

## GRUPE EUROTUNNEL S.A /SEAFRANCE S.A. MERGER INQUIRY REMITTAL

### RESPONSE TO CMA'S PROVISIONAL CONSIDERATION OF POSSIBLE MATERIAL CHANGE OF CIRCUMSTANCES ("PFs")

#### Overview:

- The CMA is not bound by its previous findings on SLC: the 2013 Report was quashed in its entirety and therefore cannot bind the CMA. There may also be a "special reason" to reconsider, on the merits, points which were unsuccessful on a judicial review basis.
- The PFs indicate that in its 2013 Report the CMA made material errors concerning:
  - the scale and speed at which overall demand would increase on the Short Sea and in particular on the Dover-Calais route; and
  - the likelihood that DFDS would cease operating on the Dover - Calais route in the short term.
- In the PFs, the CMA continues to make errors which go to the heart of its provisional finding that there has been no material change in circumstances or special reasons as to why it should now adopt a different decision on SLC or remedies.
- The provisional findings of the CMA cannot reasonably be maintained to a 'balance of probabilities' legal threshold, especially when market uncertainties and the CMA's previous errors concerning the scale and speed of increases in demand and likelihood of DFDS' exit are properly taken into account.
- The CMA has wrongly adopted an entirely new analytical approach in the PFs which disregards the analytical approach taken in the 2013 Report.
- The CMA has not undertaken sufficient analysis in its PFs, wrongly declining to undertake new GUPPI and IPR analysis, and has instead cherry-picked data to support its previous conclusions.
- The remedy proposed by CMA is disproportionate in all the circumstances, and in particular taking account of the fact that this intrusive and unusual remedy inhibits GET's Treaty freedoms.
- Representations concerning Figure 3 of the PFs are made in a separate confidential submission because it is covered by a Confidentiality Ring.

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## 1. CMA'S PROVISIONAL FINDINGS RE MATERIAL CHANGE IN CIRCUMSTANCES AND SPECIAL REASONS AFFECTING ITS PREVIOUS SLC FINDING

### The CMA's 2013 Report<sup>1</sup> contained material errors

- 1.1 The CMA's 2013 Report made material errors concerning the size and speed at which demand would increase on the Short Sea (and especially on the Dover-Calais route). In particular, the PFs note that:
- *"Growth on the whole short sea was approximately 4% in 2013, taking a weighted average of growth in freight, passengers and coaches whereas the report had assumed 2%"*<sup>2</sup>;
  - *"According to Ferrystat and Ferryfreight, growth in 2013 was 18%, as it is for the GET projections"*<sup>3</sup>;
  - Capacity utilisation for ferry operators was higher in 2013 than the CMA had anticipated, and the CMA now accepts that projected utilisation for 2014 and 2015 is higher than envisaged in the 2013 Report.<sup>4</sup>
- 1.2 The 2013 Report also wrongly accepted indications from DFDS that: (a) it would exit the Dover-Calais route in the short term if MFL remained operating on the route; and (b) it would do so because of reasons *"related to the expiry date of a charter agreement for one of the vessels that it was using on the short sea, namely, October 2013"*<sup>5</sup>. It has since become clear that DFDS' comments were inaccurate, and that the CMA was wrong to rely on them; DFDS has neither exited the Dover-Calais route nor reduced the scale of its operations on the Short Sea.
- 1.3 Further, the 2013 Report did not consider the impact of the MARPOL Regulations, which it is clear will now take effect from 1 January 2015 and will affect the costs and operations of ferry companies and the behaviour and route choices of freight operators.
- 1.4 The above factors all represent a material change of circumstances from those envisaged in the 2013 Report. Equally, these circumstances represent special reasons as to why the CMA should reconsider the conclusions it reached in the 2013 Report. However, as discussed below, the CMA has not done so in the PFs.

### The CMA is not bound by its previous findings on SLC

- 1.5 The CMA has adopted a starting point that it is "bound by" its previous findings<sup>6</sup>. However, the consequence of the CAT's judgment<sup>7</sup> is that the original report was quashed in its entirety. The CMA is therefore entitled to take its earlier work into consideration, but can in no sense be "bound" by its findings.
- 1.6 In any event, in considering whether there is a "special reason" to depart from its earlier analysis, the CMA is not bound by points which have been unsuccessfully challenged. The challenges were brought on judicial review principles, and not on the merits. It is therefore perfectly possible that a point made by GET or SCOP on the application to the Tribunal was correct on the merits, but dismissed as not satisfying judicial review principles. If the CMA considers on reflection that any of the points raised on the applications are correct, this would plainly provide a "special reason" to adopt a different approach at this stage.

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<sup>1</sup> For ease of reference, where possible GET is using previously defined terms.

<sup>2</sup> PFs paragraph 3.7

<sup>3</sup> PFs paragraph 3.11

<sup>4</sup> PFs Table 2 and paragraphs 3.16-3.18

<sup>5</sup> See paragraph 233, CAT Judgment

<sup>6</sup> PFs paragraph 1.4

<sup>7</sup> [2013] CAT 30, Case Nos.: 1216/4/8/13 1217/4/8/13

- 1.7 For example, GET argued that the remedies should be limited to the Dover-Calais and Dover-Dunkirk routes, rather than all routes from Dover, and the CMA defended GET's challenge at the CAT on the grounds that GET had not provided evidence that it wished to sail on other routes<sup>8</sup>. However, whilst this defence succeeded on judicial review principles<sup>9</sup>, it is plainly wrong as a matter of merger control: the remedies must go no further than is necessary to resolve the competition concerns, otherwise they are disproportionate. GET should be free to do anything else, without needing to provide evidence that it wishes to pursue such a line of business. GET requests the CMA to correct this error in the original report either generally (since the case has been remitted) or applying the "special reason" provision.

### **CMA errors in the PFs**

- 1.8 In the PFs, the CMA has conceded that "*demand has grown faster than anticipated in 2013*"<sup>10</sup>. Nevertheless, the CMA has provisionally concluded that there has been no material change of circumstances and that there are no special reasons that justify it reaching different conclusions on SLC or remedies from those contained in the 2013 Report. In reaching this provisional finding, the CMA has erred in the following respects:
- 1.8.1 the CMA has failed to take sufficient account of the market changes that have already occurred and the future market changes that are likely to occur, including on the Dover-Calais route;
  - 1.8.2 the CMA has made provisional findings concerning the potential for three ferry operators and Eurotunnel to operate on the Dover-Calais route that are not justified by the current evidence;
  - 1.8.3 the CMA has failed to address and/or has incorrectly assessed the available evidence about DFDS' intentions and incentives, which in fact mean that it is not likely to exit the Dover-Calais route;
  - 1.8.4 the CMA wrongly declines to assess whether prices would be less likely to rise or would increase by a smaller amount if DFDS and MFL were both active on the Dover-Calais route than if either of them were to cease operating on that route; and
  - 1.8.5 the CMA has also taken no account of any current financial benefit to customers which arises only as a result of the Transaction, and which DFDS has now clearly quantified at around £50m per annum<sup>11</sup>.
- 1.9 When all of the above is considered, both individually and in aggregate, the CMA cannot reasonably maintain its view that an SLC arises on a 'balance of probabilities' legal threshold. The fact that the 2013 Report has since been shown to be materially inaccurate should be taken into account now when the CMA undertakes a fresh assessment of whether an SLC arises from the Transaction on the balance of probabilities.

### **The Dover-Calais route can support three ferry operators and the Eurotunnel Shuttle**

- 1.10 The CMA notes in the PFs that "*The 2007 benchmark in the report did not fix a level of utilisation that would be profitable irrespective of any other circumstances. Break-even is a function of average realised prices and costs as well as capacity utilisation. We do*

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<sup>8</sup> See paragraph 404 of the Competition Appeal Tribunal's judgment in GET's appeal against the CMA's 2013 Report [2013] CAT 30, Case Nos.: 1216/4/8/13 1217/4/8/13 ('CAT Judgment')

<sup>9</sup> See CAT Judgment, paragraph 409

<sup>10</sup> PFs paragraph 3.5

<sup>11</sup> See the summary of DFDS' hearing with the CMA on 15 April 2014, paragraph 10

not believe that it is right to disregard the average revenue levels at which utilisation levels are achieved."<sup>12</sup>

- 1.11 **This is however a significant departure from the analytical approach taken in the 2013 Report, where the CMA took no account of average revenue levels when deciding what was necessary for three ferry operators and Eurotunnel to achieve breakeven on the Short Sea.** In the 2013 Report, the CMA held simply that:

*"We therefore consider that a share of at least [5–15] per cent of passengers and [10–20] per cent of freight on the short sea is necessary for a Dover–Calais service to cover operating costs."*<sup>13</sup>

*"Despite the improvement in their market position, both DFDS and MFL remain well below the break-even points of [5–15] per cent for passengers and [10–20] per cent for freight"*<sup>14</sup> (emphasis added)

- 1.12 The PFs are intended to address the question of whether there has been a material change of circumstances or special reasons as to why the CMA should now reach a different conclusion on SLC and remedies from that outlined in the 2103 Report. However, **the CMA should not now adopt a fundamentally different test as to when an SLC may arise from that contained in the 2013 Report.** The PFs' analytical approach in this respect should mirror that taken in the 2013 Report. Instead, **the PFs adopt in section 3 an entirely new analytical approach which is based around the average revenue levels achieved by DFDS, disregarding the analytical approach taken in the 2013 Report, which relied on the size of ferry operators' market shares.**

- 1.13 Further, the analytical approach now taken in the PFs is internally inconsistent within the PFs and at odds with the stance taken in the 2013 Report. It can best be characterised as a "cake and eat it" approach by which:

1.13.1 the PFs rely on the 2013 average revenue figures actually achieved by DFDS to justify a conclusion that its average revenue is unsustainably low both currently and for the foreseeable future<sup>15</sup>;

1.13.2 but the PFs ignore the 2013 volume data figures actually achieved by DFDS on the basis that *"we would expect P&O to cease to accommodate the increased DFDS and MFL shares"*<sup>16</sup>; and

1.13.3 the PFs state that, *"the margins and market shares in the report continue to be the right basis on which to judge expected levels of IPRs and GUPPIs"*<sup>17</sup>.

- 1.14 Yet, as discussed above, the PFs elsewhere reject reliance on market shares as the yardstick for assessing whether the Dover-Calais route can sustain three ferry operators, in favour instead of relying on average revenues achieved by DFDS.

- 1.15 Against that backdrop, the CMA now accepts that it wrongly assessed demand on the Short Sea and the Dover-Calais route for 2013. In the 2013 Report, the CMA wrongly assumed that growth levels on the Short Sea would be 2% whereas in fact they were 4%<sup>18</sup>, and demand on the Dover-Calais route actually grew by 18%<sup>19</sup>. The CMA has not in fact challenged GET's submissions regarding increased demand levels on the Short Sea and the Dover-Calais route in subsequent years, including when account is

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<sup>12</sup> PFs paragraph 3.14

<sup>13</sup> 2013 Report paragraph 8.35

<sup>14</sup> 2013 Report paragraph 8.71

<sup>15</sup> PFs paragraph 3.14

<sup>16</sup> PFs paragraph 3.28

<sup>17</sup> PFs paragraph 3.36

<sup>18</sup> PFs paragraph 3.7

<sup>19</sup> PFs paragraph 3.11

taken of the MARPOL Regulations' impact<sup>20</sup>. The CMA has also been shown to have been significantly wrong in its estimates for 2014.

1.16 The CMA attributes the greater demand levels in 2013 to the increased frequency of service due to the presence of MFL and DFDS, and because of reduced prices attracting freight operators from other routes<sup>21</sup>. The CMA has not however ascertained what proportion of the increase in demand on the Dover-Calais route is attributable to low prices on the one hand, or to the increased frequency of service on the other hand<sup>22</sup>. The CMA has not conducted sufficient analysis to be able to understand the ongoing economics of the Dover-Calais route, and therefore to conclude now that an SLC will arise as a result of the Transaction.

1.16.1 The CMA has not considered the extent to which demand grew in 2013, and may be expected to continue growing in the future, either because of higher than expected levels of economic growth or because of long-term shifts in freight operators' behaviour towards using the Dover-Calais route.

1.16.2 The CMA has not considered the extent to which the MARPOL Regulations mean that freight operators will shift demand on a permanent basis towards using the Dover-Calais route.

1.16.3 The CMA considers that price reductions attracted additional freight and passenger business to the Dover-Calais route in 2013, but it has not carried out any analysis of what volume shifted in 2013 to the Dover-Calais route because of lower prices (rather than because of the increased frequency of sailings)<sup>23</sup>. Consequently, the CMA cannot assess how much of that shifted demand will remain on the Dover-Calais route in 2014 and subsequent years even if ferry prices (including those of DFDS) were to rise. This is a significant omission given the CMA's views that "*price has been unsustainably low*"<sup>24</sup> and that "*the assumption that DFDS can maintain its 2013 market shares is generous*".<sup>25</sup>

1.17 The CMA has not considered a scenario in which both MFL and DFDS remain on the route but increase prices to a level which enables them to achieve breakeven more quickly than is currently predicted by the CMA. Specifically, the CMA has not considered whether this would have a less detrimental impact on competition and customers than if either MFL or DFDS ceased operating on the route. In this context, the following considerations would affect DFDS' ability (and incentives) to decide independently to increase its prices on the Dover-Calais route, even if MFL continues operating, in order to achieve breakeven:

1.17.1 DFDS seems to consider current pricing levels to be unsustainably low;

1.17.2 The CMA considers that "*the realised prices charged by MFL appear to be slightly higher than DFDS*"<sup>26</sup>, and that P&O has not discounted prices "*to the same extent as DFDS or MFL*"<sup>27</sup>. This may therefore suggest that DFDS, of all the ferry operators, has the greatest capacity to raise prices;

1.17.3 the closure of other ferry routes (e.g. Ebsjerg-Harwich and Dieppe-Newhaven) means that these routes will no longer exercise a competitive constraint on the Short Sea, and therefore that there may be a permanent shift in demand onto the Dover-Calais route;

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<sup>20</sup> PFs paragraph 3.20

<sup>21</sup> PFs paragraph 3.12

<sup>22</sup> PFs paragraph 3.12

<sup>23</sup> Ibid.

<sup>24</sup> PFs paragraph 3.31

<sup>25</sup> PFs paragraph 3.28

<sup>26</sup> PFs Appendix D paragraph 5

<sup>27</sup> PFs paragraph 3.29

1.17.4 expected price increases on Western Channel and North Sea routes as a result of the introduction of the MARPOL Regulations will shift demand onto the Dover-Calais route; and

1.17.5 [✂]

1.18 The CMA's judgment that "*the ferry segment of the market last appeared sustainable in 2007*"<sup>28</sup>, provides further evidence that the CMA has significantly misjudged ferry operators' willingness to remain on the route, since the ferry segment was sustained in 2008, 2009, 2010, 2011, 2012 and 2013 and shows no sign of ceasing to be sustained in 2014 or in any subsequent year.

#### **Failure to consider properly the strength of DFDS' incentives to remain on Dover-Calais**

1.19 The CMA has failed to consider properly the strength of DFDS' incentives to remain on the Dover-Calais route. In particular, the CMA has not considered with sufficient objectivity and scrutiny the comments made by DFDS in relation to its exit from the Dover-Calais route or to give sufficient consideration to GET's challenges to these. In doing so, the CMA disregards DFDS' stated commercial strategy, its comments to investors and to the press, and its unfulfilled predictions about exit during the initial inquiry. The CMA's unequal treatment of statements made by the two parties is apparent throughout the PFs, but is most clearly demonstrated by the fact that it includes DFDS' arguments in the main document, whilst GET's comments on these are confined to an appendix (Appendix B).

1.20 GET did not consider, at the time that the CMA was preparing its 2013 Report, that it was the case that it had significantly stronger incentives than DFDS to continue on the Dover-Calais route. It is even less plausible that this would be the case now, one year later on, when: (a) DFDS has invested even more in the route; (b) it stands to gain much more from the route (given the extremely high recent market growth and predicted future growth); and (c) its overall shipping strategy going forward has the Dover-Calais route at its heart. The CMA's assessment of DFDS' incentives to remain on the Dover-Calais route is therefore only a partial one.

1.21 GET has a number of specific objections to the CMA's assessment of DFDS' incentives to remain on the Dover-Calais route. These relate to:

- (i) the CMA's analysis of DFDS' financial results for 2012, 2013 and the first 14 weeks of 2014;
- (ii) DFDS' own statements regarding any exit from the Dover-Calais route;
- (iii) the extension of DFDS' charterparty for the *Molière*;
- (iv) DFDS' recent withdrawal from other routes; and
- (v) DFDS' comments on rationalisation of capacity by P&O.

1.22 Each of these issues is considered below in turn.

#### **(i) CMA analysis of DFDS' financial results**

1.23 The CMA notes at paragraph 3.2 of its summary that "*caution should be exercised in drawing conclusions from 2013 given the strategic uncertainties caused by the present inquiry*". However, it then draws on DFDS' 2013 results to make significant assumptions about its future performance and profitability, thus failing to follow its own logic. In particular, the CMA's assessment of DFDS' future profitability, set out at Appendix D, is based on DFDS' average revenues per lane metre remaining at 2013

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<sup>28</sup> PFs paragraph 2.4

levels, despite the fact that, by its own admission, "*strategic uncertainties*" mean that data from this year should be treated cautiously.

- 1.24 As concerns DFDS' 2012 results, the CMA does not take into account several important points, all of which have a significant bearing on the extent to which these results can be used as a basis of comparison for DFDS' 2013 results. These points are as follows:
- 1.24.1 DFDS did not start operating on the Dover-Calais route until 17 February 2012;
  - 1.24.2 even then, it was only operating one vessel, the *Norman Spirit*; and
  - 1.24.3 it was not until 27 April 2012 that DFDS launched a second vessel on the route, the *Barfleur* (which it renamed the *Deal Seaways*).
- 1.25 Therefore, it is entirely predictable and understandable that DFDS' EBIT loss for 2012 would be lower than its loss for 2013. This is because DFDS was not operating two vessels on the route for a substantial part (almost four months) of 2012, or indeed operating any vessels for the first 1.5 months. Consequently, DFDS' operating costs were substantially lower for 2012 than for 2013. The CMA appears to have entirely failed take this into account in its analysis, when assessing DFDS' financial performance in 2013 and especially when comparing it to DFDS' 2012 outturn.
- 1.26 As concerns DFDS' financial performance for the first 14 weeks for 2014<sup>29</sup>, these cover the period in which the vessels underwent routine maintenance, for much of which DFDS was only operating one vessel instead of two on the Dover-Calais route. During this period, DFDS' service offering was consequently far below the minimum efficient scale set out by the CMA in its 2013 Report. This means that the financial information included here is by no means representative of DFDS' likely performance for the rest of the year, and is thus of extremely limited use. Indeed, the CMA has previously excluded January and February performance from its analysis, as it notes that, due to vessel maintenance, this period does not give an accurate or reliable indication of market conditions more generally. It is therefore wrong for the CMA to treat DFDS' financial performance over this period so definitively as evidence of its inability to achieve breakeven on the Dover-Calais route, especially given its rapid growth in volume and market share since entry.
- 1.27 Finally, no account has been taken of the possibility that DFDS' losses can be explained by the fact that DFDS is not operating as an 'as efficient' competitor on the Short Sea. The CMA appears to have failed to scrutinise, to any degree, DFDS' avoidable costs or to consider whether it could have adapted its business strategy so as to operate in a more profitable manner. This is despite the fact that DFDS has itself conceded that its own actions adversely affected its 2013 financial performance "*due to the costs of the short term decisions it had made about vessels*"<sup>30</sup>. Throughout 2013 and the first five months of 2014, DFDS has been seen to be consistently pricing at the bottom of the market. If, in so doing, it has failed to reap the benefits of the significant upturn in the market, this cannot be assumed automatically to be the fault of MFL. The CMA should have analysed whether it might instead be a function of flaws in DFDS' business strategy. MFL should not be punished, through forced exit from the Dover-Calais route, if DFDS is simply failing to operate efficiently.

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<sup>29</sup> Summarised at paragraph 3.46 and set out more fully at Appendix E

<sup>30</sup> DFDS conceded – see paragraph 10 of the summary of its hearing with the CMA - that its "financial performance remained flat due to the costs of the short term decisions it had made about vessels".

## (ii) DFDS' statements regarding exit from the Dover-Calais route

- 1.28 The CMA maintains its conclusion from the 2013 Report that DFDS is likely to exit from the Dover-Calais route, if the MFL service continues in its current form and ownership<sup>31</sup>. The CMA uses as part of its rationale for this, statements by DFDS both to investors and in press articles to the effect that the Dover-Calais route suffers from overcapacity and that the current situation is unsustainable<sup>32</sup>. The reference at footnote 44 to DFDS' statements to investors is redacted, so GET cannot comment on this. However, in the press articles mentioned by the CMA, DFDS has been far from unequivocal about its intention to exit from the Dover-Calais route.
- 1.29 In an interview with Nord Littoral, published on Friday 25 April 2014, Jean-Claude Charlo, Managing Director of DFDS Seaways France, stated: "*If the question is: 'Would DFDS leave Calais in the event of an unfavourable decision from the Competition Commission for our company?', the answer is no. The Calais-Dover line is a line in which the group believes.*" He also stated in the same article that: "*DFDS has the means to invest. We want to make our activity on the Calais-Dover line durable.*" This message is repeated by Mr Charlo in a further interview, published on the same day in La Voix du Nord, where he states that: "*Our future in Calais does not depend on the opinion of the Competition Commission*" and that: "*We are fortunate to have behind us a healthy and profitable group which sees its losses more as investments.*" At section 6 of its submission dated 4 April 2014 on material change in circumstances, GET drew attention to other similar statements made by DFDS, including in its Annual Report, which have not been considered by the CMA in the PFs. GET subsequently provided the CMA with other public comments made by DFDS, in which it indicated an intention to remain on the Dover-Calais route.
- 1.30 The CMA's treatment of DFDS' statements is unequal. The CMA fails to address any of DFDS' public comments about its commitment to remain on the Dover-Calais route, and instead cherry-picks other comments which it holds to be "*consistent with the DFDS statements to investors – in particular that the route suffers from overcapacity and the present situation is unsustainable*".<sup>33</sup>
- 1.31 The CMA quotes a public statement from DFDS President and CEO Niels Smedegaard, in which he states that DFDS would withdraw from the Dover-Calais route if no solution is found<sup>34</sup>. The statement is consistent with DFDS' case to the CMA and therefore not of great evidential weight in itself. It is significant, however, in that it shows that DFDS was willing to state publicly, unequivocally, at a high level and in a forum which is likely to be reported in the trade press that it was willing to withdraw from the Dover-Calais route. Thus, the explanation given by the CMA for attaching little weight to the previous inconsistent statements made by DFDS - namely that "*We attach little weight to comments made in the press as generally companies may seek to communicate positive messages to their customers in this way*"<sup>35</sup> - must be wrong as DFDS has since showed itself willing to reveal to its customers the risk (as DFDS sees it) that DFDS will exit from the Dover-Calais route, even though this is a negative message for customers. Now that DFDS has abandoned the position that it must tell its customers that it will remain on the route forever or else its customers may leave, its public statements that it will remain on the Dover-Calais route generally (and even if the CMA drops its remedies) are of great significance in disproving its claims that it will shortly leave the Dover-Calais route absent enforcement of the CMA's remedies.
- 1.32 Furthermore, withdrawal from the Dover-Calais route is entirely at odds with DFDS' strategic direction and priorities. In both of the articles mentioned above, Mr Charlo noted that DFDS is focusing much more on its French operations, and on expanding

<sup>31</sup> See CMA's Provisional conclusion on MCC, paragraph 3.63.

<sup>32</sup> Ibid., paragraph 3.58.

<sup>33</sup> PFs paragraph 3.58 and DFDS' comments at Appendix B.

<sup>34</sup> PFs paragraph 3.5

<sup>35</sup> See 2013 Report, paragraph 8.68

and consolidating its network. This is also apparent from DFDS' 2013 Annual Report. To withdraw from the most profitable cross-Channel route runs entirely contrary to DFDS' corporate strategy, especially at a time when this route is set to benefit from increased traffic as a result of both improvements in the market generally and price increases arising from the MARPOL Regulations in particular. The CMA has failed to engage with these points when assessing DFDS' incentives, and the likelihood of its exit from the Dover-Calais route.

### **(iii) Extension of the *Molière* Charterparty**

- 1.33 In the 2013 Report, the CMA's assessment of the likelihood of DFDS' exit from the Dover-Calais route in the short term was based on DFDS' assertions that its charterparty over the *Molière*, which it operates on that route, was due to expire in October 2013 with no option for renewal. In fact, it has since transpired that the assertions made by DFDS were entirely incorrect. The owner of the *Molière* proved to be extremely flexible in its negotiations with DFDS on this point, offering it a one- or a two-year lease, or the option to purchase the vessel. Currently, DFDS holds a charterparty over the vessel until November 2014. From the information available to GET, there is nothing to suggest that this charterparty might not be extended by the *Molière*'s new owners.
- 1.34 DFDS must (or at least should) have known or tried to ascertain these potential options far in advance of October 2013, as it would have needed to undertake contingency planning for the possibility that the *Molière* was not available beyond this point. GET therefore queries at what point it became apparent to DFDS that the vessel could be chartered beyond October 2013. If this occurred prior to the publication of the 2013 Report, GET queries whether DFDS brought this development to the CMA's attention at that point.
- 1.35 Equally, GET queries what steps DFDS is currently pursuing in order to replace the *Molière* after November 2014 because it cannot assume – even if MFL is required by the CMA to exit the Dover-Calais route – that GET would allow DFDS to use any of the Vessels. There is however no consideration of this in the PFs, even though it is now clear that DFDS' previous threat about exit in the short term from the Dover-Calais route was groundless. Absent such inquiries, GET does not understand how the CMA can reasonably opine on DFDS' likely incentives to remain on the Dover-Calais route.

### **(iv) Recent withdrawal by DFDS from other routes**

- 1.36 The CMA appears to view the fact that DFDS has recently exited a number of routes as indicative that it would exit the Dover-Calais route<sup>36</sup>. However, there are substantial differences between the routes which DFDS has announced that it is closing (Ebsjerg-Harwich and Dieppe-Newhaven) and the Dover-Calais route.
- 1.36.1 Both the Ebsjerg-Harwich and the Dieppe-Newhaven routes are longer, low-volume routes which can be seen as casualties of the MARPOL Regulations due to the increased fuel prices these will entail.
- 1.36.2 This is particularly true for the Ebsjerg-Harwich route on the North Sea which, as described in the MARPOL Report, would suffer from a passenger shift towards the Short Sea. Indeed, DFDS specifically mentioned the Dover-Calais route as an alternative to the Ebsjerg-Harwich route in its recent press release on its closure of the latter. This indicates DFDS' expectation of increased traffic on the Dover-Calais route as a result of rationalisation of routes in response to the MARPOL Regulations. A copy of DFDS' press release making this point was sent to the CMA but has not been considered in the PFs.

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<sup>36</sup> See CMA's Provisional conclusion on MCC, paragraph 3.60.

1.36.3 The Dieppe-Newhaven route meanwhile has a very small share of the Short Sea market, and is also likely to suffer from the MARPOL Regulations as it is substantially longer than the Dover-Calais and Dover-Dunkirk routes, and will thus face comparatively larger fuel price increases. In direct contrast, the Dover-Calais route is the route which is set to benefit most from passenger shift as a result of the MARPOL Regulations, and is the route which has seen the most considerable market growth recently.

1.37 There are therefore no parallels to be drawn between DFDS' closure of the Ebsjerg-Harwich route and its withdrawal from the Dieppe-Newhaven route on the one hand, and any potential exit from the Dover-Calais route on the other. In fact, the closure by DFDS of its low-volume routes means that it will have increased resources to invest in its other routes where there is a significant prospect of success, such as Dover-Calais.

#### **(v) Rationalisation of P&O capacity**

1.38 The CMA has failed to give adequate reasons to explain why it still considers that P&O's response to the growth in economic performance, significantly increased demand on the Dover-Calais route and the impact of the MARPOL Regulations would be to "*cease to accommodate the increased DFDS and MFL shares*"<sup>37</sup>, rather than reduce capacity. GET has consistently submitted that the latter is the more likely scenario, given that P&O has lost significant market share over the last twelve months and that, as the operator with the largest fleet, it has the most flexibility to reduce capacity incrementally. DFDS appears to agree with the latter point, as evidenced by Mr Charlo's interview with Le Nord Littoral on 25 April 2014, where he states that: "*A rationalisation of tonnage in accordance with the economic situation [would lead to a reshuffling of cards on the Channel]...P&O has five ships and MyFerryLink has three*". This clearly shows that he considers a reduction in capacity by P&O to be a realistic prospect.

1.39 Alternatively, the CMA has not considered the possibility that P&O's refusal to implement price reductions of the same magnitude as DFDS and MFL might continue and in turn lead either or both of the latter to decide independently to raise their prices. Doing so would in turn improve their financial performance, but might still result in lower prices, or lower price rises<sup>38</sup>, than would be the case if the CMA were to require MFL to cease operating. The CMA has not however conducted the GUPPI or IPR analysis for such a scenario (which is discussed further below).

#### **Failure to undertake revised IPR and GUPPI analysis**

1.40 The CMA has wrongly decided not to undertake new IPR and GUPPI analysis. Specifically, the CMA has refused to revise the IPR and GUPPI analysis from the 2013 Report, to address the scenarios that, (a) Eurotunnel Shuttle, MFL, DFDS and P&O all remain operators on the Dover-Calais route, or (b) MFL exits but Eurotunnel Shuttle, DFDS and P&O remain operating on the Dover-Calais route. GET believes that, properly conducted, such an analysis would indicate that prices would be lower if MFL and DFDS both remain on the route than would be the case if either DFDS or MFL exited the Dover-Calais route. This would in turn indicate that MFL's presence benefits rather than undermines the intensity of competition on the Short Sea.

1.41 The CMA's reasoning for its refusal is that: "*we do not believe that the change in demand and likely future demand has been such as to put us into this situation. We believe that it remains the case that DFDS is likely to exit*"<sup>39</sup>. For the reasons given above however, this reasoning is flawed, and the CMA is wrong to conclude that "*the most likely scenario for capacity reduction, absent an intervention, is a DFDS exit from*

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<sup>37</sup> PFs paragraph 3.28

<sup>38</sup> DFDS noted explicitly in its hearing with the CMA that it would raise prices if MFL were to exit – see paragraph 10 of the note of DFDS' hearing dated 15 April 2014.

<sup>39</sup> PFs paragraph 3.33

the route"<sup>40</sup>. GET addresses in its separate submission on Figure 3 the CMA's statement that "price and quantity movements during 2013 do not represent movements to a sustainable state"<sup>41</sup>.

- 1.42 In this context, it is unreasonable and irrational for the CMA simply to have refused to conduct the GUPPI and IPR analysis. The CMA's stance is even more indefensible when it is recalled that the 2013 Report contains material errors concerning: (a) the size and speed of growth in market demand on the Short Sea; and (b) the likelihood of DFDS exiting the Dover-Calais route in the short term. Given the development of DFDS' market shares and commercial/financial position since the 2013 Report, it is necessary for the CMA to undertake the GUPPI and IPR analysis in order to be able to assess whether, on the balance of probabilities, the Transaction gives rise to an SLC.

#### **No account taken of the existing customer benefits of MFL entry**

- 1.43 DFDS has itself valued the price competition resulting from MFL's entry at about £50m annually<sup>42</sup>, and has indicated that if MFL exits the Short Sea then DFDS will increase its prices. The lower prices resulting from MFL's entry already benefit customers, whereas the CMA's theory of harm depends on a speculative view that in the longer-term price competition might be endangered as a result of the Transaction.
- 1.44 No consideration has been made in the SLC analysis of the benefits for customers of the price competition arising from MF's new entry (now quantified by DFDS), which would disappear immediately if MFL is required to cease operating<sup>43</sup>.

#### **Failure to apply appropriately the balance of probabilities threshold**

- 1.45 The CMA outlined in the PFs that: "*the Act provides little guidance on our obligations in the context of a remittal. Such cases are exceptional and must be considered on their particular facts.....This is, however, subject to the constraints of public law, and in particular the obligation to take into account all relevant circumstances" (emphasis added)<sup>44</sup>*
- 1.46 One relevant circumstance that the CMA should take into account is the fact that it previously made material errors in the 2013 Report. Specifically, the CMA erred in the 2013 Report in its view of the rate and amount by which demand would increase on the Short Sea, and also in considering that DFDS would exit the Dover-Calais route in the short term. The CMA must now decide whether an SLC arises on the balance of probabilities threshold in relation to an unusual and especially intrusive theory of harm<sup>45</sup>. In doing so, the CMA should:
- 1.46.1 acknowledge that its previous view of the size and speed by which demand would increase on the Short Sea (and especially on the Dover-Calais route) has now been proven to be incorrect;
  - 1.46.2 acknowledge that its previous opinions that DFDS would exit, and would do so in the short term rather than the longer term, have now been proven to be incorrect;
  - 1.46.3 give appropriate and sufficient weight to market uncertainties and to its own previous errors, when now conducting its inherently uncertain forward-looking assessment of whether an SLC arises from the Transaction;

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<sup>40</sup> PFs paragraph 3.32

<sup>41</sup> PFs paragraph 3.31

<sup>42</sup> See the summary of DFDS' hearing with the CMA on 15 April 2014, paragraph 10

<sup>43</sup> See Merger Assessment Guidelines, CC2 (Revised), paragraph 5.7.3

<sup>44</sup> PFs paragraph 1.4

<sup>45</sup> i.e. requiring MFL as a new entrant to cease operating, where entry has been shown to have led to materially lower prices, because of longer term concerns based on submissions by a competitor DFDS that it might exit the Dover-Calais route in circumstances where a previous threat of imminent exit by DFDS has been shown to have been incorrect.

- 1.46.4 take due account of the fact that, apart from DFDS, the submissions made by third parties to the CMA have been either supportive or neutral towards the Transaction; and
- 1.46.5 apply appropriate scepticism to submissions made by DFDS which obviously carry the risk of being self-serving, especially given its role as the only active complainant against the Transaction.

## 2. REMEDIES

- 2.1 Even if the CMA maintains its SLC findings, any remedy imposed by the CMA must be proportionate, in addition to being sufficient to address comprehensively the SLC concerns that the CMA identified. However, the remedies proposed by the CMA are disproportionate in all the circumstances, especially given that the Transaction has already been approved by the French Competition Authority. GET has the following comments.
- 2.2 First, proportionality in this context must take account of the fact that the CMA has previously made material errors about the amount by which, and the speed with which, demand would increase on the Short Sea and especially on the Dover-Calais route. It cannot be excluded that the CMA has again mistakenly underestimated the scope for demand to increase on the Short Sea and/or for DFDS to achieve breakeven on the Dover-Calais route. The market uncertainties (including of DFDS' intentions) should be reflected in the decision to be made now on whether an SLC may arise and in the remedies adopted.
- 2.3 Secondly, the proposed remedies interfere with GET's EU law freedom to provide maritime services and any remedy must therefore be proportionate in EU law terms, as the CAT Judgment recognised at paras 150 to 156. As the competition concerns raised by the Transaction are on any view now less acute given the growth in demand ahead of CMA forecasts, the remedies are now no longer proportionate even if the SLC finding is maintained. As the Tribunal noted in its judgment:

*"whilst the Commission is right to say that UK merger control does not in general regulate access to maritime transport services in the UK, but rather regulates the activities of any person wishing to provide such services in the UK without discrimination, it is certainly the indirect effect of the Decision to affect access to maritime transport services in the UK through merger control. The effect of the Decision is, clearly, significantly to restrict Eurotunnel's ability to provide maritime transport services in the UK."<sup>46</sup> (emphasis added)*

*"Inevitably, where divestment is ordered, this involves a level of expropriation somewhat beyond that which the Tribunal considered, in MCT, to be sufficient to engage Article 1 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, this was precisely the conclusion reached by the Tribunal in BAA at [19], which concerned the review of a decision by the Commission that BAA divest itself of Stansted airport. Accordingly, we hold that the Commission's Decision must be judged by the "EU" standard of review."<sup>47</sup> (emphasis added)*

- 2.4 Thirdly, in considering the nature and extent of any remedies the CMA must take account of the loss of customer benefits that only arise as a result of the Transaction<sup>48</sup>. MFL's entry onto the Dover-Calais route has already created price competition, which has been to the immediate benefit of customers. DFDS has itself valued the benefits of the price competition resulting from MFL's entry at about £50m

<sup>46</sup> Groupe Eurotunnel v Competition Commission paragraph 154

<sup>47</sup> Groupe Eurotunnel v Competition Commission paragraph 155

<sup>48</sup> See paragraph 1.15 of CC8 – Merger Remedies: Competition Commission Guidelines

annually<sup>49</sup>, and has indicated that if MFL exits the Short Sea then DFDS will increase its prices. The lower prices resulting from MFL's entry already benefit customers, whereas the CMA's theory of harm depends on a view that in the longer-term price competition *might* be endangered as a result of the Transaction. Clearly, the risk of a longer-term threat to competition is less certain and more speculative than the existing benefits to customers in the form of lower prices as a result of MFL's entry. This would argue against the imposition of a remedy preventing MFL from operating from the Port of Dover, and for any such remedy (if one is to be imposed) having a shorter duration.

2.5 Given the above, any remedies should be proportionate in the sense that they are for a shorter duration than that proposed by the CMA and should allow GET freely to re-deploy the Vessels to routes not involving the Port of Dover. The PFs have not however addressed the submissions which GET made as to why, even if the CMA's previous SLC findings are upheld, the remedies imposed:

2.5.1 should be for a duration of 5 years not 10 years<sup>50</sup>; and

2.5.2 should not require the CMA's prior consent for a divestment or sale of the Vessels to an independent entity who is not at the time of the transaction an operator on the Short Sea<sup>51</sup>.

2.6 The CMA's failure to address these points runs counter to its obligation to devise remedies that are proportionate in the light of all relevant circumstances.

2.7 As mentioned above, the need for proportionality in this case is heightened because:

2.7.1 of the unusual, highly interventionist and restrictive remedy which the CMA intends to impose (i.e. requiring MFL to cease operating, even though its entry has delivered customer benefits valued by DFDS at about £50m annually); and

2.7.2 the remedies envisaged by the CMA will unreasonably and disproportionately restrict GET's freedoms under the Treaty on the Functioning of the European Union to provide services, and in the free movement of workers and capital, between EU States.

2.8 GET does however agree with the CMA's view that, if remedies are to be imposed, there should be a period of not less than six months (rather than the three months proposed by DFDS) as an implementation period. As the CMA accepts<sup>52</sup>, there has been substantial uncertainty about the outcome of the remittal process following the Tribunal's judgment of 4 December 2013. Also, an implementation period of less than six months risks precipitating a disorderly exit of MFL that would be to the detriment of customers. In particular, a truncated implementation period could be to the detriment of any passengers who had already made advance bookings with MFL, and of freight companies who wished to take advantage of volume discounts in framework agreements with MFL.

### 3. COMMENTS MADE RE FIGURE 3

3.1 The CMA's analysis of whether the Dover-Calais route can sustain three ferry operators and the Eurotunnel Shuttle fundamentally depends on Figure 3<sup>53</sup>. The CMA's analysis and provisional findings in this respect are then inextricably linked to the CMA's assessment of DFDS' incentives to remain operating on the Dover-Calais route.

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<sup>49</sup> See the summary of DFDS' hearing with the CMA on 15 April 2014, paragraph 10

<sup>50</sup> See Annex 2 section 6 of GET's submission dated 4 April 2014

<sup>51</sup> See Annex 2 section 7 of GET's submission dated 4 April 2014

<sup>52</sup> See PFs paragraph 4.52

<sup>53</sup> See PFs paragraphs 3.22-3.32 and Appendix D

3.2 Figure 3 is covered by a Confidentiality Ring to which GET is not a party. Consequently, the submissions on Figure 3 that are made on GET's behalf by certain of its legal and economic advisors are contained in a separate document. However, because of the confidentiality restrictions imposed by the Ring, the submissions in this respect are made without the benefit of GET's input or even its knowledge of the relevant details.

3 June 2014