, the SCOP had approximately 800 subscribers*".
Footnote 74	*"Of the total number of SeaFrance employees, just over half were then employed by SCOP".*	This statement is factually inaccurate and is not supported by any of the evidence that the SCOP has provided to the CMA. Of the c.820 employees who were made redundant under PSE3, the SCOP ultimately employed only around [✂]. In addition, only [✂] of the 190 former SeaFrance staff who were retained by the liquidator were subsequently employed by the SCOP.
3.71 (Footnote to Table 2)	*"*We note that this figure is different in the preceding table ([X] compared with [X]). We understand that this is because the higher figure included ex-SeaFrance employees which had been made redundant before PSE3. The lower number reflects employees made redundant under PSE3 as a result of the liquidation".*	The figures in Tables 1 and 2 are redacted. However, we note that the footnote to Table 2 indicates that the total number of ex-SeaFrance employees employed as at 29 October 2012 is different in Table 1 as compared to Table 2. However, from our review of the confidential version of the Provisional Findings, that is not correct. The footnote should be deleted.
3.77	"*We appreciate that not all ex-SeaFrance employees gained employment in MFL's ferry operation. MFL operates one fewer vessel than SeaFrance did (the SeaFrance Molière was not acquired by GET). The French Court Minutes dated 11 June 2012 refer to 'reducing staff/position ratio to 2.3 (compared with 2.9 for SeaFrance)'. There are statements by the 'Juge Commissaire' in the judgment of the French Court dated 9 January 2012 that are critical of staff and management and which refer to repeated industrial*	While these facts are, in themselves, accurate, this paragraph misleadingly suggests that there are particular reasons which explain why the SCOP has not employed the whole SeaFrance workforce. The size of the SeaFrance business that previously operated on the Dover-Calais route has no impact on MFL's recruitment decisions or on the number of staff that it took on. Its decisions were based purely on the need to employ the requisite number of employees in order to safely launch services under the

	action, in particular during peak times, and a situation of systematic obstruction. In light of those factors, we consider that it was to be expected that the SCOP and MFL would conduct a selection exercise to select what it considered to be the right number of suitable employees (see also paragraph 3.51 above)".	MFL brand.
3.78	"*In our view, given that the Berlioz and the Rodin are sister ships and they operate on the same route, it is not surprising that staff can work on either ship*. *Similarly, given that the number of employees has decreased, it is not surprising that a number of job titles or responsibilities changed to accommodate this. Also, a change in job descriptions is not unusual in the context of a reorganization*."	The SCOP's submissions on this point were not limited to the *Berlioz* and the *Rodin*, but included a number of employees who now work on the *NPC* having been assigned to a different vessel under SeaFrance or who previously worked on the *NPC* for SeaFrance but who now work on either the *Rodin* or the *Berlioz*. In the SCOP's recruitment process, it made no material difference at all whether or not the particular individuals were familiar with the vessels. Certainly, for the purposes of the recruitment 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 the *NPC*. In addition, we note that a considerable number of the SCOP's employees (and all of those individuals who are employed by DCFL) are shore-based. The SCOP also notes that the CMA mistakenly characterises the transaction as a 'reorganization' albeit one given effect through a liquidation and sealed bid auction.
3.88	"*We understand that when the request for payment was made, the liquidator initially queried whether the SCOP was entitled to such payments since the SCOP was not the owner of the vessels. The SCOP approached the French Court for a ruling. We understand from the liquidator that in the meantime, SNCF was not opposed to making the payment to the SCOP despite the fact that the strict terms of the indemnity may not have been met. The liquidator therefore consented to the payment and the court ruling dated 23 January 2013 was made on this basis*".	This extract fails to adequately describe the difficulties that the SCOP experienced in securing receipt of the indemnity payments. As we have told the CMA on several occasions, there was considerable doubt as to whether the SCOP was entitled to the payment at all and the SCOP was forced to return to the Paris Commercial Court to seek payment of the sums that it considered were due to it under PSE3. This was resolved outside the relevant period. During the relevant period, the position was at best uncertain.
3.100	"*Whilst PSE3 was the result of a legal requirement, its content was open to negotiation. A 'special clause' granting an indemnity of €25,000 per employee was negotiated. While there were lower indemnity payments that would accrue to other employers of ex-SeaFrance employees in a variety of circumstances, the highest level of indemnity (€25,000 per employee) was negotiated for the benefit of*	This paragraph is inaccurate and misleading. In addition, it contradicts the language used in paragraph 3.83. As the CMA is aware, the €25,000 indemnity payments were available to any SCOP or any other company (of any form) in which the employees would have a direct interest and an indirect

	the SCOP and with the continuation of the SeaFrance business in mind given: (a) the context (two bids by the SCOP to acquire SeaFrance assets and a large number of SeaFrance employees belonging to the SCOP); and (b) the terms of the indemnity: 'allowing similar operation of the vessels belonging to SeaFrance in favour of the SeaFrance Cooperative Enterprise [the SCOP] or any other company (of any form) in which the employees have a direct interest (share of the equity capital) and indirect interest (employment contract)'".	interest and which allowed a similar operation of the vessels belonging to SeaFrance. The payments were in no way limited to the SCOP that existed as at the date of PSE3. We also note that this extract fails to adequately describe the difficulties that it experienced in securing receipt of the indemnity payments (see above). This extract also fails to recognise that other companies stood to benefit from the payments under PSE3. The SCOP does not propose to repeat its submissions on this point here.
3.102	"*The total indemnity payable to the SCOP was €[], which was very near to the €10 million working capital it required for the MFL activities and a significant sum compared with the €[] that DFDS received. We are not aware of anyone other than the SCOP having received an indemnity payment of €25,000 under PSE3*".	The CMA compares the amount received by the SCOP with the amount received by DFDS. It attaches no weight to the fact that indemnities were payable in a range of circumstances, indicating that the objective was to facilitate re-employment, with higher sums payable on the basis that they would increase the prospect of employment if the vessels were put to use in a similar operation.
3.104	"*We do not consider that the fact that indemnity payments were available to other parties if they offered employment to ex-SeaFrance employees detracts from this position. These payments were considerably lower. Neither are we persuaded otherwise on the basis that according to its strict terms, the indemnity was initially interpreted by the liquidator as only being payable to the owner of the vessels, or on the basis that some uncertainty arose about the SCOP's entitlement. We noted the SCOP's views that some of the ex-SeaFrance employees who were made redundant upon liquidation gained employment elsewhere before being employed by SCOP SeaFrance. We do not consider that this impacts on our provisional conclusions on employees. If anything, we consider that it demonstrates the strong incentives for GET/SCOP to employ ex-SeaFrance st*aff".	The SCOP has addressed aspects of this reasoning elsewhere. There was considerable uncertainty as to whether any of the former SeaFrance employees would obtain employment elsewhere. As regards the last sentence, the fact that some individuals had obtained employment elsewhere in the interim period is clearly an indication that the link between the former SeaFrance business and the new business set up under the MFL brand had been broken.
3.105	"*Although a TUPE transfer may be an indicator of the transfer of an enterprise, the converse is not necessarily true. There may well be circumstances, of which this—in our view—is one, where had TUPE (or its French equivalent) applied, this would have been damaging to the transfer of a viable business. The evidence indicates to us that the SeaFrance business required restructuring in part because it was over-manned and suffered from bad labour relations. The liquidation avoided a TUPE transfer of employees, and as a result GET and the*	TUPE is intended to apply in cases where there is a continuity of business. Its non-application is a clear indication that no business was transferred.

	SCOP were in a better position to carry on a viable ferry business (albeit on a reduced scale compared with SeaFrance) and the SCOP was able to offer employment to a number of appropriately skilled persons, drawn substantially from ex-SeaFrance employees. That, in turn, enabled GET to table an acceptable offer for the vessels and other assets, and assisted GET and the SCOP in developing a viable business plan for the Dover– Calais route."	
3.106	"*In this section, we consider the extent and cost of the actions that were required in order to reactivate the business as a trading entity.*"	The SCOP considers that the starting point for this section is entirely wrong and that the approach adopted by the CMA is highly indicative of the CMA's pre-disposition to reach the same conclusion. The SCOP considers that there should be two component parts to this question: (i) what costs/actions were required before services could commence; and (ii) in spite of those costs and activities, can it be said that the activities of the business were "reactivated"?
3.114	"*…. we are of the view that there is a link between the vessel names and the route, and that GET/MFL acquired some advantage through goodwill inherent in the vessel names.*"	This conclusion is based on an unsubstantiated and unexplained assumption. On its launch, MFL was clearly acting as a start-up operation. In its first full month of trading, MFL carried only 1,431 freight units, a market share on the Short Sea only 1%. As we have previously told the CMA, freight customers were initially slow to book with MFL, a fact supported by the evidence.
3.118	"*….Furthermore, the vessels could be brought back into operation with reduced cost, time and effort; normally in the range of less than one week recommissioning time….*"	As the CMA is aware, following completion of the transaction on 2 July 2012, it took a period of seven weeks in order for the vessels to be launched under the MFL brand and a substantial amount of work was carried out on the vessels (at a substantial cost). The SCOP has made detailed submissions on this period and its evidence has not been adequately reflected in the Provisional Findings. The CMA acknowledges that the usual time for such a launch is <u>less than one week</u>. It is therefore unclear why the CMA has treated the scale of the work required as insignificant in its analysis when the facts suggest the opposite.

3.129	"*Based on this evidence, we note that the SeaFrance Rodin and the SeaFrance Berlioz were brought into operation within seven weeks of being acquired and at a cost of [€1–€3] million for both vessels. Relative to the value of the assets concerned, we consider that the time/cost implications of bringing the vessels back into operation after they had been laid up was modest. The fact that a total of [€] was eventually spent on the vessels is not relevant since what we are concerned with here is the effect of the period of inactivity*."	The SCOP does not understand why the CMA is referring to the vessels by using the "SeaFrance" prefix. This extract is clearly referring to the time when the vessels were owned by GET and there is no legitimate reason why the CMA would refer to the vessels under their old name. We note that the CMA has chosen to ignore the fact that a total of €[✂] million was spent because "*what we are concerned with here is the effect of the period of inactivity*". Yet this ignores the fact that the vessels were initially given only temporary certificates and the further work was required in order for the vessels to re-gain the necessary <u>permanent</u> certificates. In other words, the full amount relates to the period of inactivity as it was that period of inactivity that resulted in the vessels losing the necessary certification (other than the class certificates).
Footnote 133	"*There are complementarities in supply and demand in using two sister vessels. For example, crews can transfer easily between vessels, reducing costs. In addition, the operator has identical capacity for passengers, cars, etc on each sailing, thus allowing it to provide a uniform service to its customers on each trip*."	These issues are not relevant to the question of whether GET acquired anything more than bare assets. The idea that MFL can provide a similar service between some of its vessels does not mean that there were activities that transferred from SeaFrance.
3.141	"*We consider the cost and time incurred by GET/SCOP to bring the Rodin and the Berlioz back into service following hot lay-up to be similar to the minimum modifications and time required if GET/SCOP had either chartered or purchased two vessels. Relative to the value of the assets concerned, we consider that this time and cost of bringing the vessels back into operation was modest.*"	The SCOP considers that the first sentence in this extract amounts to a clear conclusion that, in fact, GET/SCOP were not in any better a position than any other potential new entrant who might have acquired other vessels.
3.140	"*In our view, while it may be possible to buy or charter a vessel that could be converted for use on the Dover–Calais route, there appears to be a limited number of suitable vessels*".	Leaving aside the fact that the evidence points directly at the fact that other vessels are available to charter or buy for use on the route (as proven by the fact that in February 2012 DFDS was swiftly able to launch operations on the Dover-Calais route with one vessel (the *Norman Spirit*) and shortly thereafter double the size of its operations by chartering the *Barfleur* in April), the potential limited availability of alternative vessels does not of itself add any weight to question of whether GET acquired anything more than bare assets. The SCOP also notes that DFDS in conjunction with Polferries currently operate the former *Stena Fantasia* (now named the

		Wawel) on a route between Poland and Sweden. The *Wawel* spent a large part of its early years on the Dover-Calais route (as did its sister ship, the *SeaFrance Cézanne*) and it is noteworthy that DFDS therefore could (and still can) easily have redeployed this vessel to the Dover-Calais route at a minimal cost had it chosen to do so.
3.142	"*Additionally, the use of the SeaFrance vessels reduced commercial risk for GET/ SCOP compared with either chartering or buying given the known history of operation on the Dover–Calais route. We also considered that the commercial risk for GET/SCOP would have been lessened as a consequence of the retention of the vessel names which maintained a link between their past and future use on the route and the fact that these vessels were known to the ports*."	This conclusion is based on an unsubstantiated assumption.
3.150	"*DFDS submitted that it was of considerable benefit to be able to use ex-SeaFrance employees on its Dover–Calais route. For example, the captains already had PECs for both Dover and Calais. According to DFDS, if ex-SeaFrance captains had not been available, it would have taken six weeks to train another captain to be ready for the Dover–Calais service. DFDS further submitted that there was not a 'huge glut of available crew on the market'."*	It is unclear whether the CMA has accepted DFDS's submission as referred to in this text. However, in any event the idea that there "is not a huge glut of available crew on the market" is not supported by the evidence. Under PSE3 alone, c.820 former employees of SeaFrance were made redundant. While a portion of these individuals will have been based in Paris, the majority were based in the Calais region. In addition, there were two previous redundancy plans in the context of the administration. PSE1 involved a series of voluntary redundancies and PSE2 involved two authorised redundancy programmes under which there were 74 redundancies in October 2010 and a further 279 redundancies in November 2010. The SCOP does not have the data to track whether these individuals are still available for employment. However, it is true that the majority of those individuals will have been based in the Calais region, an area in France which is notable for its high levels of unemployment. In addition, the evidence of V-Ships and NMM clearly shows the ease with which such companies can staff a new operation. NMM in particular told the CMA that "*it would take about two to three weeks in total to supply the crew to the vessel and ensure that the ship was manned sufficiently and safely. This included both sourcing the crew and familiarization, which it said could take 10 to*

		15 days".
3.155	"*NMM believed that there would be nothing particularly unique about putting together a crew to operate a ferry on the Dover–Calais route when compared with other short-sea ferry routes. NMM stated that on some routes, seafarers' unions could have a greater or lesser influence on the choice of nationality of the officers and crew, particularly where one vessel operator was replacing another on the same route*."	The evidence points to the opposite of the CMA's conclusion that the availability of the SCOP' labour force conferred a material advantage.
3.156	"*We note that, as at 29 October 2012, [] of the officers that were involved in SeaFrance's operations were involved in the new ferry operation. Moreover, [70– 80] per cent of employees of the SCOP were ex-SeaFrance. In our view, obtaining new operations and customer service staff for the vessels would not have been as simple as GET/SCOP anticipated; we appreciate that it did not seriously investigate the possibility of using a crewing company because it had committed to using ex-SeaFrance staff employed by the SCOP. The evidence indicated that one of the two crewing companies GET/ SCOP mentioned did not appear to provide the relevant services at all; the second did not currently provide these services and indicated that it would be able to provide crew but not customer service staff. That company mentioned that it would take two to three weeks to assemble the crew and it would take 10 to 15 days to train them (those periods running concurrently). In our view, having [70–80] per cent of employees, including [60–70] per cent of officers, who were available, in possession of the relevant skills and training, and were familiar with the vessels and their operation on the Dover–Calais route, was a material advantage to GET/SCOP enabling it to restart operations quickly*."	In addition to the points already made, this passage misunderstands the SCOP's submissions on this point. The SCOP did not suggest that operational staff could be easily transferred from land-based activities. The SCOP stated that customer service staff, however, have skills that are readily transferrable from similar shore-bound activities (SCOP Initial Submission on Jurisdiction, paragraph 4.50).
3.157	"*We noted that the harbour authorities indicated that having staff with PECs was helpful in order to allow a quick and efficient start-up. In this case [] officers held valid Port of Calais PECs and a total of [] had held Port of Dover and Port of Calais ones in the past (and in the case of the Port of Dover, were able to reacquire PECs with a shortened process). Even if SCOP had to incur some fees because not all of the relevant staff had PECs, in our view, the evidence suggests that it obtained a benefit from having officers familiar with the relevant ports who had previously held a PEC and/or still held*	The conclusion that the SCOP obtained a benefit from having officers familiar with the ports (and who had previously held PECs) is not supported by the facts. The evidence submitted by the SCOP demonstrates the number of crossings that were required before PECs could be obtained. All officers also had to take an examination. Further, there is no analysis of the impact on the MFL business of the fact that, upon commencing its operations, it could not operate without pilots from the port of Dover (and incurring the cost of doing so until its own officers obtained their

	one in relation to Calais."	Dover PECs).
3.169	"*The evidence indicates to us that GET/SCOP/MFL did not encounter material obstacles in obtaining berthing slots in Dover and Calais. Further, we are of the view that the fact that the vessels were known to the relevant authorities, together with the fact that the ex-SeaFrance officers were familiar with the port, materially facilitated the process of obtaining berthing slots. We also note that berthing slots cannot be assigned by one ferry operator to another, which suggests that even if SeaFrance's assets had been sold when SeaFrance was still a going concern, the acquirer of those assets would have needed to apply to the relevant authority to obtain permission to use the berths. Finally, we observe that our report notes: 'GET told us that MFL had experienced no problems in obtaining berthing slots at Dover and Calais'*"	The fact that DFDS was able swiftly to obtain authorisation and berthing slots for the *Barfleur* (which had not previously operated on the Dover-Calais route) suggests that there was no material advantage arising from the fact the vessels had previously operated out of Dover and Calais. Equally, the CMA ignores the reality of the situation as regards experienced officers holding valid PECs. The SCOP described in detail to the CMA the number of crossings that were required for its officers to obtain PECs. Further, all officers had to undertake an examination. The Provisional Findings contain no analysis of the impact of the fact that upon commencing its operations, MFL could not operate without pilots from the port of Dover (and incurring the cost of doing so until its own officers obtained their Dover PECs).
3.172	"*In our view, the parties encountered no material difficulties in obtaining the booths they required for their ferry operation*".	As a matter of fact, the necessary check-in booths that are required in order to run a ferry service did not transfer. They were surrendered and new application had to be made by MFL, requiring the new entity to take whatever booths were available at that time.
3.185	"*Whilst we acknowledge that some of the goodwill associated with the brand and domain names is likely to have dissipated in the period of inactivity, nevertheless, GET's offer to the French liquidator included €1 million attributable to the trademarks and domain names of SeaFrance. We find it significant that P&O bid separately for the domain names, indicating that it attached value to them despite the period of inactivity. We note also that GET did not withdraw the SeaFrance web page immediately and gained some business as a result of redirected traffic (see further Appendix D).*"	Whether or not P&O bid for the domain names is not relevant. The CMA needs to focus only on the transaction involving the purchase of the vessels by GET.
3.196 – 3.197	"*We recognize that since the systems were 'blank', work would have been required to repopulate them with parameters and data. We note, however, that all of the IT staff [redacted] employed by the SCOP are ex-SeaFrance employees and this is likely to have been useful in overcoming any difficulties associated with use of the system and the fact that it was 'blank'.* *In our view, IT systems suitable for use on the short sea are likely to*	The CMA's conclusions in relation to the IT systems do not reflect the evidence that the SCOP provided to the CMA regarding the vast amount of work that the SCOP had to carry out in order to bring the IT assets up to an operational standard. By way of reminder: • It took a technical team of five members of staff working for 12 hours per day for 6 days a week in the period between 2 July

	have special requirements over and above IT systems suitable for operating ferry services more generally, given the high frequency of services and multiple daily departures that are a feature of the short sea, as well as the requirement for accurate manifests. We contacted the third parties that we were told would be in a position to supply an off-the-shelf system that would be suitable. The responses we received indicated that one provider was able to offer a web-based reservation system. It appeared to us that this lacked much of the functionality of SeaFret and SeaPax. We consider that GET's acquisition of the SeaFrance IT systems gave it access to systems that were proven in practice to be effective in managing passenger and freight operations on the short sea, reducing the risk (and cost) associated with having to introduce new unproven IT systems which may not have all the required functionality. Together with MFL's employment of ex-SeaFrance IT staff, this places MFL at a material advantage compared with the situation where GET did not purchase the SeaFrance IT systems."	and 20 August in order for the IT systems to support the operation of the new business. Even with this level of work and commitment, it was still not possible to do everything that the SCOP wished to do prior to the commencement of services. • In terms of those assets that were acquired, their value was *de minimis*. For example, there was no usable content on any of the PCs or servers and the hardware was kept in a warehouse. Of the software that was purchased, the liquidator handed over only some coding of the programmes and compilation procedures, but practically no documentation. • It was necessary to set up an entire IT infrastructure, complete with local internal networks, inter-site networks, the installation of servers, the installation and configuration of operating systems and basic software and the implementation of an email system. • Work stations had to be set up. From the outset, the PCs had no software and it was necessary to install a variety of basic functions and programmes, including Windows and other office technology software. New printers had to be installed along with other basic equipment and access rights configured. • A variety of application programmes had to be installed, including the SeaPax and SeaFret distribution and booking systems. The SeaPax system itself had been shut down during the liquidation period with the result that when it was acquired by GET, it came across with a completely empty database and MFL had to establish a fresh set of parameters within that database. In fact, SeaPax had never previously been used without any underlying data so GET was effectively acquiring an entirely unknown quantity when it decided to purchase SeaPax in the absence of underlying data. SeaFret had been shut down in the same way. • The software that was acquired as part of SeaPax which enabled MFL to use the Unicorn interface (which, in turn, enables the travel industry (including our agents) to make bookings directly on our system and for which MFL pays an

		annual licence fee to the Travel Technology Initiative), also required a substantial amount of work to bring it up to operational standard. In fact, the servers that were used by SeaFrance for hosting the interfaces to the travel trade were obsolete and were destroyed prior to GET's acquisition. Therefore, it was necessary for MFL to purchase new equipment which host those interfaces. • Programmes such as Alicia (advanced linux crash-dump interactive analyser), Oscar (open source cluster application resources) and Qualiac (a specialist Enterprise Resource Planning management systems solution) had to be installed, including various software programmes to support them, such as web servers, application servers and database servers. These in turn needed to be configured. • The SCOP had to initialise all of the reference data which the software needs in order to operate (for example, codifications, client files, setting up authorised users and so on). Only once all of these operations were completed were the applications installed and configured in a functional capacity. • Further adaptions were made to SeaPax, SeaFret and the website and it was necessary to integrate those applications with the other building blocks of the IT infrastructure, such as the accounting system (which is different to that used by SeaFrance), information centre interfaces, and interfaces with our on-board sales software. It is clear that the IT assets were materially adversely affected by the period of inactivity.
Appendix B, page B2	"Other assets – Staff (transferred to the SCOP)"	The CMA has accepted that TUPE (or its French equivalent) did not apply so as to transfer the former SeaFrance employees to the SCOP. It is not correct to include the staff in the list of assets transferred.