GROUPE EUROTUNNEL S.A /SEAFRANCE S.A. MERGER INQUIRY REMITTAL

IMPLICATIONS OF THE MATERIAL CHANGE IN CIRCUMSTANCES ON THE CMA'S SLC FINDINGS

Overview:

In a submission dated 4 April 2014, GET identified the **following significant developments on the Short Sea that have occurred since the CMA's 2013 Report, all of which undermine the CMA's previous SLC analysis**.

- the certain introduction from 1 January 2015 of the MARPOL Regulations, which are widely expected to result in a 6-16% shift of North Sea and Western Channel traffic to the Short Sea;
- much higher than anticipated volume growth on the Short Sea market (official March 2014 statistics, received since GET's hearing on 11 April 2014, show a 11.6% increase for freight on the Short Sea overall compared to March 2013. This figure is even higher, at 14%, for ferries-only);
- evidence of continued and sustainable economic growth in the UK and Europe;
- DFDS remaining on the Dover-Calais route (despite previous threats to the contrary) and significantly increasing its freight market share to 24% for 2013 (a markedly higher increase than the CMA had predicted); and
- material declines in both P&O's and Eurotunnel's freight market shares for the same period.

The above **material changes in circumstances also undermine the CMA's previous SLC findings in the following respects:**

- the Dover-Calais route will be able to accommodate three ferry operators;
- in anticipation of future demand, no ferry operator is likely to reduce capacity on the Short Straits and, even if there was any capacity reduction, it is more likely to be undertaken by P&O rather than either DFDS or MFL;
- the weakening of competition theory of harm is fundamentally undermined because it depends on the exit of DFDS from Dover-Calais, which is now unlikely to occur for the above reasons;
- the CMA's internalisation theory of harm is also fundamentally affected because:
    - the material changes in circumstances undermine the calculation of the key inputs into the price pressure tests relied on by the CMA (and especially affect the diversion ratio from Eurotunnel to MFL and the margins of MFL), and
    - if DFDS and MFL remain on the Dover-Calais route, the overall capacity on the route will be greater, and the route will have a higher number of ferry operators, which will engender lower prices and greater competition than would otherwise be maintained – greatly undermining the CMA's internalisation analysis.

1. INTRODUCTION AND SUMMARY

1.1 On 4 April 2014 Groupe Eurotunnel S.A ("GET") provided the CMA with a written submission on the material changes in circumstance ("MCC") that have occurred since publication of the CMA[1]'s Report in June 2013 ("the 2013 Report"). The MCC events identified in GET's 4 April submission undermine the CMA's findings on SLC and the remedies it adopted, both of which were set out in the 2013 Report.

1.2 As requested by the CMA in its letter of 14 April, in this submission GET supplements the reasoning and arguments set out in its submission of 4 April, as to why the MCC negates and undermines the CMA's SLC findings in the 2013 Report[2]. The reasoning and arguments in this submission, as to why the CMA's 2013 SLC finding cannot survive, should be read in conjunction with and considered in addition to GET's MCC submission of 4 April.

1.3 As GET explained previously, the considerations that comprise the MCC also amount to special reasons for the purposes of s.41(3) of the Enterprise Act 2002 (the "Act") as to why the SLC finding in the 2013 Report can no longer be upheld by the CMA.

1.4 In brief, there have been **substantial changes in the Short Sea market which fundamentally affect the CMA's previous conclusions on the SLC**, and hence on the applicability of the CMA's proposed remedies. In particular, the MCC include:

1.4.1 substantially higher growth in demand on the Short Sea, and in particular on Dover-Calais (and specifically for DFDS on that route), than was anticipated by the CMA in the 2013 Report;

1.4.2 evidence that, rather than being apportioned equally across all operators, the demand increase has disproportionately benefitted DFDS on the Dover-Calais route as well as MFL, while Eurotunnel and in particular P&O have lost market share;

1.4.3 indications that the MARPOL Regulations will have a further impact on growing Short Sea demand; and

1.4.4 the continued operation of DFDS on the Dover-Calais route, despite previous DFDS claims that it would exit in the short term.

1.5 GET considers that if considered individually, and even more so when the factors are taken together, the available evidence indicates that:

1.5.1 **the Dover-Calais route will, given the increases in demand, be able to accommodate three ferry operators**; and

1.5.2 in anticipation of future demand, **no ferry operator is likely to reduce capacity on the Short Straits**[3]. Further, if, there were to be any capacity reduction, the new evidence obtained since the 2013 Report substantially increases the likelihood that any such reductions in capacity would be undertaken by P&O and not DFDS or MFL.

1.6 These significant changes fundamentally affect and fatally undermine the weakening of competition and the internalisation theories of harm established by the CMA in the 2013 Report.

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[1] For ease of reference, the Competition Commission and Competition and Markets Authority ("CMA") are both referred to as the CMA in this submission

[2] For ease of reference, GET has where possible used the same defined terms as in previous submissions to the CMA

[3] With the possible exception of Newhaven-Dieppe. GET noted in its hearing with the CMA on 11 April 2014 that there is considerable uncertainty as to the future of this route. It is currently heavily subsidised by local authorities, who are now seeking to withdraw this subsidy. A new request for interest in the route has been launched with no success at this stage (see page 24, line 17-19 of hearing transcript).

1.7 As the CMA acknowledged in its 2013 Report[4], the weakening of competition theory of harm depends on the exit of DFDS from Dover-Calais. This theory of harm therefore stands or falls based on the conclusions on the viability of three operators on the Dover-Calais route and depends on an evaluation of DFDS' incentives to remain on the route. As discussed in Section 2 below, the MCC goes directly to the question of whether DFDS would remain viable on the Dover-Calais route, and its incentives to remain on the route. The MCC fundamentally undermines this theory of harm.

1.8 The CMA's internalisation theory of harm is also fundamentally affected by the MCC, for two main reasons.

1.8.1 First, maintaining three rather than two operators on the Dover-Calais route would be expected to affect the calculation of the key inputs into the price pressure tests relied on by the CMA to reach its conclusions on the SLC. In particular, both the diversion ratio from Eurotunnel to MFL and the margins of MFL would naturally be expected to be lower if three ferry operators are maintained on the Dover-Calais route than if only two were present.

1.8.2 The relevant test for a finding of SLC is that the prices would be higher relative to the counterfactual. However, in the CMA's counterfactual[5], there would be only two ferry operators, and the overall Dover-Calais (and Short Sea) capacity would be two vessels lower than it is today. If DFDS and MFL remain on the Dover-Calais route, the overall capacity on the route will be greater, and the route will have a higher number of ferry operators. Both of these factors will engender lower prices and greater competition than would otherwise be maintained. Any "internalisation" effects of Eurotunnel pricing have to be considered in this context. Consequently, even if the CMA finds that there is some upwards price pressure from the Transaction, if this price impact is felt over a lower starting price level than in the counterfactual, the overall price may still be lower than in the counterfactual.

1.9 GET accepts that merger analysis is inherently forward looking, and requires the CMA to make some judgements about the future which are inherently uncertain. However, the CMA's previous analysis and assumptions have been shown to be flawed in material respects in the light of the market developments that have already become visible, in the short time period since the publication of the CMA's 2013 Report. **It is therefore crucial that the CMA fully re-evaluates the conclusions reached in the 2013 Report on the SLC**.

1.10 In considering whether an SLC may be expected to arise, the CMA must consider the impact of the MCC to date, and the likelihood that the MCC effects will continue into the future. The CMA must assess whether an SLC will arise, applying the balance of probabilities test; and in doing so, the CMA should acknowledge that its previous findings have already been demonstrated to be incorrect, and that its approach this time should therefore be considerably more cautious.

1.11 In undertaking this assessment, the CMA should also have regard to the fact that the chain of reasoning on which its SLC is founded is unusually lengthy and depends on the occurrence of a series of specific events. The nature of the MCC is such as to undermine crucially a significant number of links in this chain. In so doing, not only are the links *in themselves* substantially weakened, but also the entire chain of reasoning is fatally undermined. Therefore, when looking at each stage, **the effects of the MCC should be considered not in isolation but in conjunction with the effects on other links in the chain**.

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[4] See CMA 2013 Report, §10.119, "*Were DFDS/LD to exit the Dover–Calais route, this would result in the market-weakening aspect of the SLC that we have identified*.", 10.128 "*We do not accept that the SLC is speculative. We have concluded that the merger can be expected to give rise to the incentive for Eurotunnel to raise prices (the internalization effect) and to a weakening of competition <u>if DFDS/LD withdraws from the Dover–Calais route</u>*." [*emphasis added*]

[5] The remedy from the CMA 2013 Report would seek to replicate this counterfactual in terms of capacity and operator numbers, if not in the exact identity of Vessels operational on the Short Sea.

1.12 If the CMA nevertheless considers that an SLC will arise, in assessing what remedies might be needed the CMA should consider the nature and impact of the remedies it was previously advocating, which will inevitably reduce ferry operating capacity and therefore increase the prices paid by freight and passenger customers. The CMA should also reconsider the remedies which GET proposed, and which the CMA rejected, during the initial merger inquiry.

2. IMPACT OF THE MCC ON THE "WEAKENING OF COMPETITION" THEORY OF HARM

2.1 As GET has set out in its 4 April submission on the MCC, the new available evidence on Short Sea demand demonstrates that **there has already been a substantially greater increase in traffic on the Short Sea route than had been anticipated by the CMA in its 2013 Report**. The latest official market statistics, discussed in greater depth at paragraph 2.8 below, are evidence of this. The effects of both the economic recovery and the MARPOL Regulations substantially affect the demand available on the Short Sea in the short to medium term. In addition, the cessation of Ramsgate-Ostend in April 2013 will have further increased the demand available for the remaining Short Sea operators.

2.2 GET submits that the evidence on the development of the Short Sea market even since June 2013 disproves the CMA's lengthy chain of reasoning that:

2.2.1 future growth in demand is not sufficient to support three ferry operators on Dover-Calais;

2.2.2 P&O would not have the incentive to remove any "excess" capacity on the Dover-Calais strait, and

2.2.3 DFDS would exit from the Short Sea route in the short term.

2.3 The fact of these crucial steps in the CMA's lengthy chain of reasoning having already been disproved undermines the conclusion that the Transaction may, by removing DFDS from Dover-Calais, enable MFL to be a weaker competitor to GET, and to the other Short Sea ferry operators.

Dover-Calais route will in the short to medium term support three operators

2.4 The new evidence on demand, together with the evidence on the development of market shares, strongly indicates that the Dover-Calais route will be able to sustain three ferry operators, because:

2.4.1 the demand will be sufficient in the short to medium term to support the current capacity levels, and/or

2.4.2 the reduction in capacity, were it to be undertaken, would be most likely carried out by P&O.

2.5 On this basis, the MCC fundamentally undermines the conclusions that DFDS would exit the Dover-Calais route.

2.6 In its 2013 Report, the CMA considered that the excess capacity on the Short Sea was equivalent to 2-3 ferries.[6] This might be approximately equated to 8%-10% of capacity on the Short Sea, in 2012.[7] However, relative to the data that the CMA relied on in the 2013 Report, there has already been a substantial increase in demand relative to capacity, thus narrowing the capacity overhang identified by the CMA.

[6] CMA 2013 Report, §8.46

[7] Estimate based on the proportion of overall capacity in the market accounted for by DFDS (Dover-Calais only) and MFL in 2012.

2.6.1 First, the closure of Ramsgate-Ostend in late April 2013 has removed two vessels from the Short Sea, which accounted for approximately 2% of Short Sea capacity.

2.6.2 In addition, between 2012 and 2013, demand has increased 4.5% on freight traffic and increased 3.4% on passenger vehicle traffic, with an increase in lane metres overall in 2013 relative to 2012 of 4.2%, accounting for a further 2% of capacity on the Short Sea.

2.6.3 Moreover, the increase in demand on the Dover-Calais route specifically has been substantially greater: there has been a 6% increase in demand on the Dover-Calais route as a whole, and a 15% increase in demand for Dover-Calais maritime services, between 2012 and 2013.[8]

2.7 Together, **these factors have already substantially eased the extent of overcapacity on the Short Sea**. Moreover, based on current rates of demand growth, demand by 2015, even without the impact of the MARPOL Regulations, on the Short Sea routes as a whole is projected to be up to **16% higher than in 2012**.[9] It can however be safely assumed that the MARPOL Regulations will lead to switching to the Short Sea from the Western Channel and North Sea routes; on this basis, the demand increase relative to 2012 is projected to be up to **20%**. Even on more pessimistic demand estimates, it is clear that the observed improvements in demand can be expected to offset the CMA's findings on excess capacity in the short to medium term.

2.8 The extent of market growth, even prior to any switching as a result of MARPOL, has most recently be evidenced by the official market statistics for the Short Sea for March 2014[10]. These show a year on year increase of **11.6% for freight on the Short Sea overall, and of 14% for ferries-only**.

2.9 The available evidence indicates that, rather than the demand growth being spread equally across all operators (as the CMA predicted would be the case[11]), **the new smaller operators on Dover-Calais, DFDS and MFL, have grown disproportionately, while P&O and Eurotunnel have both lost share**. This further undermines the CMA's conclusions that demand growth will not be sufficient to support more than two operators on Dover-Calais.

2.10 The analysis of demand growth is also supported by the estimates of the industry capacity utilisation (or "load factors") observed in the market. As is set out in GET's submission on MCC dated 4 April 2014[12], GET's capacity utilisation estimates suggest that already in 2013 there has been a substantial improvement in load factors, both on the Short Sea market as a whole, and in relation to the Dover-Calais ferry operators in particular. **Even in 2013, the overall Short Sea capacity is operating at 55.1% utilisation**, notably above the utilisation figures for 2010 and 2012, and substantially above the CMA's estimate that the total operating capacity on the routes was 49%.

Evidence on the development of market shares supports conclusion that P&O is best placed to undertake any capacity reductions

2.11 Even if the CMA considered that the demand growth was still not sufficient to support three operators on Dover-Calais[13] the evidence that has come to light since the 2013

[8] Demand given across freight and passengers combined, and given in lane metres (assuming a coach is equivalent 12 lane metres, car 3.333 lane metres and lorry 16.5 lane metres). All data based on Ferrystat and Freightstat, full year 2012 vs 2013.

[9] Based on lane metre capacity combining freight and passenger vehicles, all Short Sea routes, based on the assumption that YOY growth rates in January and February 2014 are continued in 2014 and 2015.

[10] These are attached as an **Appendix**. The negative YOY growth rates in the passenger market (car and coach) are explained by the fact that, in 2013 Easter (which is one of the busiest periods for the market) fell at the end of March, whilst in 2014 it fell in late April.

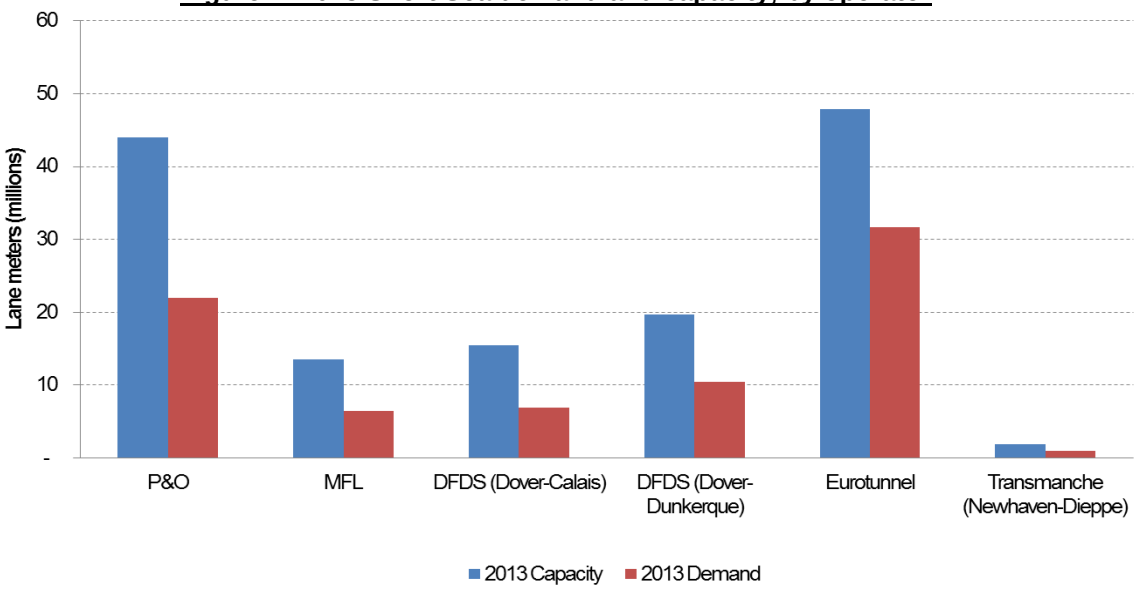
[11] CMA 2013 Report, §8.48

[12] See paragraphs 5.22-5.23

[13] But this conclusion is not in any event supportable, based on revised data on demand.

Report indicates that P&O is the ferry operator that is best placed, and has the greatest incentive, to accommodate new entry by removing capacity. In particular, P&O has lost 7 percentage points' market share since 2012 alone (21% relative to its 2012 demand) and, of all the operators, faces the greatest gap between capacity and its demand[14] (see **Figure 1** below). In these circumstances, GET submits that the CMA should, on the basis of this new evidence, revisit its findings that P&O would not reduce capacity, were the CMA still to identify the need for any such capacity reductions.[15]

Figure 1: 2013 Short Sea demand and capacity, by operator



MCC affects likelihood of DFDS exit

2.12 Given the above findings in relation to demand and market share developments, GET submits that there is now a much lower likelihood of DFDS exit from Dover-Calais, especially given the even greater size and importance of the route[16].

2.13 In its 2013 Report, the CMA considered that a market share of [10-20] per cent on freight and [5-15] per cent on passengers on the Short Sea would be sufficient to sustain an operator the size of DFDS on Dover-Calais.[17] However, **in 2013 DFDS already has a market share on the Short Sea of 10% and 6% for freight and passengers respectively**, while the market overall is 6% greater for both freight and passengers than it was in 2012, when the CMA analysis was made.[18] The benefit of this to DFDS is twofold, as effectively DFDS is enjoying a significantly larger share of a larger market than was anticipated by the CMA in its 2013 Report. Therefore, **DFDS market shares are already close to satisfying the break-even condition that the CMA assumed in its 2013 Report**. Furthermore, the monthly data on DFDS' market share on Dover-Calais indicate that it **continued to gain freight share throughout 2013**. This clearly contradicts the CMA's conclusion that, "*given that annual freight contracts tend to start in January and given the trend seen in the past four months, we have no reason to believe that DFDS will further improve its market position in the*

[14] P&O's reduction in market share calculated from calendar year 2012 compared to calendar year 2013 including all Short Sea routes.

[15] As GET has set out in response to the CMA's Provisional Findings in 2013, indeed in most standard economic models, P&O as the largest operator may be expected to have the greatest incentive to reduce any excess capacity, since it would feel the effects of low prices due to overcapacity across a larger volume base – and would, by corollary, have the most to gain from reducing capacity.

[16] This is further reinforced by the increase in overall demand and the imminent additional impact of the MARPOL Regulations

[17] CMA 2013 Report, §8.34

[18] All figures are based on lane meters operating on the Dover-Calais routes (including Eurotunnel).

near future."[19] **These are issues that the CMA must re-examine afresh before it can conclude that an SLC will, on the balance of probabilities, arise as a result of the Transaction.**

2.14 The CMA stated in its 2013 Report that DFDS had stated to its investors that, by 2014, it would either be close to break-even or have exited the market[20]. It is clear from the above that it is the former scenario which has prevailed, despite MFL's continued presence on the market.

2.15 Clearly, therefore, **DFDS' previous representations about its intention to exit the Dover-Calais route in the short term have been proven to be incorrect**. Since then, there have been no submissions made by DFDS, from the data publicly available or from the gist so far provided to GET, that it is likely to exit if MFL continues operating. The new evidence does not support the finding that DFDS would exit the Dover-Calais route at all (and certainly not in the short term) on the basis of the following:

2.15.1 its continued presence;

2.15.2 DFDS' continued emphasis on growing the scale and breadth of its European ferry route network[21], at the centre of which is the Dover-Calais route, which is the largest UK route;

2.15.3 the clear economic advantages of the Dover-Calais route in the face of cost increases brought about by the MARPOL Regulations; and

2.15.4 the improving demand data on both the Dover-Calais route in particular and on the Short Sea as a whole.

2.16 The above considerations also go to the heart of the CMA's previous appraisal of DFDS' incentives to remain on the Dover-Calais route. Given the above considerations, it would simply be implausible for the CMA now to conclude that, "*GET and its subsidiary have stronger incentives to continue to operate on the [Dover-Calais] route*".[22]

2.17 The CMA acknowledged in its 2013 Report[23] that the weakening of competition theory of harm is fundamentally premised on the exit of DFDS from Dover-Calais. As GET submitted, including in the Hearing with the CMA in relation to the MCC on 11 April 2014, in the light of these new findings, **the risk of DFDS exit can be safely discounted. Therefore, the CMA's weakening of competition theory of harm should now be overturned.**

3. IMPLICATIONS OF THE CONTINUATION OF THREE OPERATORS ON DOVER-CALAIS ON THE INTERNALISATION THEORY OF HARM

3.1 The CMA's internalisation theory of harm is also fundamentally affected by the MCC, for two main reasons. First, the MCC undermines the CMA's previous upwards pricing pressure (GUPPI) analysis. Secondly, the MCC affects the CMA's previous assessment of price impact relative to the counterfactual. These two considerations are each, in turn, addressed below in more detail.

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[19] CMA 2013 Report, §8.71

[20] CMA 2013 Report, §8.66

[21] For example, page 7 of DFDS' 2013 Annual Report lists as one of its four strategic principles, "*network strength: expand network to leverage operating model*" with the Dover-Calais route shown as being at the heart of its European route network, see page 6 of that Annual Report

[22] 2013 Report §9.2

[23] See CMA 2013 Report, §10.119, "*Were DFDS/LD to exit the Dover–Calais route, this would result in the market-weakening aspect of the SLC that we have identified.*", 10.128 "*We do not accept that the SLC is speculative. We have concluded that the merger can be expected to give rise to the incentive for Eurotunnel to raise prices (the internalization effect) and to a weakening of competition <u>if DFDS/LD with-draws from the Dover–Calais route</u>.*" [*emphasis added*]

MCC impact on GUPPI analysis

3.2 The CMA's primary theoretical and evidentiary basis for its internalisation theory of harm is the CMA's upwards pricing pressure (GUPPI) analysis. GET disagrees strongly with the theoretical applicability of this analysis in the context of Short Sea crossings. In particular, GET disagrees with the CMA's use of diversion ratios based on market shares given the product differentiation between different operators, but it does not intend to revisit these arguments here. However, GET does submit that the inputs into the GUPPI analysis, both in terms of diversion ratios and margins, are substantially affected by the MCC.

3.3 Given that the CMA has calculated diversion ratios based on market shares, and in particular based on the expectation of the market share that MFL may be able to achieve, new information on market shares substantially affects the GUPPI analysis.

3.3.1 First, it implies that the higher range of the diversion ratios relied upon by the CMA in its final report would not be applicable, as these assumed DFDS' exit from the Dover-Calais route. That DFDS' exit was assumed in relying on these higher estimates is clear from the following discussions in the 2013 Report, where the CMA concluded:

"*We do not consider the target for 2013 to be an appropriate estimate, as the current competitive situation is not sustainable (as illustrated by the fact that both MFL and DFDS are expecting significantly large losses) and market shares can be expected to change substantially following the exit of DFDS, which is likely to take place [EXCISED].*" [24]

3.3.2 Secondly, it should be noted that the CMA's estimate of the diversion ratio from Eurotunnel to MFL depends not only on MFL's market share but also on Eurotunnel's market share (i.e. it will be higher, the higher MFL's market share is, but also the higher Eurotunnel's market share is)[25]. With a greater number of operators, it can be expected that both MFL's market share and Eurotunnel's market share will be lower, thereby reducing the diversion ratio from Eurotunnel to MFL. Indeed, Eurotunnel's market share has already been seen to have reduced markedly since the CMA's 2013 Report.

3.3.3 Thirdly, if, when calculating diversion ratios, one uses the current observed industry structure[26], this indicates consistent market shares for MFL of 9%-10% on freight and 5-6% on passenger numbers. These market shares, when combined with reductions in Eurotunnel's own market share, equate to diversion ratios of approximately 15% for freight, and 10% for passengers, which are at the lowest end of the CMA estimates of diversion ratios used in its previous analysis.[27]

3.3.4 These are also more generally **very low diversion ratios for intervention by competition authorities**, which would only be expected to give rise to incentives to raise price when combined with extremely high margins earned by MFL. However, the continued presence of greater capacity and of three ferry operators on Dover-Calais can also be expected to affect the margins earned by the ferry operators relative to the levels previously assumed by

[24] CMA 2013 Report, §8.119(c). See also Appendix G "*we have based our calculations on a likely range of diversion ratios from Eurotunnel to MFL of between* [✂] *and* [✂] *per cent. These diversion ratios are equivalent to assuming that MFL stabilizes at a share of ferry volumes in the freight market that lies between approximately* [✂] *and* [✂] *per cent, while in passengers MFL achieves a market share between approximately* [✂] *and* [✂] *per cent. We note that these are conservative assumptions, when compared with the actual market shares of DFDS [on Dover-Dunkirk] and SeaFrance prior to the exit of SeaFrance.*"

[25] This is because the diversion ratio from Eurotunnel to MFL is calculated as: MFL market share/ (1-ET market share).

[26] And it should be noted that the CMA did not have these available in reaching the conclusions in its 2013 Report because the market was at the time still in a substantial state of flux.

[27] Diversion ratio estimates based on market shares for freight (accompanied and unaccompanied) and by passenger numbers, in 2013.

the CMA, even as greater demand allows the support of three ferry operators on Dover-Calais.

3.3.5 Fourthly, GET would assume that, as demand increases relative to capacity, ferry operators' margins will improve. However, operator margins would by the CMA's own analysis be expected to be lower with more operators and greater capacity. Indeed, this was the CMA's conclusion in relation to the weakening of competition theory of harm:

"We considered the likely response of competitors to subdued competition by MFL… In the case of DFDS, following its exit from the Dover–Calais route, we consider that it would be limited in its ability to price aggressively to win market share, given the cost structure of the Dover–Dunkirk route. DFDS also recognizes that a price increase on the Dover–Calais route could potentially enable it to raise prices on its Dover–Dunkirk route.

…We consider it likely that P&O would respond to subdued competition by MFL by maintaining or increasing its prices (or maintaining its level of capacity). It appears unlikely that it would respond through vigorous price competition or an increase in capacity."[28]

3.4 For these reasons, GET submits that – **even if the CMA wishes to rely on its GUPPI analysis – the key inputs for that analysis must, in light of the MCC, be revised downwards**.

3.5 Further, in taking account of the above points, **given the speed and scale of the market changes that have already occurred since the 2013 Report, the CMA must be especially cautious and reticent about relying on its previous GUPPI analysis**. Given the extent to which the MCC undermines the CMA's existing SLC analysis (which was already tenuous at best), GET considers that it would now be entirely disproportionate for the CMA to order the removal of an operator, including its operating capacity, from the Short Sea.

MCC impact on SLC relative to the counterfactual

3.6 The MCC also affects the assessment of price impact relative to the counterfactual. In the 2013 Report it was assumed that, if DFDS were to exit in the "merger scenario", the overall capacity would be similar in the "merger scenario" and in the counterfactual, but the internalisation effect (according to the CMA) would be higher in the "merger scenario".

3.7 However, GET submits that the fact that the MCC renders viable the survival of all three operators on the Dover-Calais route implies that the "merger scenario" will likely result in a greater number of ferry operators and higher capacity on the route relative to the counterfactual[29]. In these circumstances, it can no longer be appropriate to focus only on the price effect of internalisation while ignoring the fact that the "merger scenario" gives rise to downwards price pressure (relative to the counterfactual). This is because the "merger scenario" creates a greater number of operators and higher levels of capacity.

3.8 Put simply, because three operators – with greater combined capacity – are sustainable on the Dover-Calais route, that is an outcome that is beneficial to consumers, in terms of available capacity and number of operators, relative to a counterfactual where only DFDS and P&O would operate on the route. Such a benefit in terms of price must be weighed up against any concerns that the Transaction internalises competition between Eurotunnel and MFL.

[28] CMA 2013 Report, 8.133-8.136

[29] Even if P&O reduces some capacity, with its larger ship fleet, it is more able to reduce capacity incrementally than would be MFL or GET.

3.9 GET draws the CMA's attention to the letter it received from the Chambre de Commerce et d'Industrie Côte d'Opale on 10 April 2014 where it stated that the reduction of ferry operators from three to two would risk weakening competition between the remaining operators, which would have a detrimental effect on both consumers and businesses in the region. This is a further reason for the CMA to reconsider its previous SLC analysis.

3.10 While the CMA might consider that in the counterfactual, further investment in capacity by DFDS and P&O might enable the total level of capacity to rise to match the total level of capacity operating with three operators, such an analysis would not be consistent with a number of key findings in the CMA's 2013 Report:

3.10.1 The CMA recognised that DFDS would have the incentive not to further increase capacity on Dover-Calais: "*We are aware that…DFDS would experience a similar effect due to the depressing effect on its profits on its existing Dover–Dunkirk business should it expand capacity on the Dover–Calais route. However, we think the effect is more concerning in the case of MFL.*"[30]

3.10.2 The CMA has found that P&O would not have the incentive to compete aggressively to expand capacity;[31]

3.10.3 The CMA found that entry and expansion on the Short-Sea from other operators was not likely to be timely, likely and sufficient.

3.11 For these reasons, **the MCC substantially alters the CMA's SLC analysis, and mitigates any SLC concerns from the Transaction**. By contrast, the imposition of the CMA's preferred remedy substantially risks worsening the competitive outcomes for freight and passenger customers on the Short Sea.

4. MCC REQUIRES SUBSTANTIAL REVISION TO THE CMA CONCLUSIONS

4.1 In light of GET's submission of 4 April on the MCC and the information set out here, the CMA must revise its SLC analysis, and explicitly take into account the impact of the new evidence on its previous SLC findings. In particular, at the least, the CMA will need to:

4.1.1 Revise its estimates on the extent of demand relative to capacity;

4.1.2 Revise upwards its estimates of demand forecasts;

4.1.3 Reconsider, in the light of these, the evidence on capacity utilisation, and in particular compare the current and likely forecasts of capacity utilisation against the 2007 benchmark for sufficient capacity utilisation identified by the CMA in its 2013 Report[32];

4.1.4 Revise its assumptions on how any future demand growth may be allocated across operators;[33]

4.1.5 Reconsider its conclusions on the likelihood of P&O reduction in capacity (in the event that the CMA disagreed with GET's conclusions that no such reductions will be required in the short to medium term)[34];

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[30] CMA 2013 Report, Appendix G, 44
[31] CMA 2013 Report, 8.136
[32] CMA 2013 Report §8.46, "*Using load factors achieved in 2007 as a suitable benchmark (see Appendix E, paragraph 32) against which to compare current capacity utilisation levels, we concluded that the level of excess capacity on the short sea was currently equivalent to between two and three ferries.*"
[33] CMA 2013 Report §8.48
[34] CMA 2013 Report §8.49

4.1.6 Consider the impact of the MARPOL Regulations on the strategic importance of the Dover-Calais route to DFDS;

4.1.7 Reconsider the credibility of DFDS' incentives to exit the Dover-Calais route;

4.1.8 Reassess the appropriate inputs into any GUPPI or IPR analysis (diversion ratios and margins), to exclude assumptions which are premised on the exit of DFDS from the Dover-Calais route; and

4.1.9 Explicitly take into account the greater capacity and greater number of ferry operators in the "merger scenario", once it is recognised that the Dover-Calais route will continue to support three ferry operators, than would be the case in the counterfactual, to consider properly the price impacts of the Transaction.

4.2 As GET has submitted previously, including during its hearing with the CMA on 11 April, the remedies are only relevant if an SLC is identified and, even then, the remedies must address the specific SLC that is identified. As discussed above and in GET's submission of 4 April, there have been material changes in circumstances (also amounting to special reasons for the purposes of s.41(3) of the Act) since the 2013 Report. This means that the SLC analysis set out by the CMA in its 2013 Report can no longer stand, such that no or different remedies are now required.

4.3 Even if the CMA is minded to find that the MCC and the special reasons do not justify any change to the CMA's SLC finding in the 2013 Report, the CMA must still consider if there are alternative, more proportionate remedies that comprehensively address the SLC that the CMA identifies. GET has already commented at length on this issue in its submission dated 4 April 2014[35], and does not intend to repeat those points here. However, GET notes that the remedies it set out in its submission of 4 April are more proportionate, and therefore appropriate, given the MCC and the special reasons that exist in this case, and which have arisen since the 2013 Report. For the reasons set out in its submission of 4 April 2014[36], each of the remedies put forward by GET in that submission satisfies the CMA's obligations, under section 35(4) of the Act, "*to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it*".

4.4 GET looks forward to having an opportunity to comment on the CMA's provisional findings on the impact of MCC on the issue of whether any SLC may be expected to arise as a result of the Transaction. It is necessary to consider this issue prior to, and separately from, any question of remedies.

23 April 2014

[35] See, in particular, Section 12 and Annex 2 of GET's submission dated 4 April 2014.
[36] Ibid., Annex 2.

APPENDIX: SHORT SEA MARKET STATISTICS FOR MARCH 2014

CAR - MARCH

Operator	Volume	vs. 2013	Share	vs. 2013 Pts
Eurotunnel	147,721	-13.3%	55.9%	+0.9 Pts
P&O Ferries	63,194	-8.4%	23.9%	+1.7 Pts
DFDS DO/DUNK	28,436	-31.2%	10.8%	-2.6 Pts
DFDS DO/CA	12,615	-12.5%	4.8%	+0.1 Pts
MyFerryLink	12,234	-16.8%	4.6%	-0.1 Pts
Ferries Total	**116,479**	**-16.5%**	**44.1%**	**-0.9 Pts**
Market Total	**264,200**	**-14.7%**		

CAR - YTD

Operator	Volume	vs. 2013	Share	vs. 2013 Pts
Eurotunnel	453,440	+0.5%	59.2%	+2.6 Pts
P&O Ferries	161,020	-6.3%	21.0%	-0.5 Pts
DFDS DO/DUNK	83,871	-12.1%	11.0%	-1.0 Pts
DFDS DO/CA	31,300	-34.3%	4.1%	-1.9 Pts
MyFerryLink	36,283	+17.4%	4.7%	+0.9 Pts
Ferries Total	**312,474**	**-9.6%**	**40.8%**	**-2.6 Pts**
Market Total	**765,914**	**-3.9%**		

COACH - MARCH

Operator	Volume	vs. 2013	Share	vs. 2013 Pts
Eurotunnel	5,080	-11.9%	46.0%	+3.1 Pts
P&O Ferries	5,146	-22.2%	46.6%	-2.6 Pts
DFDS DO/DUNK	294	-48.8%	2.7%	-1.6 Pts
DFDS DO/CA	423	-9.8%	3.8%	+0.3 Pts
MyFerryLink	106	+606.7%	1.0%	+0.8 Pts
Ferries Total	**5,969**	**-22.2%**	**54.0%**	**-3.1 Pts**
Market Total	**11,049**	**-17.7%**		

COACH - YTD

Operator	Volume	vs. 2013	Share	vs. 2013 Pts
Eurotunnel	11,963	-6.1%	45.3%	+0.4 Pts
P&O Ferries	12,494	-7.6%	47.3%	-0.3 Pts
DFDS DO/DUNK	773	-24.4%	2.9%	-0.7 Pts
DFDS DO/CA	751	-30.5%	2.8%	-1.0 Pts
MyFerryLink	420	+2,700.0%	1.6%	+1.5 Pts
Ferries Total	**14,438**	**-7.7%**	**54.7%**	**-0.4 Pts**
Market Total	**26,401**	**-7.0%**		

TRUCK - MARCH

Operator	Volume	vs. 2013	Share	vs. 2013 Pts
Eurotunnel	121,218	+7.7%	37.1%	-1.3 Pts
P&O Ferries	95,602	+9.5%	29.3%	-0.6 Pts
DFDS DO/DUNK	49,720	+13.0%	15.2%	+0.2 Pts
DFDS DO/CA	28,179	+26.1%	8.6%	+1.0 Pts
MyFerryLink	32,039	+20.4%	9.8%	+0.7 Pts
Ferries Total	**205,540**	**+14.0%**	**62.9%**	**+1.3 Pts**
Market Total	**326,758**	**+11.6%**		

TRUCK - YTD

Operator	Volume	vs. 2013	Share	vs. 2013 Pts
Eurotunnel	347,025	+4.2%	37.9%	-1.5 Pts
P&O Ferries	264,892	+1.2%	29.0%	-2.1 Pts
DFDS DO/DUNK	134,121	+15.7%	14.7%	+0.9 Pts
DFDS DO/CA	77,661	+1.9%	8.5%	-0.5 Pts
MyFerryLink	90,769	+60.3%	9.9%	+3.2 Pts
Ferries Total	**567,443**	**+11.1%**	**62.1%**	**+1.5 Pts**
Market Total	**914,468**	**+8.4%**		

Source: FerryStat & FreightStat data