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

SCOP Response to CMA provisional consideration of possible material change of circumstances

1. Introduction

1.1 This response sets out the SCOP's comments on the CMA's Provisional Consideration of Possible Material Change of Circumstances (the "MCC PFs") published on 20 May 2014.

1.2 The SCOP notes the CMA's statement at paragraph 3 of the MCC PFs that the decisions of the Competition Commission ("CC") in its Report of 6 June (the "Report") on SLC and remedy stand and that the CMA's only task is (a) to consider whether GET and the SCOP had in fact acquired an 'enterprise' on the facts and hence whether or not a relevant merger situation has arisen within the meaning of section 23(1) of the Enterprise Act 2002 (the "Act"); and (b) if so, whether or not there has been a material change of circumstance ("MCC") or other special reason within the meaning of section 41(3) of the Act since publication of the Report.

1.3 As the CMA will be aware from previous submissions, the SCOP does not agree with the CMA's analysis. In its view, the correct legal interpretation of section 35(1) of the Act is that the CMA has power to undertake an SLC analysis under section 35(1)(b) <u>only</u> after it has concluded that a relevant merger situation has been created under section 35(1)(a). Any other interpretation ignores the inclusion of the words "*if so*" at the beginning of section 35(1)(b) which would otherwise have no meaning.

1.4 As the CMA will also be aware, the SCOP fundamentally disagrees with the CMA's provisional findings on jurisdiction, considering that the acquisition of the vessels and certain other assets by GET does not meet the statutory definition of an enterprise and hence that no relevant merger situation has been created.

1.5 In any event, however the CMA seeks to characterise the MCC PFs, it is clear that the CMA's entire substantive case (assuming, which is not admitted, that a relevant merger situation has been created) rests on its analysis of whether or not DFDS may be expected to exit from the Dover-Calais route in the short-term despite evidence of significant market growth.

1.6 This issue is absolutely central to the CMA's findings. However, the SCOP has been frustrated in its attempts to respond to the MCC PFs by an inability to understand and interrogate the CMA's analysis. The SCOP considers that, given that the analysis of DFDS's profitability is fundamental to the CMA's proposed decision, and will (as matters stand) lead to the cessation of the SCOP's whole business, it is necessary and proportionate for the CMA to establish a data room to enable its advisors to understand and fully test that analysis.

1.7 This point is reinforced by the fact that, based on the limited disclosure provided by the MCC PFs, the SCOP has grave doubts concerning the validity of the analysis and the conclusions drawn from it for the reasons set out below.

1.8 In addition, the CMA has failed to consider whether its proposed remedy is proportionate, in circumstances where the direct and immediate effect of the CMA's proposed remedy is to remove a competitor from the market. That remedy necessarily gives rise to certain and imminent costs in the form of reduced choice and competition and higher prices for consumers. For the CMA to impose a remedy which gives rise to a certain *reduction* in competition, the CMA must be satisfied by clear and cogent reasoning and analysis that the

expected benefits of the remedy outweigh the known costs. However, the CMA has failed even to consider that question in the current market circumstances (and this is just one illustration of how the CMA's flawed focus on material change of circumstance has resulted in deficiencies in its analysis).

1.9 Please note that owing to the confidential nature of Figure 3 in the MCC PFs and the bounds of the confidentiality undertakings given to the CMA, we have included in a separate, confidential submission the observations of the SCOP's legal and economic advisors in respect of the Figure 3. Those observations should be read in conjunction with the relevant paragraphs of this response.

2. Access to Data Room

2.1 In the Report, the CC concluded that DFDS would be likely to exit the Dover-Calais route if MFL was allowed to continue to operate in its present form and ownership. At paragraph 3.64 of the MCC PFs the CMA provisionally concludes that, whether assessed individually or collectively, the impact of the significant growth in demand seen throughout 2013 and at the start of 2014 and the improved performance of DFDS as compared to the projections identified in the Report are not "*such as to impact materially on our assessment and conclusions in the report that DFDS is likely to exit; our provisional conclusion is therefore that no MCC has arisen in this regard*".

2.2 In other words, the CMA concludes that, despite the changes in the market since the Report, DFDS is still likely to exit and therefore the SLC originally identified remains. This conclusion (and hence the sustainability of the SLC finding) wholly depends on the CMA's analysis of the profitability of DFDS' business.

2.3 As the SCOP explains further below, there are good reasons based on the limited disclosure provided through the MCC PFs to doubt the CMA's analysis of DFDS' break-even point and profitability. However, the points which the SCOP has been able to develop are based on extrapolations from the information provided by the CMA and comparisons with the position of MFL. They are not based on a direct understanding of the critical analysis on which the CMA's assessment rests.

2.4 It is impossible for the SCOP properly to understand and test the CMA's analysis without access to the analysis itself including the underlying data. It is critical that the SCOP's external economic and legal advisors be given the opportunity to interrogate DFDS' management accounts so that it may:

- Understand whether the CMA has calculated the incremental profitability of DFDS' Dover-Calais route and, if so, test the robustness and sensitivity of the assumptions and methodology that has been used;

- Carry out a precise interrogation of how DFDS has allocated overhead and other costs across its network of short sea routes (including how costs have been apportioned to Dover-Calais). This is critical given that DFDS operates multiple routes across the Short Sea and Channel, with many shared resources (for example commercial teams all based in Dieppe and significant costs in Dover that are irrelevant to the question of increased profitability on the Dover-Calais route);

- Use its experience as a short sea ferry operator (or as advisors to a short sea ferry operator) to demonstrate to the CMA what the incremental profitability of DFDS should be, assuming a proper allocation of costs.

2.5 Access to the above information is critical to enable the SCOP to comment meaningfully and respond properly to the CMA's MCC PFs. This is supported by the comments of the Tribunal in *BMI Healthcare Limited v Competition and Markets Authority (No. 1)* in the context of access to data in competition inquiries "*given the technical nature of the material, we consider it to be the case that a fair disclosure of the "gist" of a case will require – as in Eisai - a high degree of disclosure and transparency on the part of the Commission*"[1].

2.6 The SCOP suggests that issues of confidentiality could readily be addressed by the CMA placing DFDS' monthly management accounts in a data room, accessible only to external legal and economic advisers of the parties. Failure to do so would deprive the SCOP of the opportunity to comment meaningfully and respond properly to the CMA's MCC PFs.

2.7 The following comments are made without prejudice to the points made above.

3. Assessment of Profitability on Dover-Calais

3.1 The CMA's provisional conclusion on MCC is underpinned by an assumption that whilst demand has increased, average revenues have declined such that volume on Dover-Calais remains insufficient to support three ferry operators. As a result, the CMA remains convinced that DFDS will exit the route[2].

3.2 The SCOP considers that, even on the basis of the limited disclosure provided thus far, the CMA's chain of logic in this regard cannot be relied on for two principal reasons:

(i) The factual evidence put forward in the MCC PFs does not support the most important finding, namely that DFDS will continue to make substantial losses despite growing demand; and

(ii) In any event, the MCC PFs ignore the evidence put forward by the SCOP on 8 May that based on the figures for Q1 2014, MFL is already operating at a level that is close to, if not already exceeding, break-even on operating costs.

3.3 Both of these points are of critical relevance to the analysis, casting doubt on the accuracy of the analysis into DFDS' profitability and the consequent impact of demand growth upon it. They also point to the potential for DFDS to operate significantly more efficiently than at present on the Dover-Calais route in order to reach break-even sooner.

[1] Paragraph 61(2).
[2] MCC PFs, paragraph 3.32.

Evidence does not support the finding on DFDS' profitability

3.4 The CMA's case rests on the conclusion that despite substantial volume growth in 2013 and an increase in revenues of 61% for DFDS on the Dover-Calais route, DFDS continues to make substantial losses, with the EBIT loss stated to have increased from €13m to €15m from 2012 to 2013[3]. The critical reasoning is set out at paragraph 3.26 which concludes that "*DFDS outperformed [expected] increases in volumes by a considerable amount – it had an increase of 221,000 freight units and 481,000 passengers. There has been no substantial change in costs, and losses on the route have continued to be substantial. Only a reduction in average revenues can account for these facts together.*" The CMA notes, however, that P&O appears not to have experienced similar price reductions[4], whilst MFL has seen an improvement in revenues in 2014 (see Table 3 below).

3.5 At paragraph 3.44, the CMA states that DFDS' 2013 EBIT loss on Dover-Calais was greater than the 2012 EBIT loss (before overheads). Yet this does not appear to take into consideration that DFDS did not start operating in 2012 until late February, only reaching full capacity with two ships at the end of April, a third of the way through the year. Any comparisons between DFDS' financial performance in 2013 and 2012 must be made on a like-for-like basis. If indeed the CMA has failed to annualise the 2012 figures, this might suggest that DFDS' true 'full year' losses in 2012 were greater than for 2013. Or to put it another way, that increases in volume and revenue growth resulted in increased profitability (or at least a <u>reduction</u> in losses) in 2013, contrary to the CMA's conclusions.

3.6 Table 3 of the MCC PFs shows that DFDS' volumes increased by c166% and Table 4 of the MCC PFs shows that DFDS' overall revenues increased significantly by 61% (from €44m to €71m).

3.7 Given that fixed and/or non-volume related variable costs account for a significant proportion of a ferry operator's costs[5], any increase in total revenues would be expected to result in a <u>decrease</u> in losses, consistent with the observation that 2012 is not a full year for DFDS and hence not an appropriate basis for comparison.

3.8 Furthermore, the CMA states in the same paragraph (3.26) that there has been no substantial change in costs – this reinforces the logical conclusion that a 61% increase in revenues should have been profit-enhancing (or at least loss reducing).

3.9 Finally, the CMA also appears to have considered the wrong measure of profitability. It needs to consider the incremental profitability of the Dover-Calais route rather than profitability after allocation of costs. This is because DFDS is a multi-route operator and hence incurs fixed and common costs by virtue of operating two routes from Dover, in addition to other routes across the short sea and the Channel more widely.

3.10 The finding that DFDS' losses have in fact increased is therefore not supported and/or is inconsistent with the evidence presented in the MCC PFs. These findings cast significant doubt on the CMA's analysis of DFDS' profitability.

Key evidence has been omitted that supports the profitable operation of a third operator

3.11 The CMA's analysis focuses only on a comparison between 2013 and 2012. Yet that ignores key market developments, including:

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[3] MCC PFs, Table 4.
[4] MCC PFs, Table 3 and paragraph 3.29.
[5] The SCOP estimates that c80% of its own costs are fixed and/or non-volume related.

(i) Continued strong growth into Q1 of 2014;

(ii) The slow build-up of MFL's market position from zero, with relatively little traffic carried at all in 2012; and

(iii) The absence of any dry-docking periods for DFDS vessels in 2012.

3.12 The CMA's failure to take into account the continued revenue growth data in 2014 is particularly surprising. Indeed, Figure 1 of Appendix E not only provides no evidence to support the CMA's conclusions, it raises very significant questions that the SCOP considers fatal to the CMA's analysis.

3.13 Whilst the precise levels of break-even have been redacted from the text in Appendix E, the following can be concluded:

(i) Outside the dry-docking period of weeks 4-8, DFDS experienced periods of break-even or even positive contribution after vessel costs; and

(ii) Losses were made during the weeks where one of DFDS' vessels was in dry dock.

3.14 Of course the first 14 weeks of the year are traditionally a low season (particularly for passenger traffic, freight traffic tends to be more constant throughout the year), where volumes (and hence revenues and contribution) can be expected to be much lower than e.g. the summer or Easter periods. It should be noted that Easter fell into Q1 in 2013, whereas it fell much later, and into Q2, in 2014. Furthermore, having undertaken its annual dry docking for both vessels in the first 8 weeks of the year, DFDS can look forward to 44 weeks of unbroken operation for the remainder of the year.

3.15 It therefore follows that DFDS' contribution levels for the period before week 4 and after week 10 are more representative of the likely trend for the remainder of the year. The CMA itself recognises in Appendix E that rolling 4-week contribution was higher, and losses lower, from week 10 onwards. It is also implicit from Appendix E that contribution was also positive for at least some of the period prior to week 4 as identified above. Extrapolating this information over the course of the year does not support the CMA's conclusion of increased losses for DFDS going forward. Quite the reverse.

3.16 These conclusions are further supported by the evidence provided by the SCOP on MFL's performance in 2014 to-date. In its submission of 8 May, the SCOP explained to the CMA that it had experienced very significant increases in volumes in Q1 2014 as compared to the same period in 2013.

Table 1: Volume Growth Q1 2013 to Q1 2014

	Q1 2014	Q1 2013	YoY Growth
Freight	[✂]	[✂]	[✂]
Cars	[✂]	[✂]	[✂]
Coaches	[✂]	[✂]	[✂]
Total Crossings	[✂]	[✂]	[✂]

Source: SCOP, from management accounts

3.17 Contrary to the assertions in the MCC PFs, this volume growth has been accompanied by revenue growth in similar proportions:

Table 2: Revenue Growth Q1 2013 to Q1 2014

	Q1 2014	Q1 2013	YoY Growth
Freight	[✂]	[✂]	[✂]
Cars	[✂]	[✂]	[✂]
Coaches	[✂]	[✂]	[✂]
Total	[✂]	[✂]	[✂]

Source: SCOP, from management accounts

3.18 Dividing the revenues by the volumes gives the average prices (and hence average price growth) by unit (i.e. per lorry, car, coach). The weighted average price increase is [✂]% if base year revenue weights are taken or [✂]% if final year revenue weights are taken - an average of [✂]%.

Table 3: Average Prices Q1 2013 and Q1 2014

	Q1 2014	Q1 2013	YoY Growth
Freight	[✂]	[✂]	[✂]
Cars	[✂]	[✂]	[✂]
Coaches	[✂]	[✂]	[✂]

Source: SCOP, from management accounts

3.19 Given the very small volumes and revenues accounted for by coaches (accounting for only [✂]% of 2014 revenues and [✂]% of 2014 volume), the key data is clearly for freight ([✂]% of 2014 revenues) and, to a lesser extent, cars.

3.20 Table 3 above shows that average revenues in 2014 have improved as compared to 2013. Given the high proportion of fixed and non-volume related costs, the volume growth shown in Table 1 will translate directly into increasing profitability in 2014.

3.21 This evidence, which directly contradicts the CMA's case, has been omitted from the MCC PFs. Yet it clearly shows that at current (2014) demand levels, there is room for MFL to operate at or above break-even. It follows that another operator at least as efficient as MFL could also expect to operate at or close to break-even on current demand projections.

3.22 Moreover, the CMA appears not to have considered whether DFDS' apparent lack of profitability is driven by an inaccurate allocation of costs.

3.23 The SCOP notes that DFDS operates its commercial teams for all its Channel business from Dieppe and operates two destinations from Dover such that particular care should be taken by the CMA to ensure a fair and equitable allocation of costs, and to understand the extent which these costs are incremental to the operation of the Dover-Calais route. In this regard, the SCOP notes the comments made in April 2013 by Didier Marie, President of the Seine-Maritime regional council for whom DFDS operates the Newhaven-Dieppe line, that the 2010

accounts were still to be validated and that there was a "*manque de transparence certain*" (a "certain lack of transparency") in DFDS' accounting practices[6]. In addition, the SCOP has concerns regarding the manner in which DFDS accounts for its entire cross-Channel business based in Dieppe, which includes all DFDS' cross-Channel routes and its services between Marseille and Tunis. This lack of transparency and uncertainty over how DFDS allocates its costs across its Channel businesses was one reason for the SCOP's decision not to proceed with its own tender for the Newhaven-Dieppe service from 2015 onwards as it did not have enough information in relation to the costs of the route[7]. The SCOP understands that DFDS' 2012 accounts for the route are yet to be agreed with the regional council.

3.24 The SCOP has already brought to the attention of the CMA the availability of vessels within DFDS' own fleet that are well suited to the Dover-Calais line and which would reduce the need for continued charter party fees[8]. These include the former *Stena Fantasia*, which has operated for nearly 20 years on the Dover-Calais route. In addition, the *Sirena Seaways* will be available for redeployment as of the autumn of 2014 as a result of DFDS' decision to withdraw services from the Harwich-Esbjerg route[9]. The SCOP also notes that any reductions in average revenues experienced by DFDS are a result of DFDS' own commercial decisions on pricing, which have resulted in DFDS consistently pricing at a significant discount to the market, whilst also offering all lorry drivers a free meal as a further enticement to sail with DFDS. This strategy runs contrary to rational economic behaviour.

3.25 The CMA will of course be aware that it is in DFDS's interests to understate its profitability, given the impact this may have on the outcome of the remittal. The CMA would therefore need to satisfy itself that DFDS' profitability relates to the genuine profitability of a commercial operator absent any strategic behaviour. It is clear that operating both Dover-Dunkerque and Dover-Calais gives rise to economies of scale and scope for DFDS which can only be accounted for by undertaking a proper incremental profitability analysis. This also requires appropriate scrutiny of DFDS' accounting and commercial activity over the course of its operation on Dover-Calais.

3.26 The CMA has not commented on this issue in the MCC PFs, nor has it explained how it has controlled for these issues in its analysis or assessment of DFDS' financial statements.

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[6] http://www.lesinformationsdieppoises.fr/2013/04/06/dieppe-des-doutes-sur-les-comptes-de-la-ligne-transmanche/.

[7] The SCOP was unable to obtain the relevant accounts from the Seine-Maritime regional council during the public tender process as a result of these disputes over the transparency of DFDS accounts.

[8] All of DFDS' vessels on the Dunkerque line and one of the two on Dover-Calais are owned by DFDS and hence free of charter fees.

[9] Contrary to statements made by DFDS to the CMA, summarised at paragraph 3.54 of the MCC PFs.

DFDS and total market evolution 2014

3.27 Table 4 below reveals the continued growth of the market into 2014, data that the CMA has singularly failed to take into consideration in the MCC PFs:

Table 4: Market volumes (freight)

	Q1 2014	Q1 2013	YoY Growth
Dover-Calais (P&O)	271,294	269,233	+0.8%
Dover-Calais (MFL)	91,449	56,793	+61.0%
Dover-Calais (DFDS)	78,169	76,597	+2.1%
Total Dover-Calais	**440,912**	**402,623**	**+9.5%**
Dover-Dunkerque (DFDS)	136,184	117,161	+16.2%
Total	**577,096**	**519,784**	**+11%**

Source: Freightstat Q1 2014

3.28 It is notable that these growth figures are <u>despite</u> the lengthy period of dry docking in Q1 2014 for DFDS. The market as a whole has grown by around 11% (9.5% on Dover-Calais alone). Most remarkably, despite the period of dry docking, DFDS has seen growth of just over 2% on its Dover-Calais route alone (with its Dunkerque route experiencing even greater growth).

3.29 To put the dry docking in context, the SCOP estimates that the reduction from two vessels to one on the Dover-Calais route during the dry docking period, resulted in an 8% reduction in DFDS' number of crossings in Q1 2014 as compared to the same period in 2013. As can be seen from Table 5 below, adjusting for this reduction in crossings gives rise to an underlying growth figure for DFDS on Dover-Calais of 18%, broadly in line with the growth experienced on the route as a whole (19%). Even accounting for the fact that some traffic lost from dry docking will have switched to other routes (e.g. Dunkerque) or services, and some may have been lost altogether, the true like-for-like growth of demand on the Dover-Calais route will lie somewhere between the 9.5% figure in Table 4 and the 19% in Table 5 below:

Table 5: Underlying growth on Dover-Calais, adjusting for 2014 dry dockings

	Q1 2014	Q1 2013	YoY Growth
DFDS freight volume	78,169	76,597	+2%
DFDS crossings	1,339	1,550	-14%
DFDS freight per crossing	58.4	49.4	+18%
Dover-Calais freight volume	**440,912**	**402,623**	**+10%**
Dover-Calais crossings	6,733	7,312	-8%
Dover-Calais freight per crossing	**65.5**	**55.1**	**+19%**

Source: FreightStat, Q1 2014

Implications for the CMA's break-even analysis

3.30 As is clear from the evidence previously provided by the SCOP and omitted from the MCC PFs and the information explained above, the market has seen a sustained and significant growth in volumes throughout 2013 which has continued into Q1 2014. This has been supported by proportionate increases in revenues which provides compelling evidence that both MFL and DFDS are approaching (and likely to surpass in the short-term) their respective break-even points. This can broadly be summarised for two key reasons:

(i) Volume growth in 2014 has not come at the expense of lower margins and hence profitability growth is also strong; and

(ii) The largely fixed (or non-volume related) nature of a ferry operator's fixed cost base, accounting for c80% of costs, which means that volume and revenue growth translates readily and rapidly into rising profitability.

3.31 Table 6 below reveals how increased volumes have impacted on overall variable costs (i.e. port fees) between Q1 2013 and Q1 2014 for MFL:

Table 6: MFL variable cost growth

MFL variable costs (€000s)	Q1 2014	Q1 2013	YoY Growth
Freight [✂]	[✂]	[✂]	[✂]
Cars [✂]	[✂]	[✂]	[✂]
Coaches [✂]	[✂]	[✂]	[✂]
Total	[✂]	[✂]	[✂]

Source: SCOP submission to CMA on operating costs, FreightStat Q1 2014

3.32 Variable costs increased overall by [✂]%, slightly below MFL's overall revenue growth of [✂]%. This is consistent with the improvements in average prices detailed at Table 3 above. In other words, MFL's gross margins also actually improved in Q1 2014 as compared to Q1 2013.

3.33 In short, the continued growth experienced in 2014 provides compelling evidence that MFL (and likely DFDS given that it should be incrementally more profitable than MFL) are rapidly approaching break-even. Indeed, with 80% of costs fixed or non-volume related, break-even will shortly be passed at current growth rates.

3.34 Applying MFL's cost structure to DFDS and its reported Dover-Calais revenues and EBIT from the MCC PFs, it is clear that the underlying growth experienced by DFDS on Dover-Calais in Q1 2014 of +18% (see Table 5) will in fact bring them very close to a position of break-even:

Figure 1 [✂]

3.35 The left hand side of the chart at Figure 1 starts at the actual position across 2013 as a whole. Taking the figures at face value, Table 4 in the PFs shows that DFDS made a loss of €15m

on revenues of €71m (a net profit margin of –21%)[10]. MFL made a lower net profit margin in 2013.

3.36 Figure 1 then forecasts forward the volume growth from this baseline that would be required to achieve break-even. This is based on a fixed/variable cost split (with respect to units of freight/cars/coaches carried) of approximately 80% fixed/20% variable. This is the fixed/variable cost split identified by the SCOP in its submission to the CMA on operating costs.

3.37 The solid line curves plotted are based on the same volume growth across different types of traffic (freight, cars, coaches) and on an assumption that there is no change in average prices. However, as shown in Table 3 above MFL's average prices have improved slightly from 2013 to 2014, by around [✂]% on a weighted average basis. This price increase is shown as the dotted red line – this lies above the solid red line as when prices increase, other things equal, MFL becomes more profitable for any level of volume growth.

3.38 We have then marked on the levels of volume growth experienced by MFL and DFDS from Q1 2013 to Q1 2014. For MFL overall weighted volume growth was [✂]% (as shown in Table 6 above). It can be seen that if this volume growth and the price increase are maintained over the year, MFL will be above break-even in 2014. We have also identified the average growth in freight volumes on the Dover-Calais routes from Q1 2013 to Q1 2014 (data from Freightstat). It can be seen that this level of growth would be sufficient to close around three-quarters of the gap required for DFDS to achieve break-even in just one year in the absence of any price changes. This is consistent with the evidence reported by the CMA in Appendix E of the MCC PFs, which demonstrates that DFDS was at break-even or above in Q1 2014 in those weeks where no dry-docking was taking place.

3.39 Moreover, the relevant question is not whether DFDS would achieve breakeven in 2014 but whether DFDS would expect the Dover-Calais route to be incrementally profitable over its lifetime. DFDS would need to expect only small volume growth in the future for the route to start to move into positive incremental profit territory. The pick-up in the UK economy and the impact of MARPOL from 2015 would likely move it into such territory and so demonstrate that a conclusion that DFDS is expected to exit is unsound.

3.40 Accordingly, even without sight of the analysis on which the CMA's conclusions rest, the SCOP considers that the analysis is unsound.

4. Remedy

4.1 It should be recalled that the immediate effect of the CMA's proposed remedy is directly anti-competitive, resulting in the <u>certain</u> withdrawal of a competitor, capacity and customer choice from the market to protect against a hypothetical concern of market exit. That is in addition to the dire impact which the remedy will have on a social level in Calais.

4.2 It is instructive to note that DFDS itself estimated in its Hearing with the CMA that customers have enjoyed a benefit of lower prices of around €50m a year as a result of the vibrant competition on the short sea ferry routes. The CMA's proposed remedy will directly result in the loss to consumers of this benefit to counter-act an uncertain potential future event that may never arise (i.e. the exit of DFDS).

[10] Note our concerns above about whether the CMA is taking the correct measure of DFDS profitability (i.e. the incremental profitability of the Dover-Calais route) and more general concerns about the potential for strategic behaviour from DFDS in the light of the present proceedings.

4.3 It is axiomatic that in such circumstances the CMA will need to be satisfied by particularly clear and cogent evidence that its chosen remedy is proportionate – that is that the benefits of removing an additional competitor in the market outweigh the certain and known costs.

4.4 However, the MCC PFs contain no analysis of this question. The CMA appears to rely on the cost benefit analysis in the Report. The CMA has therefore afforded no consideration to whether the expected benefits of the remedy, on the evidence as it stands today, outweigh the costs. More generally, the CMA's analysis takes no account of the clear and known risk that its remedy will have the opposite of the intended effect and reduce competition in the market. The risk is in effect disregarded.

4.5 It is wrong for the CMA's proportionality assessment to treat DFDS' exit from the market as a certainty when it is not. There is at the very least a substantial risk that the CC's provisional assessment that DFDS will exit the market is incorrect; and that the effect of the CMA's remedy will be to impose unnecessary and anti-competitive costs on consumers on the short sea. Further, that risk is greater now than it was on the evidence over a year ago. These points are all pertinent to the assessment of proportionality, but are disregarded.

4.6 Further and in any event, the CMA criticises the SCOP's proposed remedy for failing to achieve instant results. It has however failed to appreciate that the short term to medium term effects of its own chosen remedy will be to make the position worse for consumers rather than better. This is a further aspect which has been omitted from the CMA's assessment of proportionality.

RPC

3 June 2014