



Groupe Eurotunnel S.A. and SeaFrance S.A. merger inquiry

A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A.

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The Competition Commission has excluded from this published version of the final report information which the Inquiry Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. Non-sensitive wording is also indicated in square brackets.

Contents

Page

Summary	4
Findings	7

Appendices

A	Terms of reference and conduct of the inquiry
B	GET's financials
C	Event analysis—freight and passenger cross-Channel ferry and tunnel services
D	Prices and volumes
E	Capacity and its utilization
F	Bundling of tunnel- and ferry-based services
G	Horizontal unilateral effects
H	Likelihood of entry
I	Analysis of GET's corporate documents and board minutes
J	Assessment of the effect of the Order by the Commercial Court of Paris on the CC's ability to implement structural remedies

Glossary

Table of Contents

	<i>Page</i>
Summary	4
Findings	7
1. The reference.....	7
2. General context.....	7
The economic context	7
Demand for transport services on the short sea	8
Suppliers of transport services on the short sea	10
3. The companies, transaction and rationale for the merger	12
Groupe Eurotunnel SA	12
SeaFrance	12
Events leading to the transaction.....	13
The rationale for the merger	16
Preventing the acquisition of the Vessels by a competitor and capacity rationalization	17
Complementary transport option and cost synergies	18
Capacity expansion	19
Market analysts' reports.....	21
Conclusions on the rationale for the merger	22
4. The 'relevant merger' situation	23
Enterprises: what are the relevant assets and do they constitute an 'enterprise'?	23
The legal test and CC guidance.....	23
GET's views	24
The SCOP's views.....	25
Context of the analysis	25
Vessels.....	27
Staff.....	28
Other assets acquired.....	33
Assets not acquired by GET	34
Conclusions	36
Ceasing to be distinct	37
Share of supply test.....	37
Turnover test.....	37
Statutory time limit.....	37
Conclusion	38
5. Counterfactual.....	38
GET's views on the counterfactual	38
Our approach to the counterfactual assessment	39
Approach 1: the Court abandoned the sealed bid process and held a public auction	41
Approach 2: the Court considered only the initial sealed bids	43
Conclusions	44
6. Market definition.....	44
Introduction	44
Product market.....	45
Freight versus passenger markets.....	46
Freight: substitution from accompanied to unaccompanied services (ro-ro).....	47
Freight: substitution from ro-ro to lo-lo	47
Passengers: evidence on intermodal competition	47
Geographic market.....	48
Capacity	50
Transport costs.....	50
Freight customers' evidence	51
Event analysis	52

Pricing analysis.....	52
Conclusions on market definition.....	52
7. Nature and evolution of competition	53
Approach to competition.....	54
Positioning of the key operators.....	54
Nature of freight contracts and competition for freight customers	55
Sales to passengers	56
CC analysis of the intensity of competition between suppliers on the short sea.....	57
Share of traffic of various routes and operators	57
Events analysis.....	57
Pricing analysis.....	59
Customers' views	60
Conclusions	61
8. Assessment of the competitive effects of the merger.....	62
Introduction	62
Views of parties	63
Approach taken to the analysis	65
Minimum efficient scale	67
GET's views (including MFL)	67
Views of other parties	68
CC analysis	68
Viability of three ferry operators on the Dover–Calais route.....	69
GET's views (including MFL)	69
Other parties' views	69
CC analysis	70
Which operator is more likely to withdraw capacity?.....	73
GET's views	73
DFDS's views	74
CC analysis	74
Size of losses and companies' expectations/plans	74
Financial strength of DFDS and GET.....	77
Bundling	77
Analysis of incentives	78
Would DFDS also exit the Dover–Dunkirk route?	79
Would DFDS exit from the Dunkirk route but remain on the Calais route?.....	79
Conclusions	80
Unilateral effects	81
'Internalization' effect.....	84
'Competition-weakening' effects	87
Likelihood of entry and expansion	90
History of entry	90
Considerations regarding entry.....	92
Considerations regarding expansion.....	93
Countervailing buyer power.....	94
9. Conclusions on the competitive assessment.....	95
Conclusions on the SLC test	97
10. Remedies.....	97
Remedy options	98
The CC's powers to remedy the SLC	99
GET carries on business in the UK.....	100
Bid for the SeaFrance business.....	101
Corporate governance of the relevant subsidiaries and control of commercial strategy	101
Day-to-day operations	101
Activities of interconnected bodies corporate, associated persons and those under common ownership or control	102

Similar patterns of GET involvement in its other UK operations	102
Overview of parties' responses to the Remedies Notice and Supplementary Remedies Notice.....	102
GET's position	102
Views of the SCOP	103
Views of ferry operators.....	103
The effectiveness of structural remedies	104
Introduction.....	104
The components of the MFL business	104
The implications of structural overcapacity for our assessment of purchaser suitability	105
The inalienability clause.....	105
Divestiture remedy options	106
Consideration of the effectiveness of delayed divestiture.....	113
Prohibition of operations on certain routes.....	114
Structural remedy proposed by GET.....	115
Overall conclusions on structural remedies	118
Our assessment of the proportionality of the preferred remedy	121
GET's views	122
Remedy costs.....	123
Potential costs to consumers of the SLC	124
Conclusion.....	125
Other remedy options.....	125
Framework in the CC's guidelines for assessing behavioural remedies	126
Behavioural remedy proposed by GET	126
Behavioural remedy proposed by the SCOP	128
Behavioural remedy proposed by P&O	129
Short-term price controls	130
Recommendation for a market investigation	131
Relevant customer benefits	131
Decision on remedies.....	132

Summary

1. On 29 October 2012, the Office of Fair Trading (OFT) referred the completed acquisition by Groupe Eurotunnel S.A. (GET) of certain assets of former SeaFrance S.A. (SeaFrance) to the Competition Commission (CC) for investigation and report.
2. GET is a public limited company listed in Paris and London. It is the parent company of two companies (The Channel Tunnel Group Limited and France Manche SA) which have formed a partnership (Eurotunnel) to operate the Channel Tunnel (the tunnel) between Coquelles (in the Pas-de-Calais in France) and Folkestone (in Kent in the UK) under a concession which expires in 2086.
3. SeaFrance was a wholly-owned subsidiary of Groupe SNCF which operated ferry services between Calais and Dover prior to November 2011. (Together, routes via the tunnel, between Calais and Dover, between Dunkirk and Dover and certain other routes across the English Channel are referred to as the short sea.)
4. Following a period of heavy losses, SeaFrance was placed in liquidation on 16 November 2011 and its ferry services ceased operating. In early 2012, taking advantage of the freeing of berthing slots in the port of Calais following the liquidation of SeaFrance, DFDS A/S (DFDS) launched a new service between Calais and Dover, using two chartered ships. DFDS had previously operated short-sea ferry services only between Dover and Dunkirk, using three vessels. DFDS's Channel operations were subsequently transferred into a joint venture (DFDS/LD) with the ferry operations of Louis Dreyfus Armateurs (LDA).
5. Three of the four vessels operated by SeaFrance at the time it was placed in liquidation (the Vessels) and other assets were sold in a sealed bid process. The Commercial Court of Paris (the Court) received bids from GET, P&O Ferries (P&O), Stena RoRo AB (Stena RoRo) and DFDS/LD. In order to secure the Vessels, GET acted together with a workers cooperative formed by former SeaFrance employees (a Société cooperative et participative, referred to as the SCOP) and on 11 June 2012, the Court decided in favour of GET's bid. The acquisition of the three Vessels and other assets was completed on 2 July 2012 (the transaction). Having prepared the Vessels for service and acquired berthing slots at the ports of Calais and Dover, GET launched ferry services between Calais and Dover on 20 August 2012 under the MyFerryLink brand. Its newly-created subsidiary, MyFerryLink SAS (MFL), assumes the commercial risk for the operation, while the SCOP operates the ships and acts as a sales and marketing agent for MFL.
6. We examined the rationale for the transaction and found that GET's decision to acquire the former SeaFrance assets had been primarily driven by its concern that DFDS/LD would acquire the Vessels at a low cost and drive prices to customers down.
7. We considered whether the transaction was a 'relevant merger' situation within the meaning of the Enterprise Act 2002 (the Act), in particular whether the transaction, as structured, meant that an 'enterprise' had been acquired. Our assessment turned on the ease and speed with which the Vessels were put back into operation; the fact that GET and the SCOP acted together to secure control of the Vessels and other assets and/or that GET had material influence over the SCOP; the fact that a large proportion of the staff provided by the SCOP to run the MFL service were previously employed by SeaFrance; and the fact that GET's bid had assigned some value to the brand and goodwill. We concluded that, in the context of the particular industry concerned, these elements met the statutory definition of an 'enterprise', and constituted

the activities, or part of the activities, of a business. We also found that the transaction met the share of supply test and concluded that a 'relevant merger' situation had been created.

8. A key question for our assessment of the competitive effects of the merger is what would have happened absent the transaction, ie the counterfactual. We ruled out the pre-merger situation as SeaFrance had been placed into liquidation and considered approaches that we thought would have been available to the Court, had GET not bid for the former SeaFrance assets. We concluded that, irrespective of the approach taken, the most likely outcome absent the merger would have been one in which DFDS/LD acquired one, two or three of the Vessels and continued to operate five vessels across the short sea, having replaced one or more of its existing vessels with the acquired vessels.
9. Using a combination of travel statistics, evidence received from freight customers and our own analysis of prices and events that had taken place on the short sea over the past five years, we concluded that the relevant markets in which to consider the competitive effects of the merger were:
 - (a) transport services to passengers on the short sea (the passenger market); and
 - (b) transport services to freight customers on the short sea (the freight market).
10. In order to assess the competitive effects of the merger, we first analysed how the supply of ferry services in the two markets may evolve in the short to medium term and in particular whether one of the current ferry operators could be expected to withdraw from the Dover–Calais route and/or the short sea. We concluded that in the context of excess capacity and continuing competition from MFL, as an effect of the merger DFDS/LD would be likely to cease operating services between Dover and Calais in the short term. We did not form an expectation that DFDS/LD would exit from the Dover–Dunkirk route in the short to medium term.
11. Were DFDS/LD to exit the Dover–Calais route and MFL to achieve its target market share, GET's share of passengers and freight transported on the short sea would increase substantially from its pre-merger share of over 40 per cent in each market. We found that the merger is likely to result in an increase in prices for passengers and freight customers by Eurotunnel relative to the counterfactual. This is because we would expect the transaction to result in the internalization within GET of a proportion of the sales that would previously have been lost by Eurotunnel to ferry operators following a price rise; and to result in the weakening of competition between ferry operators.
12. We found that future entry or expansion in the relevant markets by ferry operators other than MFL or P&O is unlikely and that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the majority of customers from the adverse affects we have found are likely to arise from the transaction.
13. In the light of our assessment, we concluded that the transaction may be expected to result in a substantial lessening of competition (SLC) in the freight and passenger markets compared with the counterfactual situation. This could be expected to lead to an increase in the prices charged both by Eurotunnel and ferry operators in the two relevant markets.
14. We considered whether action should be taken for the purpose of remedying, mitigating or preventing the SLC and its adverse effects, having regard to the effect of any

action on any relevant customer benefits (as defined in the Act) that may result from the merger.

15. In our Notice of possible remedies (the Remedies Notice) we set out our provisional view that the divestiture of the MFL business or the assets employed in the business, including the Vessels (namely the *Rodin*, the *Berlioz* and the *Nord Pas de Calais*) was likely to be an effective remedy. However, we found that the Court had prohibited the sale of the Vessels for a period of five years and that this prohibition could only be lifted by the Court through a process involving consultation with relevant French government ministers. Because of the uncertainty this process would cause for the timing and outcome of divestiture, we could not satisfy ourselves that such a remedy would be effective. Given these circumstances and the nature of the SLC we had found, we concluded that an effective and proportionate remedy would be to prohibit GET from operating ferry services at the port of Dover. We considered that prior to the prohibition coming into effect, GET should be permitted to divest the *Berlioz* and the *Rodin* to a purchaser (or purchasers) satisfactory to the CC, as a means of remedying the SLC; and that a period of six months should be given to enable GET to pursue this divestment; to effect an orderly exit from Dover; and to make arrangements to operate on other routes, should it wish to do so. This divestiture would be subject to a ten-year prohibition on reacquiring the *Berlioz* and the *Rodin*.
16. The SCOP proposed an alternative remedy, which consisted essentially of the transfer of MFL's responsibilities to the SCOP. After careful consideration, we concluded that this proposal was unlikely to be effective, as it would not address either the internalization effect or the competition-weakening effect resulting from the transaction, as the SCOP would not be independent from GET.
17. At a late stage in our inquiry, GET proposed a remedy that would result in the gradual transfer to the SCOP of a proportion of the capacity available on the Vessels. The SCOP would thus take on the commercial risks and rewards of managing this capacity independently from GET. We considered GET's proposal carefully and concluded that it was not likely to be effective: it would not address the internalization effect either fully or in a timely fashion; and it would not remedy the weakening of competition between ferry operators since the SCOP would not be independent of GET. In addition, GET had not discussed its proposal with the SCOP.
18. We concluded that a prohibition on GET (and on any connected body corporate of GET) directly, or indirectly through arrangements with any associated person or other body over which it has control, operating ferry services at the port of Dover which commences six months from the date the CC Order comes into effect (a) with any vessel for a period of two years and (b) with the *Berlioz* and the *Rodin* for a period of ten years represents as comprehensive a solution to the SLC and its adverse effects as is reasonable and practicable.

Findings

1. The reference

- 1.1 On 29 October 2012, the OFT referred the completed acquisition by GET of certain assets of former SeaFrance to the CC for investigation and report. The CC must decide:
- (a) whether a relevant merger situation has been created; and
 - (b) if so, whether the creation of that situation has resulted, or may be expected to result, in an SLC within any market or markets in the UK for goods or services.
- 1.2 Our terms of reference are in Appendix A.
- 1.3 This document, together with its appendices, constitutes our findings. Further information relevant to this inquiry, including non-confidential versions of submissions received from GET and third parties, as well as summaries of evidence, can be found on our website.¹

2. General context

- 2.1 Throughout this report we use the term ‘short sea’ to mean the area bounded in the north-east boundary by the Ramsgate–Ostend route and in the west by the Newhaven–Dieppe route. The short-sea routes consist of routes from Folkestone to Coquelles via the tunnel, and ferry routes across the English Channel between Dover and Newhaven on the English side and Calais, Dieppe, Boulogne and Dunkirk on the French side. It also includes a route between Ramsgate and Ostend in Belgium. The short sea is sometimes referred to as the Short Straits.
- 2.2 Eurotunnel provides transport services to freight customers and passengers through the tunnel and until late 2011 the former SeaFrance operated ferry services, also to freight customers and passengers, between Dover and Calais. In this section, we briefly set this inquiry in its broader economic context before describing recent relevant trends in demand and supply.

The economic context

- 2.3 The short-sea ports and the tunnel are important gateways for freight and passengers entering or leaving the UK. Dover is the busiest port in the UK for traffic, as measured by the number of units shipped, and in 2012 handled nearly twice as many units as the second busiest port (Felixstowe).² Dover was the ninth largest UK port by tonnage in 2012, handling 23 million tonnes of goods.³ Two-thirds of all goods vehicles leaving the UK for mainland Europe in 2012 travelled from a short-sea port or via the tunnel.⁴ The number of passengers travelling through Dover and via Eurotunnel’s shuttle services in 2012 was 11.9 million and 10 million, respectively. The combined figure represents 16 per cent of all passenger journeys between the

¹ www.competition-commission.org.uk/our-work/eurotunnel-seafrance.

² Including freight and non-freight units. Department for Transport Statistics: United Kingdom major ports, quarterly total units: to Q4 2012.

³ Department for Transport publication, *UK Port Freight Statistics: October to December 2012 (Quarter 4)*.

⁴ Department for Transport publication, *Road goods vehicles travelling to mainland Europe: October to December 2012 (Quarter 4)*.

UK and Western Europe via ferry, tunnel or air modes.⁵ The combined number of cars travelling via Dover ferry routes and on Eurotunnel rail shuttles represented 79 per cent of all cars travelling between the UK and the Continent in 2012.⁶

- 2.4 As the above statistics show, transport services on the short sea play an important role in the economy of the UK.
- 2.5 Although there are no official statistics on the balance of Channel traffic between the UK and France, we understand that at least two-thirds⁷ of Eurotunnel's passengers are UK residents and that over 80 per cent of freight traffic transported across the Channel (both on ferries and through the tunnel) is destined for the UK.⁸

Demand for transport services on the short sea

- 2.6 Tables 1, 2 and 3 show that demand for passenger transport services on the short sea declined by an annual rate of 0.6 per cent between 2007 and 2012, although demand for Eurotunnel services increased by 2.6 per cent, while demand for ferry services declined by 3.2 per cent. Demand for freight traffic experienced a more pronounced annual decline of 2.0 per cent over the period, driven by an annual decline of 3.7 per cent for ferry services, whilst demand for tunnel services increased by an annual 0.7 per cent. Demand for passenger transport services appears to be highly seasonal, with most travel taking place in the summer months and smaller peaks at Christmas, New Year and Easter. In contrast, freight traffic is generally more evenly spread across the year, although there are normally slight dips in demand in August and December. Freight traffic accounts for 64 per cent of short-sea revenue.

TABLE 1 Freight and passenger traffic over time on the short sea

	2007	2008	2009	2010	2011	2012	'000 vehicles 07–12 CAGR %
<i>Ferries</i>							
Freight traffic	2,400	2,354	2,340	2,127	2,107	1,990	-3.7%
Passenger traffic	2,921	2,914	2,855	2,917	2,754	2,477	-3.2%
<i>Tunnel</i>							
Freight traffic	1,415	1,254	769	1,089	1,263	1,465	0.7%
Passenger traffic	2,168	1,938	1,949	2,161	2,307	2,466	2.6%

Source: IRN research.

Note: Freight includes accompanied and unaccompanied traffic. Passengers includes cars only but this accounts for the vast majority of passenger traffic. We excluded Ramsgate–Ostend for which we do not have volume data. This route accounted for, at most, 3.3 per cent of total daily capacity in 2007 to 2010; later its share fell to 1.6 per cent of total daily capacity on the short sea (including Eurotunnel).

- 2.7 Over the past five years there have been services offered on six different short-sea routes, as shown in Table 2. Freight traffic is primarily carried on three of these routes: on the Folkestone–Coquelles route (in the tunnel), on the Dover–Calais route, and on the Dover–Dunkirk route. Short-sea freight traffic declined by an annual rate of 5 per cent on the Dover–Calais route, and increased modestly on the other two key routes (Folkestone–Coquelles and Dover–Dunkirk) in the 2007 to 2012 period.

⁵ IRN Ferrystat, February 2013.

⁶ IRN Ferrystat, February 2013.

⁷ In the eight quarters to Q3 2011, IRN Ferrystat October 2012 reissue. Also LEK Eurotunnel business review, 31 April 2008, states that more than three-quarters of Eurotunnel passenger shuttle sales in 2007 were to UK customers.

⁸ FCA Decision No. 12-DCC-154 of 7 November 2012 reports a statement by GET that 84.6 per cent of cross-Channel freight traffic departed from France.

TABLE 2 Freight traffic by short-sea route

	'000 vehicles						
	2007	2008	2009	2010	2011	2012	07–12 CAGR %
Folkestone–Coquelles	1,415	1,254	769	1,089	1,263	1,465	0.7%
Dover–Calais	1,847	1,773	1,767	1,583	1,601	1,427	-5.0%
Dover–Dunkirk	518	536	517	452	468	523	0.2%
Dover–Boulogne	-	-	16	53	-	-	N/A
Dover–Dieppe	-	-	2	-	-	-	N/A
Newhaven–Dieppe	36	45	37	38	38	40	2.3%
Total short sea	3,816	3,608	3,108	3,215	3,370	3,455	-2.0%

Source: IRN research.

Notes:

1. Traffic includes accompanied and unaccompanied vehicles.
2. Excludes Ramsgate–Ostend for which we do not have volume data. This route accounted for, at most, 3.3 per cent of total daily capacity in the 2007 to 2010 period; later its share fell to 1.6 per cent of total daily capacity on the short sea (including Eurotunnel).
3. N/A = not applicable.

2.8 While passenger traffic has experienced a modest decline on the short sea overall in the period from 2007 to 2012, passenger traffic declined by an annual rate of 3.3 per cent on the Dover–Calais route. One route, Dover–Dunkirk, has, however, experienced significant growth and the traffic through the tunnel has increased moderately.

TABLE 3 Passenger traffic by short-sea route

	'000 vehicles						
	2007	2008	2009	2010	2011	2012	07–12 CAGR %
Folkestone–Coquelles	2,168	1,938	1,949	2,161	2,307	2,466	2.6%
Dover–Calais	1,953	1,898	1,838	1,885	1,810	1,651	-3.3%
Dover–Dunkirk	573	691	802	850	859	737	5.2%
Dover–Boulogne	311	243	138	100	-	-	N/A
Newhaven–Dieppe	84	83	77	82	86	89	1.2%
Total short sea	5,089	4,853	4,804	5,078	5,062	4,943	-0.6%

Source: IRN research.

Notes:

1. Cars only.
2. Excludes Ramsgate–Ostend, for which we do not have volume data. This route accounted for, at most, 3.3 per cent of total daily capacity in the 2007 to 2010 period; later its share fell to 1.6 per cent of total daily capacity on the short sea (including Eurotunnel).
3. N/A = not applicable.

2.9 We obtained demand forecasts for the short sea from a number of sources:⁹

(a) In December 2012, GET was forecasting that truck traffic would increase by [X] per cent in 2013 and by [X] per cent annually to 2015 and that passenger traffic would increase by [X] per cent in 2013 and an average of [X] per cent annually to 2015.

(b) P&O told us that it did not foresee any growth in the short-sea transport market in the short to medium term, pointing to the weakness of the economy.¹⁰ In model-

⁹ We also saw forecasts for 2013 made by the Port of Calais, which appeared to be more optimistic for 2013. We, however, considered the forecasts of the operators of ferry services to be more reliable than the forecasts of the Port of Calais, as it does not directly deal with passengers and freight customers and derives its projections from its understanding of the level of capacity planned by operators.

ling the level of spare capacity on the Dover–Calais route, it assumed that freight and passenger traffic would grow by 3 and 2 per cent in 2013 respectively.

- (c) DFDS told us that it forecast that freight demand would grow by [X] per cent, while passenger demand would [X] in 2013 and 2014.

2.10 In 2012, the tunnel accounted for over 40 per cent of freight traffic and 50 per cent of passenger car traffic. In 2012, Dover–Calais and Dover–Dunkirk ferry services accounted for 41 and 15 per cent of freight traffic respectively, and for 33 and 15 per cent of passenger traffic respectively. The level of traffic on other routes¹¹ is negligible and declining.

TABLE 4 Proportion of short-sea traffic represented by key routes

	<i>per cent</i>					
	2007	2008	2009	2010	2011	2012
<i>Freight traffic</i>						
Folkestone–Coquelles	37	35	25	34	37	42
Dover–Calais	48	49	57	49	48	41
Dover–Dunkirk	14	15	17	14	14	15
Other	1	1	2	3	1	1
<i>Passenger traffic</i>						
Folkestone–Coquelles	43	40	41	43	46	50
Dover–Calais	38	39	38	37	36	33
Dover–Dunkirk	11	14	17	17	17	15
Other	8	7	4	4	2	2

Source: IRN research.

Note: Percentages do not necessarily add up to 100 per cent due to rounding.

Suppliers of transport services on the short sea

- 2.11 In 2011, six operators were active on the short sea: P&O (Dover–Calais), SeaFrance (Dover–Calais), DFDS (Dover–Dunkirk), Transmanche Ferries/LD Lines (Newhaven–Dieppe), Transeuropa Ferries¹² (Ramsgate–Ostend) and Eurotunnel (Folkestone–Coquelles).
- 2.12 SeaFrance ceased operating on 16 November 2011. The events that led to the company’s liquidation are described in paragraphs 3.8 to 3.14.
- 2.13 In 2012, both DFDS and GET began ferry operations on the Dover–Calais route. DFDS commenced operations in February 2012 with one vessel, the *Norman Spirit*, chartered from Louis Dreyfus Lines SAS (LD Lines, a subsidiary of LDA).¹³ DFDS added a second vessel, the *Barfleur*, to the Dover–Calais route two months later, renaming it the *Deal Seaways*. In November 2012, DFDS/LD chartered the *Molière* (which had formerly been operated by SeaFrance) to replace the *Barfleur*, renaming the vessel the *Dieppe Seaways*. In August 2012, using two vessels previously owned by SeaFrance, the *Rodin* and the *Berlioz*, GET launched its own ferry operation on the Dover–Calais route under the MFL brand.

¹⁰ Summary of hearing with P&O held on 14 January 2013.

¹¹ Since 2007, there have been services between Dover–Boulogne, Dover–Dieppe and Newhaven–Dieppe, although some of these have been discontinued.

¹² Transeuropa Ferries went into administration in April 2013 and ceased operations.

¹³ DFDS hearing summary, paragraph 10.

2.14 Following the exit of SeaFrance in November 2011 and the subsequent entry of DFDS and launch of the MFL business, there are now three ferry operators (including P&O) on the Dover–Calais route for the first time since 1998.

2.15 Table 5 shows shares in revenue terms in the January to October 2012 period (excluding the minor short-sea routes). Eurotunnel’s share of revenue is higher than that of volume for both freight and passenger services.

TABLE 5 Share of revenue, freight and passenger traffic on the short sea, January to October 2012

Operator	per cent		
	Passenger revenue share	Freight revenue share	Total revenue share
Dover–Calais (DFDS)	[X]	[X]	[X]
Dover–Calais (P&O)	[X]	[X]	[X]
Dover–Calais (MFL)	[X]	[X]	[X]
Dover–Dunkirk (DFDS)	[X]	[X]	[X]
Short sea ferries	[X]	[X]	[X]
Eurotunnel	[X]	[X]	[X]

Source: Operators, CC calculations.

2.16 The new ferry service launched by DFDS on the Dover–Calais route had grown substantially by the end of 2012, gaining shares of freight customers primarily from P&O and DFDS’s Dover–Dunkirk service, as shown in Table 6. At that time, MFL’s new service had only achieved a 1 per cent share of freight volume.

TABLE 6 Volume share of freight on the Dover–Calais and Dover–Dunkirk routes

	per cent				
	Eurotunnel	P&O	DFDS (D-D)	DFDS (D-C)	MFL
Q1 2012	43	38	17	1	0
Q2 2012	44	37	15	4	0
Q3 2012	43	36	15	5	0
Q4 2012	43	36	14	6	1

Source: IRN research.

Note: Underlying volume is for accompanied traffic only.

2.17 The two new services have gained passengers at the expense of DFDS’s Dover–Dunkirk route and P&O’s Dover–Calais service, as shown in Table 7.

TABLE 7 Volume share of passengers on the Dover–Calais and Dover–Dunkirk routes

	per cent				
	Eurotunnel	P&O	DFDS (D-D)	DFDS (D-C)	MFL
Q1 2012	54	31	14	1	0
Q2 2012	48	34	14	4	0
Q3 2012	45	33	15	6	0
Q4 2012	55	27	10	5	3

Source: IRN research.

Note: Underlying volume is measured in car-equivalent units (CEU).

3. The companies, transaction and rationale for the merger

Groupe Eurotunnel SA

- 3.1 GET is a public limited company that has its primary listing in Paris and its secondary listing in London. It is the parent company of two companies (The Channel Tunnel Group Limited and France Manche SA) which have formed a partnership (Eurotunnel) to operate the tunnel between Coquelles (in the Pas-de-Calais, France) and Folkestone (in Kent, UK) under a concession granted in 1986. The concession gave the companies the right and obligation to design, finance, build and operate the fixed link between the two countries originally for a period of 55 years. Following two extensions, the concession now expires in 2086. The tunnel opened in 1994.
- 3.2 The tunnel system comprises two railway tunnels under the English Channel and a third service tunnel. GET also operates the terminals at either end of the tunnel at Folkestone and Coquelles and the trains and shuttles that transport cars, trucks and other vehicles and their passengers through the tunnel to provide shuttle services. The system is connected to the railway and motorway networks in the UK and France. GET receives income from providing shuttle services and from other users of the railway through the tunnel (in particular, Eurostar and rail freight companies), and from other activities, principally retail in the passenger terminal buildings.
- 3.3 GET also owns Europorte SAS (Europorte), which is a holding company for a number of businesses, including three French rail freight subsidiaries which were acquired in November 2009 and GB Railfreight Ltd (GBRf) which was acquired in May 2010. Europorte is engaged in rail freight operations primarily in the UK and France involving local, national and international rail freight haulage, and operations at rail freight terminals for industrial customers. In March 2013, GET announced that its intention in principle to take a 5 per cent share in the Chambre de Commerce et d'Industrie Côte d'Opale, the concessionaire entity that currently manages the ports of Calais and Boulogne.
- 3.4 At 15 May 2013 GET had a market capitalization of €3.5 billion (£3.0 billion). Its shares are widely held by retail and institutional investors, in the latter case often in long-term infrastructure funds. GET's turnover grew by approximately 60 per cent or €383 million to €1,023 million between 2009 and 2012. This was largely attributable to an increase in revenue from Eurotunnel together with the acquisition of the French Europorte companies in November 2009 and of GBRf in May 2010.
- 3.5 GET is financed by a mixture of equity and debt. At 31 December 2012, equity amounted to €2.2 billion. The debt was provided principally by a term loan, comprising a number of tranches, with different conditions attached to each tranche and amounting in total to €3.9 billion. The average effective rate of interest on the term loan at 31 December 2012 was 5.8 per cent.

SeaFrance

- 3.6 Originally set up in 1945 as the Service de l'Armement Naval, SeaFrance was a wholly-owned subsidiary of Groupe SNCF (state-owned French railways) which operated ferry services between Calais and Dover.
- 3.7 Following a period of capacity expansion between 2005 and 2008, SeaFrance achieved breakeven in 2006 and 2007. Its financial performance deteriorated sharply in 2008, with sales decreasing by 8 per cent and the business incurring heavy losses, as a result of the general economic downturn, exacerbated by operational difficulties, including a strike in the first half of 2008. The company's heavy losses continued in

2009 and 2010. Performance in 2010 was further adversely affected by strikes.¹⁴ In the period from 2001 to 2010, SeaFrance recorded losses in all years except in 2002, 2006 and 2007, as shown in Table 8.¹⁵

TABLE 8 Financial performance of SeaFrance, 2001 to 2010

	€ million									
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Sales	175.3	259.2	214.4	207.8	192.0	226.4	241.8	222.7	176.1	150.8
EBIT	-11.3	14.8	-10.6	-6.8	-20.8	0.3	7.8	-26.6	-36.2	-33.0
Net income	-3.5	9.7	-7.6	-3.1	-9.3	7.9	15.4	-20.9	-57.7	-36.2

Source: SeaFrance Annual Reports 2001–2010.

3.8 In January 2009, SeaFrance announced a restructuring plan which was rejected by its parent company, SNCF. In February 2009, SeaFrance announced another restructuring plan which would have resulted in the loss of 650 jobs, later reduced to 543 jobs. SeaFrance also reduced its fleet to four vessels (three ferries and one freight ship): the *SeaFrance Cézanne* and the *SeaFrance Renoir* were taken out of service in February and in August respectively. Following the restructuring announcement, LDA indicated that it was interested in taking over SeaFrance and Brittany Ferries also announced that it had made an offer for SeaFrance; neither of these offers was accepted by SNCF.¹⁶ In October and November 2010, 353 redundancies were authorized and by summer 2011 the number of SeaFrance employees had been reduced to 872.¹⁷

3.9 It is against this backdrop that the events leading to the transaction took place.

Events leading to the transaction

3.10 On 28 April 2010, SeaFrance applied to the Court for bankruptcy protection from its creditors and on 30 June 2010 the company was placed into administration.¹⁸

3.11 In July 2010, the Court administrators began searching for buyers for SeaFrance's vessels, contracts and staff as part of a plan to sell the business. The offers received by them in late July 2010 were not deemed serious and were not presented to the Court. In September 2010, SNCF appointed Crédit Agricole to find a buyer for its shares in SeaFrance. SeaFrance disclosed that four firm offers were received but none was acceptable to SNCF and the sale process was suspended in early 2011.¹⁹

3.12 In February 2011, the French Government requested approval from the European Commission to provide €223 million of financing to SeaFrance in order to recapitalize it and support the implementation of a new business plan and an Employment Safeguard Plan. The refinancing was subsequently amended to a €166 million capital increase and a €100 million loan from SNCF.

¹⁴ European Commission, 18 August 2010 letter to the French Government, paragraph 13.

¹⁵ DFDS suggested that SeaFrance had only been able to last for so long due to financial support of the French Government.

¹⁶ SNCF places advertisement for SeaFrance sale, Stuart Todd, Thursday 30 September 2010:

www.lloydsloadinglist.com/freight-directory/searcharticle.htm?articleID=20017813520&highlight=true&keywords=Brittany+AND+seafrance&phrase=

¹⁷ Source: Tribunal de Commerce de Paris, Onzième Chambre, jugement prononcé le 16 Novembre 2011 par sa mise à disposition au Greffe. RG. 2011070241. P.C. P201001398.

¹⁸ Extrait des minutes du greffe du Tribunal de Commerce de Paris dated 11 June 2012 (Court minutes).

¹⁹ Lloyd's List, 28 February 2012.

- 3.13 In June 2011, the European Commission expressed significant reservations regarding this plan and eventually rejected it on 24 October 2011. Concurrently, the Court tried again to sell the business as a going concern. It received two offers: one for €1 submitted by the SCOP²⁰ and one from DFDS/LD, a joint venture between two other cross-Channel ferry operators, DFDS and LDA,²¹ for €5 million.²²
- 3.14 Both of these offers were deemed inadequate by the Court in view of the fact that the market value of the three Vessels offered for sale was put at €50–€60 million in the lowest estimate received by the Court.²³ Accordingly, on 16 November 2011 the Court ordered the liquidation of the business and, although the Court ruled that the business could continue its activities at this stage, ferry services ceased.²⁴
- 3.15 The SCOP submitted a new bid, still at a value of €1, which was rejected by the Court on 9 January 2012. On the same day, the Court formally ordered SeaFrance to cease operating and placed the company into liquidation.
- 3.16 Around the same time, GET and the SCOP were in discussions about a possible GET bid for the SeaFrance assets. The minutes of the GET board meeting on 13 January 2012 record that GET was in contact with the SCOP. At the 27 January 2012 meeting of the GET board, the Chairman gave a progress report on discussions with the SCOP in the context of a possible GET bid for the assets.
- 3.17 As described in paragraph 2.13, DFDS commenced operations on the Dover–Calais route in February 2012.
- 3.18 The Court minutes note that, under the French Commercial Code, the Court Receiver could decide whether to sell SeaFrance’s assets in a public auction or in a private transaction. In view of the specialized nature of SeaFrance’s assets, the Court Receiver decided that a private transaction would be the best way to maximize the sale price of the assets. The Court Receiver also appointed a shipbroking firm (Parimar Francharte) on 15 February 2012 to assist with the sale of SeaFrance’s three ships (the *Berlioz*, the *Rodin* and the *Nord Pas-de-Calais*) and other assets.²⁵
- 3.19 A deadline of 4 May 2012 was set for receipt of sealed bids. The bids were allowed to be in any or multiple configurations for the various assets of SeaFrance.²⁶
- 3.20 The Court minutes recorded that the sale of SeaFrance’s assets was publicized in a number of ways and non-confidential information was provided to over 40 parties,

²⁰ It was in the process of being created at the time and was registered at the Tribunal de Commerce de Boulogne-sur-Mer on 29 December 2011 by members of SeaFrance’s advisory board. The recruitment of former SeaFrance employees was started on 3 February 2012 and 457 applications were received. (Sources: <http://tempsreel.nouvelobs.com/economie/20120614.OBS8653/la-scop-seafrance-se-jette-a-l-eau.html>; www.wk-transport-logistique.fr/actualites/detail/50580/transmanche-la-scop-des-anciens-de-seafrance-engrange-les-candidatures.html.)

²¹ The joint venture between DFDS and LDA (DFDS/LD) was 82 per cent owned by DFDS and 18 per cent owned by LDA.

²² Court minutes dated 11 June 2012.

²³ The Court minutes are unclear whether these figures relate to each vessel or the three Vessels together. We note that the Court minutes record that the valuation assessments submitted by the three shipbrokers who tendered for the mandate to assist the Court with the liquidation process ranged from €95.5 million to €156 million. We also note that Jacques Gounon (GET Chairman and CEO) stated that the *Berlioz*, *Rodin* and *Nord Pas-de-Calais* ‘with a combined price range of €125–150 million, could operate a breakeven Dover–Calais service within 18 months of relaunch’ (Lloyd’s List, 1 March 2012).

²⁴ *ibid.*

²⁵ The fourth vessel operated by SeaFrance, the *Molière*, was chartered and was returned to its owners when SeaFrance went into liquidation.

²⁶ Court minutes.

while more detailed information was provided to GET, DFDS/LD, P&O, Stena RoRo²⁷ and Liberty Maritime²⁸ subject to confidentiality agreements.

- 3.21 Four bids were received by the deadline and were opened in the Court on 10 May 2012. The bids were as follows:
- (a) [REDACTED];²⁹
 - (b) DFDS/LD bid €30 million for the *Berlioz* and €25 million for the *Rodin*, or €50 million if it acquired both vessels;
 - (c) Stena RoRo bid €30 million for the *Rodin*; and
 - (d) GET bid €65 million for the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais* and other tangible and intangible assets. The GET bid set out that it would enter into a long-term relationship with the SCOP and that ‘the production of crossings [would] be provided in practice by the SCOP’.³⁰
- 3.22 A revised bid was submitted by DFDS/LD on 25 May 2012. This bid included all three vessels (in line with GET’s offer) and was for €[REDACTED] million. However, because the bid was received after the deadline it was not considered by the Court.³¹
- 3.23 The shipbroker managing the sale indicated to the Court that DFDS/LD (like GET) intended to use the vessel(s) included in its original bid on the short sea,³² whereas Stena RoRo wished to acquire the *Rodin* as an investment for charter. This did not preclude its use on the short sea, for which it had been purpose built, but equally did not guarantee it.
- 3.24 The Court minutes recorded that the receiver recommended the GET bid on the basis that it was the best outcome for creditors given that it was:
- (a) the highest bid;
 - (b) the only bid for all three vessels. The Court minutes noted that it would be a better outcome for the creditors if the *Nord Pas-de-Calais* were sold along with the *Rodin* and the *Berlioz* as the liquidator would then avoid the cost of ongoing maintenance of the vessel (while the cost of maintaining the vessels if they were not sold was estimated to be €2 million per month, the amount attributable to the *Nord Pas-de-Calais* was not specified);
 - (c) the only bid to preserve employment of former SeaFrance employees because of the SCOP. The Court minutes noted that ‘while job creation is not a criterion established for the sole realization of assets in liquidation, it remains a significant factor in the subjective assessment’. The Court minutes recorded that GET stated in its bid that the Vessels would be purchased by a special-purpose company and leased to an operating company supported by the SCOP; at the date of the bid nearly 400 former SeaFrance employees had applied to the SCOP and GET

²⁷ Stena RoRo is a ship charter business. It is part of Stena AB.

²⁸ Liberty Maritime Corporation is a New-York-based commercial shipping company which operates 11 US and foreign flag vessels. Liberty’s fleet transports bulk, break bulk and bagged commodities as well as a variety of ro-ro cargoes around the world: www.libertymar.com/libertymar/about.html.

²⁹ The offer price was not disclosed in the Court minutes. It was noted in the OFT decision document.

³⁰ Court minutes.

³¹ The offer price was not disclosed in the Court minutes. It was noted in DFDS’s response to the OFT’s questions dated 29 August 2012.

³² However, DFDS did not specify flag conditions formally in its bid.

expected that approximately 530 former SeaFrance employees would be hired by the operating company; and

(d) the only bid to confirm that the Vessels would remain under French flag. The receiver advised that the transfer of the Vessels to a different flag could result in a tax cost to the liquidator of €35 million.

- 3.25 In addition to the three Vessels, the assets purchased by GET included the SeaFrance logos, brand and the trade name, computer software, websites and domain names, IT systems, customer records and the inventory of technical and spare parts as well as IT hardware and office equipment.
- 3.26 GET completed its acquisition of the former SeaFrance assets on 2 July 2012 (the transaction).³³ It subsequently placed the Vessels in 'flash dock' to prepare them for service again, acquired berthing slots at the ports of Calais and Dover and finalized agreements with the SCOP defining how the operation would be managed and controlled. GET told us that while the Court was supervising SeaFrance's liquidation, there were politically-motivated announcements to the effect that the Conseil Regional and the Mayor of Calais were willing to participate financially in the transaction (the region has a particularly high rate of unemployment). However, to date, neither of these bodies has made any investment in MFL.
- 3.27 On 20 August 2012, GET's subsidiary company MFL commenced ferry operations between Dover and Calais using two of the former SeaFrance vessels, the *Rodin* and the *Berlioz*. The *Nord Pas-de-Calais* is a freight-only vessel, initially used as a reserve ferry when the other two vessels were undergoing maintenance, [REDACTED]. The Vessels are owned by three separate subsidiaries of GET (Euro-Transmanche SAS, Euro-Transmanche 3Be SAS and Euro-Transmanche 3NPC SAS) and are chartered to the SCOP [REDACTED] on the purchase price and refit cost).³⁴
- 3.28 The SCOP operates the Vessels and provides the crews. The SCOP is responsible for the pricing, marketing and selling of freight and passenger tickets as agent of MFL (although it subcontracts the marketing of services to freight customers back to MFL). MFL buys ferry crossings from the SCOP and receives income from sales of passenger and freight crossings (and a commission on onboard sales), thus effectively assuming the commercial risk from the operation. MFL contracted to purchase [REDACTED] of operation at a provisional price per crossing in 2012 of €[REDACTED]. The price of the first [REDACTED] crossings was discounted by [REDACTED] per cent. The price consists of a fixed and variable element (in particular, to allow for [REDACTED]).
- 3.29 GET also told us that it was public knowledge in France that under the terms of the liquidation agreed between SeaFrance's owner (SNCF), the Court and the SCOP, the SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed. The liquidator agreed to pay these funds and part payment of these funds was made by the liquidator to the SCOP in late January 2013.

The rationale for the merger

- 3.30 GET explained that there were various rationales for its decision to bid for the acquired assets. These are set out below. Where relevant, we also set out other evidence relating to GET's stated rationales.

³³ GET told us that the assets were bought on a 'sight unseen' basis from the liquidator. Before acquiring them, GET was therefore unable to inspect the assets to determine their potential commercial utility.

³⁴ Vessel charter parties for each of the three ships.

Preventing the acquisition of the Vessels by a competitor and capacity rationalization

GET submissions during the inquiry

- 3.31 GET told us that its bid for the assets was initially motivated by a desire to prevent a competitor from acquiring the Vessels at far less than market values. It explained that, though its initial motivations were defensive, its thinking developed further and led to it taking the opportunistic decision to acquire the assets.
- 3.32 In response to our provisional findings, GET told us that GET's concern was to submit a bid to compete with the (rejected) €5 million bid made by DFDS in the previous stage of the sale process, as reflected in the 6 January 2012 minutes, and that its concern was to ensure that the Vessels were sold for over €5 million, rather than to ensure that DFDS did not acquire the Vessels at any price. We noted that the €5 million offer made by DFDS was for the SeaFrance business, including all liabilities (rather than the assets) and therefore considered DFDS's bid of €5 million to be of little relevance, particularly as it had been publicly rejected by the Court as inadequate. In seeking to understand the rationale for the acquisition, we assessed the totality of contemporaneous evidence that was available to us rather than the isolated statements that GET drew our attention to in its representations to us.

Contemporaneous evidence

- 3.33 Minutes of GET's 21 December 2011 board meeting record that the GET board discussed the possible consequences of the SeaFrance liquidation and noted the possibility that the Vessels could be bought cheaply by a competitor, which could 'exacerbate a policy of some already aggressive Short Straits prices'. At the same meeting, the board discussed making an offer for the Vessels and considered the implications that this would have on competition on the short sea.
- 3.34 At a meeting on 6 January 2012, the GET board concluded that it was important for GET to submit a bid to compete with the €5 million bid made by DFDS/LD. The GET board further discussed the value of the Vessels and 'considered³⁵ the average cost of purchasing the Vessels and the potential full year impact of a yield variation of [redacted]'. At the same meeting, the board discussed the 'possibility of a monopoly situation and division of SeaFrance's market shares and establishment of the proper market'. One board member noted that 'capacity consolidation along with the current players could only be beneficial'. This point was reiterated by the member at the 27 January 2012 meeting of the GET board, where the board also discussed competition matters relating to the proposed GET bid.
- 3.35 The decision to place a bid for the assets in liquidation was made by the GET board when it met on 26 April 2012. A presentation made to the board at that meeting set out the proposed structure of and financial projections for the new envisaged ferry operation. The presentation document does not set out the rationale for the proposed acquisition. However, [redacted].
- 3.36 At GET's Management Forum (a group of around 150 managers within GET) on 26 June 2012, a section of the presentation considering next steps in the MFL project mentions a 'Rationalisation of capacity'. The same presentation document states that one reason for GET to become a ship owner was to prevent DFDS acquiring the ferries at a low price, thereby mitigating the risk of a new price war.

³⁵ The official minutes in French use the term 'met en balance', which would be accurately translated as 'weighs'.

- 3.37 Annexed to the Court minutes is a report prepared by the shipbroker appointed by the Court, Parimar Francharte. In this document, the shipbroker sets out its observations on the bids received by the Court for the Vessels and other assets. In respect of the GET bid, it notes that GET's strategy was essentially defensive and its intention was to 'hinder the implementation of a sea going rival (New Channel) (the DFDS/LD joint venture), while enjoying the image of "white knight" for regional employment and the French maritime sector'.³⁶

Complementary transport option and cost synergies

GET submission during the inquiry

- 3.38 GET explained that the introduction of MFL enabled it to offer a complementary transport option to its freight and passenger customers which either:
- (a) could not use the tunnel, because they were carrying dangerous goods or oversized heavy loads; or
 - (b) preferred a cheaper but slower option (incorporating onboard facilities such as reclining seats, shops and restaurants).³⁷
- 3.39 GET estimated that this traffic represented [REDACTED] per cent of the market.³⁸ In addition, GET told us, [REDACTED] significant number of [REDACTED] vehicles which Eurotunnel was unable to transport for safety reasons [REDACTED].
- 3.40 [REDACTED]
- 3.41 GET told us that another related reason behind its bid for the SeaFrance assets in liquidation was a desire to provide an additional offering to customers that would otherwise be lost when the tunnel was experiencing technical difficulties.

Contemporaneous evidence

- 3.42 At GET's 27 January 2012 board meeting, the GET Chairman and Chief Executive Officer set out particular elements of a potential commercial strategy for MFL: targeting traffic that cannot travel through the tunnel and 'implementing a service at a lower cost while ensuring that the company would not suffer from themselves, any loss of its market share'.
- 3.43 GET considered in particular that there could be demand from freight customers wanting to travel via the tunnel with time-critical loads but to use a ferry when returning with an empty lorry or carrying non-time-critical loads. GET considered that shuttle services and ferry operations were 'premium' and 'economy' services respectively and that there would be no risk of MFL cannibalizing demand for the shuttle services. GET also stated that it had a very good understanding of the cross-Channel market and would benefit from organizational synergies and cost efficiencies from running complementary shuttle and ferry services.
- 3.44 A GET internal document indicates that it was considering offering to freight customers contracts that covered shuttle services and ferry services. It considered that this could be attractive to customers as volume discounts would be based on the

³⁶ Court minutes dated 11 June 2012.

³⁷ Initial submission to CC, paragraph 5.6.

³⁸ Initial submission to CC, paragraph 10.5.

total volume across both modes. Furthermore, customers' administration costs would be reduced as invoicing would be combined and there would be a single point of contact at GET handling queries.

Capacity expansion

GET submission during the inquiry

- 3.45 GET also told us that acquiring the ferries would be to its advantage because [REDACTED].³⁹
- 3.46 GET told us that accompanied freight demand was forecast to grow steadily over the next ten years. Annual growth rates were expected to be around 2 to 3 per cent (in line with pre-recession observed growth). This meant that the volume of trucks transported on the short-sea routes was expected to increase from around 3.4 million trucks in 2012 to around 4.5 million trucks in 2022, which corresponded to an increase of 1.1 million trucks. To grow in line with demand, [REDACTED].
- 3.47 We note that these forecasts appear more optimistic than the short- to medium-term forecasts assumed by GET in its MFL business plan and the forecasts that we obtained from ferry operators (see paragraph 2.9).
- 3.48 GET's evidence on the relative costs of expanding tunnel capacity or investing in MFL is inconsistent. We were told that to increase GET's freight capacity from approximately [REDACTED] million to [REDACTED] million lorries a year (an increase [REDACTED]) would require an investment of about €[REDACTED] million and it would take about [REDACTED] to [REDACTED]. By acquiring the three Vessels, GET said that it had achieved the same increase immediately for an investment of €[REDACTED] million (€[REDACTED] million acquisition and €[REDACTED] million maintenance cost on the Vessels).⁴⁰
- 3.49 However, in addition to the cost of the Vessels, GET also needs to fund the MFL business. In January 2013, GET announced that it anticipated that MFL would make losses of €25 million in the first 18 months of operation.⁴¹ Prior to making its bid, GET anticipated that MFL would need funding of €[REDACTED] million from 2012 [REDACTED] to cover negative cash flow (including €[REDACTED] million contingency), €[REDACTED] million of which would be contributed by the former employees of SeaFrance and the balance by GET.⁴²
- 3.50 GET also told to us that the total costs of investing in [REDACTED]. It said that the lead times for the [REDACTED] would have been [REDACTED] longer than the time spent in establishing MFL. GET estimated that the lead time would be about [REDACTED]. It also told us that it expected to [REDACTED]. In 2012, it had anticipated [REDACTED].
- 3.51 GET told us that it had not, prior to the liquidation of SeaFrance, considered buying or setting up a ferry company to increase capacity (or for any other reason). Instead, it saw the acquisition of the assets as a unique opportunity to add capacity cheaply and quickly, [REDACTED]. GET told us that the establishment of MFL had not caused it to [REDACTED].

³⁹ Initial submission to CC, paragraph 5.7.

⁴⁰ Initial submission to CC, paragraph 5.8.

⁴¹ www.lloydsloadinglist.com/freight-directory/viewarticle.htm?articleID=20018017346.

⁴² Draft global offer for the acquisition of the operating assets of SeaFrance, presentation to GET board, 11 April 2012.

GET's submission to the European Commission

- 3.52 We noted that in a submission prepared by GET for the European Commission in May 2011 in the context of SeaFrance's application for State Aid, GET commented that: [REDACTED].
- 3.53 We found it difficult to reconcile the statements made by GET in response to the European Commission's questionnaire with the position it later adopted in its representations to us that [REDACTED].⁴³ (emphasis added).

Contemporaneous evidence

- 3.54 GET's Reference Document for 2007 states that 'the Tunnel's capacity does not constitute a significant constraint limiting the development of the different types of traffic'.⁴⁴ We also saw a presentation prepared by LEK for Eurotunnel in 2008 discussing [REDACTED].⁴⁵
- 3.55 [REDACTED]
- 3.56 The members of the GET board, on the basis of the evidence presented to them, accepted that the acquisition of the Vessels was a viable project and approved a purchase price of €65 million. The board does not appear to have considered any issues connected with increasing capacity at any time during the period when the acquisition was being discussed by it.
- 3.57 Based on our examination of the internal GET documents relating to the acquisition, we consider that there is no evidence, with one exception referred to below, to suggest that GET made a bid for the acquired assets in order to increase capacity. We have seen no evidence (either in board minutes or any other internal documents) that GET examined the relative costs and/or benefits of increasing capacity through investing in the tunnel or through investing in a ferry operation. GET told us that its consideration of the benefits of increasing capacity that could be realized by the acquisition came later in the process and, as such, was not reflected in the board minutes.
- 3.58 At its 26 June 2012 Management Forum, GET made presentations on both the rationale for the acquisition of the Vessels and other assets and [REDACTED]. Increasing capacity is not mentioned in the explanation of why GET should become an operator of ferry services. No link between the acquisition and the [REDACTED] appears to have been made. From the evidence we have seen, only one presentation to the GET Management Forum held on 2 February 2012 suggests that [REDACTED]. Since this possible rationale for the transaction is not mentioned in any other internal document or any other analysis relevant to the transaction, and since GET suggested that we should attach limited weight to comments made in presentations aimed at its Management Forum,⁴⁶ our view is that, to the extent that it may have been a factor in GET's decision to acquire the SeaFrance assets, it was not a material one and not one that would rationally justify the significant investment (both in terms of assets and negative cash flow) that its entry into ferry operations represents.
- 3.59 In our view, the consideration of [REDACTED] carried out by GET in 2007 and 2008 is of little relevance to our assessment of the rationale for the transaction, as market conditions

⁴³ GET's response to the CC's provisional findings, p10.

⁴⁴ www.eurotunnelgroup.com/WorkArea/DownloadAsset.aspx?id=4095.

⁴⁵ [REDACTED]

⁴⁶ [REDACTED]

have substantially changed in the past few years due to the recession; and the discussions in 2007 and 2008 were in no way related to GET's entry into ferry operations. We nevertheless note that at the time of the peak in demand in 2007 and early 2008, GET considered that [REDACTED]. The more recent internal documents [REDACTED] show that GET continues to examine options to [REDACTED], regardless of the launch of the MFL operation.

Market analysts' reports

- 3.60 GET provided us with reports from analysts within the previous 12 months dealing with the acquisition of the SeaFrance assets. We examined these to see if they offered any additional insight into the rationale for the transaction. A representative summary of the views expressed in these reports concerning GET's rationale is reproduced below:
- (a) BPI Equity Research said in January 2012 that GET's proposal to bid appeared to be aimed at diversifying its risk exposure to the tunnel and increasing the strategic flexibility of its business model. The research also highlighted the opportunity for bundling ferry and tunnel crossings.
 - (b) RBC Capital Markets, writing in March 2012, concluded that GET's motive in bidding for the SeaFrance assets was to ensure that ferry pricing was rational and that market entry was undertaken at a rational cost.
 - (c) Cheuvreux (Crédit Agricole) reported in May 2012 that GET expected an 8 per cent return from leasing the vessels, an 8 per cent market share and break-even within 18 months and interim losses of €20–€25 million. It also commented that DFDS/LD would be forced to exit after capturing only a 3 per cent market share.
 - (d) Société Generale in June 2012 said that GET's motive was to prolong the favourable competitive market that had existed since SeaFrance had ceased operating. It put the capital cost at no more than €45 million (presumably meaning the initial equity investment).
 - (e) Raymond James, writing in July 2012, said that the acquisition would provide a back-up solution when the tunnel was in maintenance or the shuttles fully booked and would prevent MFL from lowering its tariffs to increase capacity utilization. He estimated losses of €7 million in 2012 and €18 million in 2013.
 - (f) Exane BNP Paribas commented in October 2012 that it anticipated that DFDS/LD would decide to exit from the short sea by the end of 2013 as the number of ferry operators was unsustainable. It considered that the annual round of negotiations with hauliers (ending in mid-December 2012) would be a critical determining factor in this.
 - (g) Oddo, also writing in October 2012, said that the deal was defensive, giving GET control over the competitive environment. It forecast a €25 million loss from the ferry business in the first 18 months of operation.
- 3.61 We have also seen a commentary prepared by Exane BNP Paribas following a discussion with GET and dated 24 May 2012.⁴⁷ In relation to the rationale for the deal, the analyst commented that GET had clarified that its purpose was twofold:

⁴⁷ Exane BNP Paribas commentary on GET, 24 May 2012.

- (a) First, to ‘deprive DFDS from acquiring the ships at a low price’. In doing this, GET would ‘force the DFDS/LD JV ... out of the Short Strait market as the ferry company would have a hard time staying profitable with its current capacity’. The analyst commented that ‘Eurotunnel believes that without more capacity, DFDS/LD JV cannot be profitable on the Dover Calais (sic) and will end up exiting the market’.
- (b) Second, to ‘create some synergies with SeaFrance2’.⁴⁸ The analyst noted that ‘If the bid is successful, Eurotunnel will secure a LT [long term] contract with Seafrance2 and buy some wholesale ferry capacity. Eurotunnel to make some “combined ferry+Shuttle” offers and potentially attract additional volume and market share with hauliers’.
- 3.62 The analyst concluded that GET believed that the acquisition would initially result in more capacity on the short-sea crossing (potentially putting pressure on prices in the short run) which would then lead to capacity cuts by competitors and eventually a better pricing environment.
- 3.63 In response to our provisional findings, GET drew our attention to two analyst reports produced by Exane BNP and RBC Europe, which commented on our provisional findings report. We noted these comments but considered that, given that these documents were produced some time after the transaction and given that they focused on the analysts’ perceptions of the implications of our provisional findings, they were not informative as to the intentions of GET when it decided to bid for the former SeaFrance assets.

Conclusions on the rationale for the merger

- 3.64 We have considered carefully the various arguments advanced by GET as well as the other evidence set out above.
- 3.65 On balance, our view is that of the three rationales advanced by GET, only one is both supported by internal documents and plausible from an economic perspective: that the acquisition of the SeaFrance assets would protect or enhance GET’s future profitability by preventing DFDS/LD from acquiring them and competing aggressively on price and also by enabling GET to rationalize the level of capacity on the short sea in the future. The potential commercial upside of this strategy was recorded in the 6 January minutes of the GET board: an improvement in yield of €[REDACTED] to €[REDACTED], equivalent to a total of €[REDACTED] to €[REDACTED] million annually.
- 3.66 Whilst we accept that having made the decision to buy the assets, GET may have identified the opportunity of offering complementary options to its customers as an additional upside of the acquisition, the proportion of the market that is not currently able to use the tunnel is in our view too small to make this a plausible commercial rationale for the acquisition. Similarly, we noted that the need to serve customers when the shuttle was unavailable had in the past been dealt with through inter-availability agreements, of which Eurotunnel made little use.⁴⁹
- 3.67 Finally, of all GET’s internal documents that we have examined, only one suggested that increasing capacity might have been a consideration in GET’s decision to acquire the assets. All other internal documents that we have seen do not support GET’s assertion that [REDACTED] were a driver of the transaction. We noted the expected

⁴⁸ Meaning the envisaged GET ferry operation.

⁴⁹ GET main submission, Appendix 6.

negative cash flow of the MFL business, upfront costs, additional risks involved in entering into this venture and clear evidence that GET will not need additional tunnel capacity for [REDACTED]. Therefore, [REDACTED], we did not accept that increasing capacity was a driver behind the decision made by the GET board to pursue the acquisition, because there was no evidence that GET's decision-makers' assessment of the attractiveness of the transaction (as reflected in the minutes of the GET board and related papers) took account of capacity [REDACTED]; and because internal documents suggested that there were options open to GET to [REDACTED]. At a late stage in our inquiry, GET provided capacity statistics which showed that [REDACTED] (see Appendix E, Table 1). This further undermines the argument that a rationale for the acquisition of the former SeaFrance assets was the [REDACTED].

- 3.68 GET has been operating transport services on the short sea since 1994, and as such is an experienced operator. Its principal rationale for the transaction (as described in paragraph 3.65 above) reflects its expectation, as an experienced operator, of the way in which competition will evolve following the transaction and is therefore informative of the likely competitive effects of the transaction.

4. The 'relevant merger' situation

- 4.1 Under section 35 of the Act and pursuant to our terms of reference,⁵⁰ we are required to decide whether a relevant merger situation has been created. A relevant merger situation is created if two or more enterprises cease to be distinct within the statutory period for reference and either the share of supply or turnover test set out in the Act is satisfied (the jurisdiction test).
- 4.2 In this section, we consider each of these elements in turn: enterprises ceasing to be distinct, the share of supply test, the turnover test and the statutory period for reference, before setting out our conclusion on the jurisdiction test.

Enterprises: what are the relevant assets and do they constitute an 'enterprise'?

- 4.3 In this section, we consider whether the assets acquired by GET, taken together, amount to the activities, or part of the activities, of a business. We begin by setting out the relevant considerations as set out in the CC's Merger Assessment Guidelines,⁵¹ then we consider GET's and the SCOP's views, before going on to consider the context for our analysis. We then go on to assess individually the SeaFrance assets acquired by GET, in particular vessels, staff, brand and customer records, and also those not acquired, such as customer contracts and supplier contracts, and how these relate to the activities, or part of the activities, of a business.

The legal test and CC guidance

- 4.4 The Act defines 'enterprise' as: 'the activities, or part of the activities, of a business'. 'Business' 'includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.⁵²

⁵⁰ www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/terms_of_reference_final.pdf.

⁵¹ *Merger Assessment Guidelines, CC2*, September 2010.

⁵² Section 129(1) & (3) of the Act.

4.5 The CC's Merger Assessment Guidelines⁵³ provide the following guidance:⁵⁴

The term 'enterprise' is defined in section 129 as the activities, or part of the activities, of a business. The enterprise in question need not therefore be a separate legal entity. The definition states that the activities in question should be carried out for 'gain or reward'. However, there is no requirement that the transferred activities should be profitable, or generate a dividend for shareholders, and the definition may include transferred activities conducted on a not-for-profit basis.

In making a judgement as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the Authorities will have regard to the substance of the arrangement under consideration, rather than merely its legal form.

An enterprise may comprise any number of components, most commonly including the assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill. In some cases, the transfer of physical assets alone may be sufficient to constitute an enterprise, for example where the facilities or site transferred enable a particular business activity to be continued. Intangible assets such as intellectual property rights are unlikely, on their own, to constitute an enterprise unless it is possible to identify turnover directly related to the transferred intangible assets that will also transfer to the buyer. The business acquired may no longer be trading but this does not in itself prevent the business from being an enterprise for the purposes of the Act.

A description of the bid made by GET is set out in paragraphs 3.24 and 3.25.

GET's views

4.6 GET considered that it did not acquire an enterprise, in particular because:⁵⁵

- (a) The assets acquired were not enough on their own to run a business, and as a result MFL needed to procure additional business-critical resources, services and facilities from third parties in order to commence business. The Vessels were not operation ready when GET acquired them and a significant amount of work was required on them.
- (b) The database of ex-SeaFrance customers acquired was of limited commercial value and of no material assistance to MFL in starting its operations from scratch.
- (c) MFL did not acquire the benefit of any ongoing contracts with customers or suppliers.

⁵³ CC2, paragraphs 3.2.2–3.2.4.

⁵⁴ The OFT's jurisdictional and procedural guidance ([OFT 527, Mergers: Jurisdictional and procedural guidance](#), June 2009) lists specific considerations that the OFT will have regard to in interpreting these principles, as follows:

- The transfer of 'customer records' is likely to be important in assessing whether an enterprise has been transferred.
- The application of the TUPE regulations would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise.
- The OFT would normally (although not inevitably) expect a transfer of an enterprise to be accompanied by some payment for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of the land and assets being transferred would be indicative of goodwill being transferred. [Paragraph 3.10.]

⁵⁵ Summarized from [GET's initial submission](#), section 7, and [response to the provisional findings](#), section 4.

- (d) There was no goodwill in the SeaFrance brand: the period during which the Vessels had not been used for the provision of ferry services meant that all SeaFrance goodwill had evaporated long before the transaction took place. As a result, MFL was a completely new brand, had made no commercial use of the SeaFrance brand name and had actively sought to distance itself from the SeaFrance brand. In addition, the assets acquired by MFL were not used during the main sales opportunities for both the passenger and freight business in 2012. Consequently, no customer goodwill or business was transferred to MFL as part of this transaction.
- (e) There was no transfer of staff from SeaFrance: the substance of the arrangement with the SCOP was that independently of, but concurrently with, its negotiations to acquire the Vessels and other assets from the liquidator, GET negotiated an arrangement to procure from the SCOP the necessary operational, maintenance and sales services. Then, in turn, the SCOP itself conducted a recruitment exercise to find the necessary staff.
- (f) The SeaFrance business had terminated permanently, and MFL built its present business slowly from scratch.

The SCOP's views

4.7 The SCOP argued that no 'enterprise' had been transferred, in particular because.⁵⁶

- (a) MFL was a 'start-up' business, which had operated 'essentially empty' vessels at its outset and by January was still far from achieving SeaFrance's pre-liquidation market share.
- (b) Failure to commence services in time for the English summer school holidays effectively meant that 100 per cent of passenger customers were lost to competitors.
- (c) Freight customers were slow to book with MFL, waiting to see whether it would offer sufficiently frequent services, and be committed to the route.
- (d) The Vessels were uncertified and in poor condition at the time of acquisition, and had to be operated under temporary certificates for a period.
- (e) The SCOP had to recruit staff 'externally' to operate the service.

Context of the analysis

4.8 As a preliminary matter, the fact that the assets⁵⁷ were not trading at the time of the acquisition does not of itself exclude the CC's jurisdiction. This is reflected in the CC's Merger Assessment Guidelines (see paragraph 4.5 above) and the long-standing decisional practice of the OFT and the CC, in which non-trading assets have been treated as an 'enterprise' in a variety of situations.⁵⁸ The need for the CC to consider the substance rather than the form of the arrangements before it means that

⁵⁶ [SCOP's response to the provisional findings](#), paragraphs 2.1–2.9.

⁵⁷ The CC uses 'assets' in the broad sense, ie to cover not only physical assets but also the benefit of contracts, intellectual property, records, goodwill etc.

⁵⁸ See, for example: (a) the OFT's decision in [Home Retail Group/Focus DIY](#) (concerning stores sold without stock, fittings or branding); (b) the OFT's decision in [HMV/Zavvi](#) (concerning a store that had been temporarily used for another purpose before the acquisition); and (c) the OFT's decision in [Cineworld/Hollywood Green](#) (concerning assignment of a lease). Further, it is common for retail businesses to cease trading for a period on change of ownership for refitting and rebranding.

it must look beyond whether a business is currently trading with the particular assets concerned and whether they comprise the activities, or part of the activities, of a business. This general principle is not contested by GET.⁵⁹

- 4.9 Nor is it necessary that the buyer acquire as part of the transaction everything required in order to operate the business concerned. Rather the question is whether, on balance, the totality of the assets transferred constitutes the activities, or part of the activities, of a business. In making this assessment, we would have regard to the common practice in corporate groups for certain corporate support functions to be provided centrally.
- 4.10 This assessment is specific to the industry and business concerned. As noted in the CC's Merger Assessment Guidelines,⁶⁰ for some businesses the activities are enabled by physical assets alone. In others, such as skilled service industries, key staff may constitute an 'enterprise'.
- 4.11 The CC considers that elements which can be readily obtained from third parties, or which are commonly provided centrally by parent companies, are less likely to be essential to the transfer of an 'enterprise', even if they are necessary to the running of the business. For example, bunker fuel is essential to a shipping business, but straightforward to obtain.
- 4.12 In the present case, a key part of the context for this analysis is the fact that GET did not acquire a trading business, as SeaFrance had ceased operations some seven and a half months before the date of completion.⁶¹ The CC will make its assessment by reference to the assets actually transferred at the date of acquisition and will therefore take into account factors such as deterioration in the physical state of the Vessels and reputational impact on the acquired brand during the non-trading period.⁶²
- 4.13 In making its assessment, the CC has had regard to its own previous decisions concerning the concept of an enterprise.⁶³ These enable it to benefit from previous thinking on the factors likely to be relevant in its consideration. However, it notes that each assessment is independent and must be considered on its own unique facts. In particular, there is no requirement to identify an analogous precedent before making a finding. For this reason, GET's arguments that previous cases applying the 'enterprise' test are distinguishable⁶⁴ appear to us to be of limited relevance to our assessment in the present case.

⁵⁹ See, for example, [GET's initial submission](#), 19 November 2012, paragraph 7.6. However, GET later indicated that it considered that the interruption in trading in this case is of a sufficiently long duration to exclude the CC's jurisdiction ([GET's response to the provisional findings](#), paragraphs 4.1–4.5).

⁶⁰ CC2, paragraph 3.2.4.

⁶¹ SeaFrance ceased operating on 16 November 2011, and the sale of the liquidation assets to GET was completed on 2 July 2012.

⁶² The OFT's jurisdictional and procedural guidance ([OFT 527, Mergers: Jurisdictional and procedural guidance](#), June 2009) lists specific considerations that the OFT will have regard to in cases where the business being acquired is not trading at the time of the merger:

- The period of time elapsed since the business was last trading
- The extent and cost of the actions that would be required in order to reactivate the business as a trading entity
- The extent to which customers would regard the acquiring business as, in substance, continuing from the acquired business, and
- Whether, despite the fact that the business is not trading, goodwill or other benefits beyond the physical assets and/or site themselves could be said to be attached to the business and part of the sale. [Paragraph 3.11.]

⁶³ In particular, [AAH Holdings plc and Medicopharma NV: a report on the merger situation](#) (May 1992), [Stagecoach Holdings plc and Lancaster City Transport Limited: a report on the merger situation](#) (December 1993) and [Stora Kopparbergs Bergslags AB/Swedish Match and Stora Kopparbergs Bergslags AB/The Gillette Company: a report on the merger situations](#) (March 1991) (Gillette/Stora/Swedish Match).

⁶⁴ For example, because of the length of the non-trading period and the question of whether there was a deliberate intent to avoid merger control rules.

- 4.14 Ultimately, the question of whether any given combination of assets constitutes an ‘enterprise’ is a commercial assessment, requiring the balancing of competing factors in the context of the industry concerned.
- 4.15 In what follows, we consider the SeaFrance assets acquired by GET, in particular vessels, staff, brand and customer records, and also those not acquired, such as customer contracts and supplier contracts and how these relate to the activities, or part of the activities, of a business.

Vessels

- 4.16 GET acquired three vessels as part of the transaction, the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*.
- 4.17 GET acquired three of the four vessels previously operated by SeaFrance on the short sea. In this regard, the CC notes that:
- (a) the Act defines an ‘enterprise’ as including ‘part of’ the activities of a business (see paragraph 4.4 above); and
- (b) GET confirmed that three ships (including two passenger ships) were sufficient to allow it to offer a competitive service.⁶⁵
- 4.18 All three Vessels had previously been operated to carry passenger and/or freight traffic on the short-sea route, and were therefore of a design suitable for this business without adaptation.⁶⁶
- 4.19 GET argued that the Vessels were also suited for use on other routes around the world and that vessels from other routes might also have been suited for the short-sea route without adaptation. However, neither of these points detracts from the suitability of the Vessels GET actually acquired for the short-sea route on which they are currently being used.
- 4.20 However, at the time of GET’s acquisition, the Vessels had been out of use for seven and a half months, and were therefore not capable of being put directly into service. The evidence on the state of the Vessels indicates that:
- (a) During the period of non-use they had been maintained in a state of ‘hot lay-by’, a minimum operating mode designed to maintain the condition of the ship, for example by running the engines regularly.⁶⁷ This was described to us as keeping the ships as good as they could be to be able to sell the ships in a very good condition.
- (b) Maintenance in a state of ‘hot lay-by’ was recognized by the Court-appointed administrator as necessary to help preserve the value of the Vessels in a sale.⁶⁸

⁶⁵ This allows for two vessels to be operational while the third is in dry dock, for example undergoing routine maintenance.

⁶⁶ GET acknowledged that ‘the Vessels have previously been operated on the Short Sea (and that they had specially fitted ramps for use here)’.

⁶⁷ Court minutes: ‘This minimum operating mode [ie ‘hot lay-by’] preserves the ship’s organs by running the engines regularly and conducting all operations required to retain most of the ship’s certificates. Such operations require the use of qualified personnel.’

⁶⁸ Court minutes: ‘The designated broker confirmed that the ships’ value would be greatly impacted by their complete shutdown. Therefore, the preservation of the creditors’ mutual surety involves placing the ships in ‘hot lay-by’. ... It thus appeared that the sale in a private transaction while preserving the ships in a ‘hot lay-by’ situation was the best way to encourage high bids rather than an auction.’

(c) The Vessels were nevertheless not operations ready. Before being used to provide the MFL service, the Vessels underwent a process of ‘flash-docking’ designed to return them to an operational state.⁶⁹ In particular, GET referred to the need to regain certificates entitling the Vessels to carry passengers and traffic. It is difficult to distinguish work required on the Vessels as a result of the non-trading period and work in the nature of routine maintenance, but GET told us that in total, before returning the Vessels to service, it undertook:

(i) one and a half months of intense work;⁷⁰ and

(ii) [REDACTED].⁷¹

4.21 Overall, GET acquired vessels which were of suitable design and of sufficient number to operate a passenger and freight transport business on the short sea. These vessels were in a condition from which they were able to be brought into operation within two months of their acquisition.⁷²

Staff

Introduction

4.22 We now consider the relevance of the ex-SeaFrance staff currently engaged in operating the MFL service.

4.23 Ex-SeaFrance staff form a large proportion—[REDACTED]—of the workforce currently engaged in operating the MFL service.⁷³

4.24 However, the majority of these staff are not employed by GET, but by the SCOP, which operates the MFL service under a series of commercial agreements with GET.

4.25 It is therefore necessary to consider the relevance of the SCOP workforce to the issue of whether two ‘enterprises’ have ceased to be distinct. In particular, given the circumstances of this transaction, should those staff be included in the bundle of assets to which we must apply the ‘enterprise’ test?

4.26 The CC considers that the ex-SeaFrance employees of the SCOP are relevant to its jurisdiction assessment if either:

(a) GET and the SCOP ‘acted together’ during the bidding period to secure control of the liquidation assets. If this is the case then they are ‘associated persons’ within the meaning of section 127 of the Act, with the specific legal consequence that they (and any bodies corporate which they or any of them control) ‘shall be treated as one person ... for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control ...’. This would mean that the ex-SeaFrance assets controlled by GET

⁶⁹ GET’s initial submission, paragraph 7.11.

⁷⁰ GET’s initial submission, paragraph 5.1.8. The precise period is 2 July 2012–20 August 2012.

⁷¹ [REDACTED]

⁷² The SCOP told us that the certificates initially obtained were temporary but that full certificates had now been obtained (SCOP’s response to the provisional findings, paragraph 2.8).

⁷³ The SCOP currently employs [REDACTED] staff, of which [REDACTED] are ex-SeaFrance (GET’s initial submission, paragraph 7.18.2). The SCOP told us that ex-SeaFrance employees had subscribed in large number (approximately 600) to be shareholders of the SCOP, with a view to future employment, by the end of 2011. (It is also notable that the SCOP was itself established by ex-SeaFrance employees.) MFL also employs [REDACTED] staff on its own account, [REDACTED] of which are ex-SeaFrance (GET’s initial submission, paragraph 7.18.1).

and the SCOP must be considered together for the purposes of applying the 'enterprise' test.⁷⁴

(b) The SCOP's economic dependence on GET is such as to confer on GET 'material influence' over the SCOP, and therefore its employees. We may treat material influence as amounting to 'control' for the purposes of section 26 of the Act, which would mean that the SCOP's assets were also part of those assets brought under 'common control' with the Eurotunnel business, and therefore relevant to the 'enterprise' test.

4.27 These two questions are considered in turn below.

4.28 In neither case are we precluded from taking account of the SCOP's ex-SeaFrance staff on the grounds that they were not transferred from the liquidator, whether directly or under TUPE regulations, but recruited in the market by the SCOP.⁷⁵ There is no requirement in the Act that all the assets making up the enterprise are obtained through the same route or at the same time, only that two enterprises cease to be distinct within the relevant time frame.⁷⁶

4.29 We noted GET's arguments⁷⁷ that the recruitment exercise did not favour ex-SeaFrance employees, some of whom were declined positions. However, we consider that our analysis should focus on the employees who were engaged in operating the MFL service and on whether, taken together with other relevant assets, these comprise the activities, or part of the activities, of a business.

Relevance of the SCOP's employees: 'associated persons'

4.30 Under section 127 of the Act, 'two or more persons acting together to ... secure control of any enterprise or assets ... shall be regarded as associated with one another'.

4.31 The CC's Merger Assessment Guidelines⁷⁸ state that:

For the purposes of considering whether an enterprise has ceased to be distinct, section 127 requires [the CC] to consider whether several persons acquiring an enterprise are 'associated persons' and thus should be viewed as acting together ...

This situation will most commonly arise where the acquiring persons are related or have an agreement to act jointly to make an acquisition, although the Act does not require that each of the acquiring parties should individually have control over the acquired entity for them all to be regarded as being associated persons.

4.32 This question therefore involves examining the considerations leading up to GET's bid, the bid itself, the reasons for GET's success and GET's and the SCOP's activities post-acquisition to analyse whether GET and the SCOP can be said to have 'acted together' to secure control over the liquidation assets.

⁷⁴ The 'associated persons' issue is also relevant (under section 127(b)) for the purpose of determining what activities are carried on by way of business by any one person so far as that question arises in connection with paragraph 13(2) of Schedule 8. For an example of a previous consideration of these issues, see the Monopolies and Mergers Commission's decision in [Gillette/Stora/Swedish Match](#), in particular paragraphs 7.48 & 7.59.

⁷⁵ GET's initial submission, paragraph 7.18.

⁷⁶ See, for example, the OFT's decisions in [CineWorld/Hollywood Green Leisure Park](#) and [HMV/Zavvi](#).

⁷⁷ GET's initial submission, paragraph 7.18.

⁷⁸ CC2, paragraphs 3.2.18 & 3.2.19.

- 4.33 GET argued that:
- (a) Its negotiations with the SCOP were ‘independent’ of its negotiations with the liquidator.⁷⁹
 - (b) The SCOP was independent from GET⁸⁰ and their relationship was at arm’s length.
 - (c) Its bid for the ex-SeaFrance assets was made on its own and in its own name.⁸¹
 - (d) The SCOP was solicited by other bidders (though DFDS did not pursue contacts intensively).⁸²
- 4.34 The SCOP argued that it and GET were not ‘associated persons’ because:⁸³
- (a) they were not related nor did they sign any agreement to act jointly to make an acquisition;
 - (b) they had no intention, or motive, to coordinate their behaviour; and
 - (c) they came together only by virtue of the bareboat charters and service contract, which were conditional on GET succeeding in its acquisition.
- 4.35 We have examined a range of evidence relating to the interactions between GET and the SCOP leading up to, during and after the transaction took place. In our view, on balance there is a significant body of evidence which taken together indicates that the SCOP acted together with GET in preparing GET’s bid, and its involvement was instrumental in securing the SeaFrance assets for GET. In particular:
- (a) GET and the SCOP were in advanced discussions over the SeaFrance project from (at least) January 2012.⁸⁴
 - (b) From an early stage, GET and the SCOP presented a united front in public and to third parties. GET made several statements to the press referring to its proposed relationship with the SCOP and the importance of that relationship to its bid.⁸⁵ Mr Giguët of the SCOP told us that when he first met the President of the Calais Chamber of Commerce (in January/February 2012) he described himself as follows: ‘I represent the SCOP but also have the agreement of Eurotunnel’. Mr Giguët also told us that GET invited him to join them for the meeting at the Court.⁸⁶
 - (c) Mr Giguët was paid by GET during the period April to June 2012, acting as GET’s project director, while at the same time acting (in a voluntary and unpaid position)

⁷⁹ GET’s initial submission, paragraph 7.20.

⁸⁰ GET’s initial submission, paragraph 7.18.

⁸¹ GET’s response to the provisional findings, paragraph 4.6.

⁸² GET’s response to the provisional findings, paragraph 4.6.

⁸³ SCOP’s response to the provisional findings, paragraphs 2.15–2.21.

⁸⁴ GET told us that further documentary evidence did not exist, but confirmed that there was a process of unofficial discussions with the SCOP. The SCOP also confirmed that it was working with GET from January/February 2012. Similar considerations led the CC to apply earlier statutory provisions on ‘associated persons’ in *Gillette/Stora/Swedish Match*, paragraphs 7.48 & 7.59.

⁸⁵ See, for example: www.connexionfrance.com/Eurotunnel-plans-buy-SeaFrance-ferries-13415-view-article.html and www.latribune.fr/entreprises-finance/services/transport-logistique/20120301trib000685796/eurotunnel-devoile-son-projet-maritime-avec-seafrance.html.

⁸⁶ The SCOP clarified that Mr Giguët was there to present the proposed project by which GET would work with the SCOP to operate the Dover–Calais route.

as member of the directoire for the SCOP (a position he had held since December 2011).

- (d) GET's own internal considerations of the proposed acquisition were informed by the SCOP's business plan:
- (i) in January 2012 the SCOP's business plan was presented to the GET board; and
 - (ii) the document 'Groupe Eurotunnel Newlink Project—Proposed Structure' dated 26 April 2012 states: 'The financial simulations presented are based on the 'BP SCOP' (e.g. the business plan prepared by the former workers of SeaFrance), which has been reviewed only lightly by Eurotunnel to date'.⁸⁷
- (e) In its offer to the liquidator, GET made repeated reference to a partnership with the SCOP, [✂]
- (f) The Court order (the Order)⁸⁸ approving GET as the acquirer of the SeaFrance assets makes reference to the arrangement with the SCOP and in particular states:

However, Eurotunnel said in its bid that the ships would remain under the French flag and that 535 former SeaFrance employees would be hired by an operating company under the project. The ships would be purchased by a special purpose company and leased to an operating company supported by a previously existing SCOP ... without any performance guarantee being provided. While job creation is not a criterion established for the sole realization of assets in liquidation, it remains a significant factor in the subjective assessment.

- (g) Completion of the purchase of the liquidation assets took place on 2 July 2012. On the same date, MFL and the SCOP signed a Memorandum of Understanding.

- 4.36 We note GET's argument that the SCOP was also solicited by other bidders, but understand from the SCOP that such discussions were very limited (Mr Giguet told us that 'nobody was ready to work with something so strange like a SCOP'). In any event, it is not clear that such discussions would undermine the fact that GET and the SCOP acted together in preparing GET's bid.
- 4.37 GET and the SCOP have continued to act together to secure GET's control over the liquidation assets and the MFL enterprise, by entering into the bareboat charters and service contract, by operating the MFL service in cooperation, and by virtue of GET's financial support for MFL (see paragraph 4.44).
- 4.38 We therefore consider that the SCOP actively assisted in preparing GET's bid, that GET and the Court both considered that the SCOP relationship was an important factor in making GET's bid the most attractive, and that the two continue to act together to secure GET's control over the liquidation assets and MFL enterprise. As a result, we have concluded that GET and the SCOP acted together in order to secure control by GET over the liquidation assets, and continue to do so, and are therefore associated persons within the meaning of section 127 of the Act.

⁸⁷ GET also told us that 'GET and the SCOP worked together on the business plan as presented in the Project Newlink document'.

⁸⁸ Dated 11 June 2012.

- 4.39 As a result of our finding, we are required to treat GET and the SCOP as one person for the purpose of deciding whether two enterprises have been brought under common ownership or common control. Accordingly, the ex-SeaFrance employees recruited by the SCOP are part of the bundle of assets we must consider when applying the ‘enterprise’ test.
- 4.40 We note the SCOP’s argument that section 127 is not relevant for the purposes of deciding whether the entities concerned have acquired an enterprise. We, however, disagree with this interpretation, particularly in light of the clear wording of section 127(1)(a), which provides that associated persons shall be treated as one person ‘for the purpose of deciding under section 26 whether any two enterprises have been brought under common ownership or common control’.

Relevance of the SCOP’s employees: ‘material influence’

- 4.41 The important relationship between GET and the SCOP also raises the question of whether GET has ‘material influence’ over the SCOP, and therefore over its employees.
- 4.42 The SCOP argues that GET cannot exercise material influence over the SCOP, because GET has no equity interest in, nor ability to participate in strategic decisions of, the SCOP, and because its undertakings⁸⁹ to the French Competition Authority (FCA) limit GET’s ability to negotiate contracts for the MFL service.⁹⁰
- 4.43 However, as envisaged throughout the bidding process by GET, the SCOP and the Court, when GET acquired the liquidation assets, at the same time GET (via MFL) also entered into contractual arrangements with the SCOP under which the Vessels are chartered to the SCOP under a bareboat charter, and the SCOP operates the ferry service under a service contract, using staff employed by it.
- 4.44 Under these arrangements, the SCOP is economically highly dependent on its relationship with GET (and/or GET’s subsidiary MFL). In particular:
- (a) [REDACTED]
- (b) GET told us in early January 2013 that in order to ensure the continued survival of the SCOP, MFL was providing working capital in the form of paying in advance and not claiming contractual price reductions, though it has since started to recoup the value of these price reductions. The SCOP confirmed that MFL had been paying for crossings in advance.
- (c) The SCOP has no viable source of income other than GET. The contract between the SCOP and GET requires the SCOP to undertake its short-sea crossings [REDACTED]. GET disagreed with this interpretation of the contract. It stated that a more appropriate interpretation of the relevant clause was that ‘in consideration for MFL’s undertakings, the SCOP will perform the services and will not sell them to the market in its own name’. In this regard, we note first that GET does not translate the ‘et pour son compte’ and second that, taken together, clauses 7.1 and 7.2 indicate that the SCOP is effectively⁹¹ required to act

⁸⁹ www.autoritedelaconurrence.fr/pdf/engag/12DCC154engagements_version_publication.pdf.

⁹⁰ SCOP’s response to the provisional findings, paragraphs 2.10–2.14.

⁹¹ Although the contract does not prohibit the SCOP from purchasing vessels to provide the services, the evidence on the costs of appropriate vessels (see Appendix H, paragraphs 10–12) and the fact that the SCOP told us that it could not raise finance and that this would be the case for several years (see paragraph 4.44(d)) means that this is not a credible option and that the provisions of the contract effectively operate as an outright prohibition on operating services on the short sea for anyone other than MFL.

exclusively for MFL, at least on the cross-Channel route, as, in addition to the restrictions referred to above, the SCOP may not enter into any bareboat charters with any other vessel owner on the cross-Channel route without the prior agreement of MFL.

(d) Further, it is clear that the SCOP is not in a position to establish its own service. The document 'Groupe Eurotunnel NewLink Project—Proposed Structure' rejected this option because the SCOP would not have been able to raise the necessary finance. The SCOP confirmed that this remained the case and it was likely to continue to do so for three years.

(e) Finally, Jean Michel Giguet was recruited by GET, and is both the CEO of the SCOP and a manager of MFL.

4.45 Taking into account all of the above factors, we have therefore concluded that, in the light of the SCOP's economic reliance on its arrangements with GET and GET's subsidiary MFL, GET (and/or MFL) has a degree of influence and/or control over the SCOP, and therefore the SCOP's employees, which is 'material' in the context of its jurisdictional assessment. We consider that, taking into account all the circumstances of this case, it is appropriate to treat this material influence as amounting to control within the meaning of section 26 of the Act.

4.46 As a result of the transaction, the SCOP workforce, along with the liquidation assets, have been brought under 'common control' with GET's existing business. This alternative reasoning therefore leads us to the same conclusion as reached above in our consideration of the 'associated persons' analysis, ie that the SCOP employees are part of the bundle of assets to which we must apply the 'enterprise' test.

4.47 Overall, we consider that the ex-SeaFrance staff employed by the SCOP fall to be included within the CC's assessment of whether two 'enterprises' have ceased to be distinct, either because GET and the SCOP acted together to secure control of the liquidation assets and are therefore associated persons, or because GET has material influence over the SCOP.

Other assets acquired

4.48 As part of the acquisition, GET acquired a database of SeaFrance's freight and passenger customers, as well as its trade and domain names.

4.49 In this regard, we note the decision recorded [X].⁹² This indicates that some positive value was ascribed internally to the assets other than the Vessels. As with any proposed component of the proposed enterprise, it is necessary to consider the importance of these assets in the context of the particular business concerned. GET told us that:

(a) passenger customers showed very little brand loyalty, and travelled relatively infrequently; and

(b) freight customers typically multi-sourced, and were readily identifiable by monitoring freight movements harbour-side.⁹³

⁹² In French: 'ainsi que les actifs nécessaires à l'exploitation' of the vessels.

⁹³ GET's initial submission, paragraph 7.14.2.

- 4.50 This suggests that we should give relatively limited weight to the presence or absence—or quality—of brand⁹⁴ and customer lists in assessing whether GET acquired an ‘enterprise’.
- 4.51 GET argued that the brand had negative value, citing SeaFrance’s history of strikes, and the nine-month interruption in service covering some of the busiest times of the year. It stated: ‘The period whilst SeaFrance was in liquidation (and no commercial activities were undertaken) also covered the busiest travel time of the year for freight customers (i.e. December 2011) and for passenger customers (i.e. Christmas 2011, and the Half Term, Easter and Summer periods in 2012).’ It also stated that SeaFrance ceased operating ‘immediately, abruptly and overnight’, and argued that ‘due to previous poor management, the company’s reputation for service quality and reliability had been poor’.⁹⁵
- 4.52 It is also noteworthy that GET rebranded the service immediately, selecting a new and unknown name over ‘SeaFrance’.⁹⁶
- 4.53 Nevertheless, GET’s offer to the French liquidator included €1 million attributable to the trade and domain names of SeaFrance⁹⁷ and the www.seafrance.com website is still in use, directing visitors to MyFerryLink. GET has argued that use of the website ‘does not ... indicate that there was material goodwill in the SeaFrance brand’.⁹⁸ However, it does appear to suggest that there is some residual goodwill value, or MFL would have withdrawn the web page. In our view, these factors indicate that GET acquired goodwill with some, if limited, positive value.⁹⁹
- 4.54 In relation to customer lists, GET provided¹⁰⁰ details of a marketing exercise carried out by MFL, [§]. It also pointed out that its payment for IT systems, software and data including customer lists was €[§] million, less than [§] per cent of the acquisition value, and in any event the pre-acquisition valuation was based on limited information and may not have been accurate.
- 4.55 We consider that it is difficult to judge objectively the value or quality of the customer lists acquired by GET, but given the other assets acquired by GET, consider it unnecessary to reach a conclusion on this issue.
- 4.56 On balance, we consider that the fact that some positive value was ascribed to the goodwill is a factor pointing towards classifying the acquired assets as an enterprise.

Assets not acquired by GET

Customer contracts

- 4.57 All SeaFrance’s customer contracts terminated when it went into liquidation, and accordingly no such contracts were acquired by GET as part of the transaction.

⁹⁴ This is further supported by [GET’s initial submission](#), 21 November 2012, paragraph 10.31:

Moreover, any possible additional advertising expenses inherent in the arrival of another player are limited. In fact, MFL’s planned marketing and business expenses for the introduction of its new maritime transport operations should not exceed [§]% of its turnover in 2013. For example, the advertising intended for passenger transport is limited to promotional advertising highlighting a fare offer and the time limits framing this offer, and advertising generally occurs via digital media, which is easier and cheaper than advertising via TV or newspapers.

⁹⁵ [GET’s initial submission](#), 19 November 2012, paragraph 5.9.

⁹⁶ GET also told us that as part of preparing its 2012 audited accounts, it would depreciate the value of the SeaFrance trademarks it acquired to €[§].

⁹⁷ Groupe Eurotunnel SA: ‘Offer to buy the assets of SeaFrance’, 4 May 2012, p16.

⁹⁸ [GET’s initial submission](#), 19 November 2012, paragraph 7.17.

⁹⁹ [§]

¹⁰⁰ [GET’s initial submission](#), paragraph 7.14.3.

- 4.58 In this context it is important to consider the nature of customer contracts in this sector, their importance to the running of the MFL business and what would be required in order to negotiate replacement contracts.

Freight traffic

- 4.59 In relation to freight traffic, GET told us that customers typically entered into framework purchase arrangements on an annual basis, with negotiations usually taking place in winter for services in the following calendar year. It appears that, in principle, such contracts may be important for the successful running of a ferry business: GET told us that about 70 per cent of the turnover generated by SeaFrance from the acquired vessels had been attributable to freight customers.¹⁰¹
- 4.60 Typically, freight contracts are not exclusive, and it is common for customers to have contracts with several providers. The arrangements may, however, specify price and credit terms on the basis of certain volume levels. GET submitted that as a result of volume commitments and rebates in these contracts, MFL faced material difficulties in persuading freight customers to use the MFL service prior to the winter 2012 negotiations (for 2013 services).¹⁰²
- 4.61 GET has not suggested that it faced any particular difficulties securing contracts for the 2013 period.¹⁰³
- 4.62 This suggests that, while GET did not receive the benefit of any existing freight contracts on acquisition, the opportunity to negotiate contracts arose relatively quickly (within five months of commencing operations), and MFL was able to compete for those contracts on a normal commercial basis.

Passengers

- 4.63 GET acknowledged that 'passenger customers tend to use ferry services for less than one return trip per year and do not enter into contracts with ferry companies'. Accordingly passenger customer contracts do not appear to be of importance to the running of the MFL business, and their absence is likely to be of very limited relevance to the question of whether the acquired assets constitute an enterprise within the meaning of the Act.

Supplier contracts

- 4.64 GET has described a number of supplies required to operate the MFL service, contracts for which were not included in the acquired assets, namely fuel supply, insurance, harbour slots and port access rights and charts. It also refers to the lack of stock, office space or property from which MFL could carry on business and corporate support services.¹⁰⁴
- 4.65 We note that these supplies were secured in time for the commencement of MFL's operations one and a half months after the date of acquisition.¹⁰⁵ We have seen no

¹⁰¹ GET's initial submission, 19 November 2012, paragraph 7.23.

¹⁰² GET's initial submission, paragraph 10.8. In its response to the provisional findings, the SCOP similarly noted that freight customers were slow to book with MFL, which it attributed to them waiting to see whether MFL would be able to offer sufficient frequency of service, and whether MFL was committed to the route (paragraphs 2.5 & 2.6).

¹⁰³ GET referred to possible advantages enjoyed by ferry operators with more extensive route services.

¹⁰⁴ GET's initial submission, paragraph 7.11.

¹⁰⁵ The precise period is 2 July 2012 to 20 August 2012. Indeed in relation to insurance the CC understands that policies were required to be, and were, in place within 72 hours of the acquisition. Some negotiation with potential suppliers will have

evidence to suggest that there is a shortage of any of these supplies on the market. GET did, however, submit that in securing contracts it took time to dissociate itself from the tarnished reputation which had attached itself to the Vessels. Further, as noted above, it is not necessary that the buyer acquire everything required to operate the business concerned.

- 4.66 In particular, we have given consideration to harbour slots, which appear by their nature to be of limited supply. It is nevertheless clear that in this instance GET was able to obtain the slots in good time. Indeed GET has emphasized that it faced no difficulties securing slots:
- (a) 'MFL experienced no difficulties in obtaining slots at either Dover or Calais, which are the busiest ports on the short sea. This was achieved in a short period of time as a new operator following discussions after completion of the acquisition on 2 July 2012.'
 - (b) 'GET does not consider that harbour slots are a material barrier [to entry]; it acquired from scratch new slots within a matter of weeks at Dover and Calais.'¹⁰⁶
- 4.67 On balance, we consider that the absence of customer and supplier contracts is of some, but limited, relevance to the 'enterprise' assessment.

Conclusions

- 4.68 In total, the assets purchased and staffing arrangements put in place by GET to be taken into account for this assessment comprise:
- (a) vessels which were of suitable design and of sufficient number to operate a passenger and freight transport business on the short-sea route; these vessels were in a condition from which they were able to be brought into operation within two months of the acquisition taking place;
 - (b) those former SeaFrance employees who now comprise [X] of the staff engaged in running the MFL service;
 - (c) brand and goodwill carrying some, but limited, positive value; and
 - (d) customer lists, though given the difficulty in assessing their value, we have not attached any weight to these in our assessment.
- 4.69 Together GET and the SCOP brought these assets under common control for the purposes of section 26 of the Act.
- 4.70 On the other hand, GET did not acquire control of ex-SeaFrance customer and supplier contracts. For the reasons given above, we have concluded that this absence is of some, but limited, relevance to the 'enterprise' assessment.
- 4.71 On balance, and taking all of the above factors into account including the length of time between the end of SeaFrance's operations and the start of MFL's operations, we have concluded that, in the context of the particular industry concerned, the components referred to in paragraph 4.68 above do meet the statutory definition of an 'enterprise', and constitute the activities, or part of the activities, of a business.

occurred prior to the date of the acquisition, but the short period between acquisition and commencement of operations nevertheless suggests that these supplies are readily obtainable.

¹⁰⁶ GET's initial submission, 21 November 2012, paragraph 11.33.

Ceasing to be distinct

- 4.72 We are satisfied that the assets acquired from the liquidator are under GET's control. As described above, we are also satisfied that the ex-SeaFrance staff employed by the SCOP have also ceased to be distinct from GET's other businesses.

Share of supply test

- 4.73 The share of supply test applies where, as a result of enterprises ceasing to be distinct, at least one-quarter of goods or services of any description which are supplied in the UK, or in a substantial part of the UK, are supplied by or to one and the same person.¹⁰⁷

- 4.74 As noted in the CC's Merger Assessment Guidelines:¹⁰⁸

The Act expressly allows the Authorities a wide discretion in describing the relevant goods or services, requiring only that, in relation to that description, the parties' share of supply or acquisition is 25 per cent or more. The share of supply is different from a market share ..., and goods and services to which the share of supply test is applied need not amount to the market defined for the economic analysis. In addition, the Authorities may have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met—the value, cost, price, quantity, capacity, number of workers employed or any other criterion may be used to determine whether the 25 per cent threshold is reached.

- 4.75 We consider that an appropriate frame of reference for the application of the share of supply test in accordance with the guidance above is the supply of passenger and freight transport services across the short sea. GET submitted to the OFT that its share of supply on this basis exceeded 25 per cent during the 2011 calendar year.¹⁰⁹ Because GET's pre-existing share exceeded 25 per cent, any increment in share of supply, however small, will result in the share of supply test being satisfied.

- 4.76 GET argued that the relevant increment in share of supply related to the period since MFL started operating commercially. In the period from 20 August 2012 to [X], which if annualized would be equivalent to a share of supply of about 1 per cent on the short-sea route for either freight or passenger transport.¹¹⁰ Therefore, we conclude that the share of supply test is satisfied.

Turnover test

- 4.77 Given our conclusion on the share of supply test above, it has not been necessary to reach a conclusion on whether the turnover test under section 28 of the Act is satisfied.

Statutory time limit

- 4.78 Section 24 of the Act stipulates that a reference must be made to the CC within four months of the enterprises ceasing to be distinct.

¹⁰⁷ Section 23(3) & (4) of the Act.

¹⁰⁸ CC2, paragraph 3.3.5.

¹⁰⁹ OFT reference decision, paragraph 32.

¹¹⁰ GET's initial submission, 19 November 2012, paragraph 5.5.

- 4.79 The transaction was completed on 2 July 2012. On the same date, GET and the SCOP signed a Memorandum of Understanding. The reference was made to the CC on 29 October 2012. The statutory time limit has therefore been observed.

Conclusion

- 4.80 We therefore conclude that the jurisdiction test under the Act is satisfied and a relevant merger situation has been created.

5. Counterfactual

- 5.1 Before we turn to the effects of the merger, we assess what we expect would have been the competitive situation in the absence of the merger. The latter is called the 'counterfactual'.¹¹¹ It provides a benchmark against which the expected effects of the merger can be assessed.

- 5.2 The CC's Merger Assessment Guidelines¹¹² state the following:

The application of the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'. The counterfactual is an analytical tool used in assessing the question of whether the merger gives rise to an SLC. While based on evidence obtained by the Authorities in their investigations, it is generally not comparable in detail to their analysis of the competitive effects of the merger.

- 5.3 In this section, we first set out GET's views on the counterfactual. We then discuss our assessment of the counterfactual before reaching our conclusion.

GET's views on the counterfactual

- 5.4 GET told us that in its view:

- (a) The counterfactual could not be the pre-liquidation operations of SeaFrance given the difference in scale between those operations and the assets purchased by GET and because those assets were not operational for many months prior to the acquisition.
- (b) The counterfactual should not be assumed to be the purchase of all the Vessels and their use on the short-sea route by another purchaser because the Court had deemed GET's bid to be the only acceptable and compliant tender for the Vessels at a price above the Vessels' liquidation value.
- (c) It is not possible to decide precisely what would have happened if GET had not purchased the Vessels as there are too many variables relating to the mode of sale, the possible buyers and the routes on which the Vessels would have been deployed.¹¹³
- (d) If GET had not been involved in the bid process, the most likely outcome was that the Vessels would have been sold in a public auction in which additional bidders

¹¹¹ CC2, paragraph 4.3.1.

¹¹² CC2, paragraph 4.3.1.

¹¹³ GET's response to PFs, paragraph 5.3.

would have participated and might have resulted in the Vessels being sold individually or as a group for use on the short-sea route or for short-sea crossings in other geographical locations or adapted for use on longer crossings.

(e) The relevant counterfactual was the situation that existed at the time immediately prior to GET's acquisition of the Vessels when DFDS was operating on the Dover–Calais route with two vessels.

5.5 GET submitted that any other counterfactual was too speculative and hypothetical to be consistent with the CC's guidelines.¹¹⁴ GET's contention was that each factor relevant to the choice of the counterfactual needed to be satisfied simultaneously for the CC to satisfy itself as to the appropriate counterfactual on the balance of probabilities.

5.6 GET also submitted that SeaFrance satisfied the exiting firm test in the CC's Merger Assessment Guidelines¹¹⁵ for the following reasons:

(a) SeaFrance had gone into liquidation and had ceased operating in November 2011.

(b) GET considered that there were no alternative purchasers for the assets above their liquidation value (which GET defined as being the amount that GET paid).

(c) SeaFrance's sales were redistributed to other competitors (and therefore there were no sales or customers transferring with the assets to GET from which MFL benefited when it began operations).

Our approach to the counterfactual assessment

5.7 We had regard to the CC's Merger Assessment Guidelines¹¹⁶ on the approach to the counterfactual:

To help make this judgement on the likely future situation in the absence of the merger, the CC may examine several possible scenarios, one of which may be the continuation of the pre-merger situation, but ultimately only the most likely scenario will be selected as the counterfactual. When it considers that the choice between two or more scenarios will make a material difference to its assessment, the CC will carry out additional detailed investigation before reaching a conclusion on the counterfactual. However, the CC will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight. Given that the counterfactual incorporates only those elements of scenarios that are foreseeable it will not in general be necessary for the CC to make finely balanced judgements about what is and what is not the counterfactual.

5.8 The Guidelines also state:

¹¹⁴ GET's response to PFs, paragraph 5.24.

¹¹⁵ CC2, paragraphs 4.3.8–4.3.18.

¹¹⁶ *ibid*, paragraph 4.3.6.

If the CC considers that there were alternative purchasers, it will try to identify who the alternative purchasers might have been and take this into account when determining the counterfactual. The analysis of the impact on competition of the merger (ie whether the effect of the merger under review would be substantially less competitive than the effect of an acquisition by an alternative purchaser) would be part of the SLC analysis.¹¹⁷

- 5.9 Concerning GET's approach to the counterfactual described in paragraph 5.5, we noted that the Competition Appeal Tribunal has confirmed that the counterfactual is an analytical tool rather than a statutory test and that it is not necessary for the CC to isolate each step of the analytical process and apply the balance of probability test separately at each stage.¹¹⁸
- 5.10 We also noted that the approach advocated by GET appeared to assume that in the counterfactual, every element of the actual sales process would remain the same, subject only to GET not having acquired the SeaFrance assets. We considered that this approach attempts to give a spurious degree of accuracy to the counterfactual assessment. The key elements of the counterfactual in this case were for the CC to identify whether there would have been alternative purchasers for these assets and if so, to identify who the most likely potential purchaser would have been and to decide whether that purchaser would have been likely to have used the assets on the short sea.
- 5.11 We took the following approach to identify the appropriate counterfactual:
- (a) We ruled out the pre-merger situation, ie the continuation of SeaFrance as an independent operator, as a realistic counterfactual given that the administration and receivership process had not resulted in the sale of the business as a going concern and the Court ordered the liquidation of SeaFrance on 16 November 2011 and terminated the business continuity provision on 9 January 2012.
 - (b) Given that the pre-merger situation is not an appropriate counterfactual, we then looked to see if, absent the merger, there were likely to have been other buyers whose acquisition of the SeaFrance business or its assets would have produced a better outcome for competition than the merger under consideration.¹¹⁹ In doing so, we considered how events were likely to have unfolded had GET not purchased the SeaFrance assets.
 - (c) We assumed that the bidding behaviour of the actual or prospective bidders (other than GET) would not have been materially different if GET had not taken part in the bid process on the basis that: (i) the sealed bid process gave parties limited information about the identity of other bidding parties and the level of their bids (although we noted that GET's interest had been disclosed in the press¹²⁰); and (ii) DFDS told us that it did not believe that GET would have been allowed to acquire the Vessels on competition grounds, and we think it is reasonable to assume that other actual or prospective bidders would have taken the same view.
 - (d) We noted that the FCA in its evaluation of the merger¹²¹ under French competition rules had considered that any situation that would have resulted from a

¹¹⁷ CC2, [paragraph 4.3.11](#)

¹¹⁸ CAT judgment in *British Sky Broadcasting Group plc v Competition Commission and others*, [2008] CAT 25, paragraphs 54 & 69.

¹¹⁹ *ibid*, [paragraph 4.3.16](#).

¹²⁰ For example, Lloyd's List article on 9 January 2012.

¹²¹ www.autoritedelaconurrence.fr/pdf/avis/12DCC154decision_version_publication.pdf.

different decision by the Court on the liquidation of the assets or the sale of the assets to another operator was too hypothetical to be considered as the counterfactual situation. The FCA therefore considered that the appropriate counterfactual was either the situation that existed prior to the liquidation of SeaFrance in November 2011 or the situation that existed prior to the launch of the MFL ferry services in August 2012 and that its conclusions would be the same in both cases. Our approach to the counterfactual was different from that of the FCA because we formed a view that there were other potential purchasers, and in line with our guidelines¹²² we then considered who would have been the most likely alternative purchaser in order to reach a view on the most likely counterfactual scenario. As part of our process, we considered the two counterfactual scenarios that were adopted by the FCA but saw no reason not to follow our guidelines in this case.

- 5.12 We recognized that there is inherent uncertainty over how events would have been likely to have unfolded had GET not acquired the SeaFrance assets; this is by its very nature a hypothetical question. To assist us in carrying out our assessment, we sought the views of the Court regarding the liquidation process. However, the Court considered that it was not permitted to respond to our questions on this issue. Nevertheless, we considered it appropriate to take into account the duty of the Court to achieve the best outcome for the creditors of SeaFrance as we considered that this would have been likely to have remained the Court's objective.
- 5.13 We noted that the sealed bid process had revealed that there were other bidders who were interested in purchasing the liquidated assets. As set out in paragraphs 3.21 and 3.22, DFDS/LD made an initial bid of €50 million for the *Berlioz* and the *Rodin*, or €30 million if it could only acquire the *Rodin*, and Stena RoRo made an initial bid of €30 million for the *Rodin*, and DFDS/LD submitted a revised bid of €[redacted] million for the *Berlioz*, the *Rodin* and the *Nord Pas de Calais* which was received after the deadline for submission of bids. The Court minutes also record that Transeuropa had expressed an interest in the *Nord Pas de Calais*, but we noted that Transeuropa did not submit a bid and in any event went into administration in April 2013.
- 5.14 We considered that there were two approaches that the Court would have been likely to have followed if GET had not acquired the Vessels: to hold a public auction or to take account only of the initial bids. Whilst we did not consider further the possibility that the Court might have accepted DFDS's revised bid given that the Court minutes report that this bid was deemed inadmissible, we regard this bid as additional evidence of DFDS's active interest in acquiring the Vessels. In considering these two potential approaches, we are principally concerned with assessing the possible outcomes rather than the details of each approach.

Approach 1: the Court abandoned the sealed bid process and held a public auction

- 5.15 We first considered an approach whereby the Vessels were sold by public auction. We considered that this was likely given that the Court minutes record that the liquidator had requested that if 'an amicable transfer in favour of Groupe Eurotunnel' could not be achieved, the Vessels should be sold by public auction.
- 5.16 DFDS told us that DFDS/LD would have participated in an auction process.¹²³ We consider this to be likely since DFDS/LD had not only bid for the Vessels in the liqui-

¹²² *Merger Remedies*, CC8, November 2008, [paragraph 4.3.6](#).

¹²³ [DFDS hearing summary](#), paragraph 34.

ation process but also previously for SeaFrance as a continuing business and had submitted a revised bid after the deadline set by the Court for the initial sealed bids.

- 5.17 DFDS told us that it had bid for the *Berlioz* and the *Rodin* because there were not many vessels suitable for use on the Dover–Dunkirk and Dover–Calais routes available for purchase, and the sale of the SeaFrance assets offered a good opportunity to purchase vessels that met the requirements of these routes in terms of speed, operational costs and reliability. DFDS told us that it had entered the Dover–Calais route to strengthen its position on the short-sea crossing because, compared with the Dover–Dunkirk route, Dover–Calais had higher traffic volumes, it was easier to achieve higher utilization levels, operating costs were lower and it supported significantly higher frequency of crossings. We also noted that at the time of its bid for the Vessels, DFDS/LD had already started operations on the Dover–Calais route with the *Norman Spirit* chartered from LD Lines and the *Barfleur* chartered from Brittany Ferries. DFDS told us that if it had acquired the *Berlioz* and the *Rodin*, its intention was to use them on either the Dover–Calais route or the Dover–Dunkirk route and that it was likely that the *Norman Spirit* would have been redeployed on to a non-short-sea route and the *Barfleur* would have been returned to Brittany Ferries. The acquisition of the *Berlioz* and the *Rodin* would have given DFDS/LD five interchangeable vessels which it could have used on either route and two or three would have been used on each route depending on demand. We also note that when DFDS sought clearance for its bid from the FCA, it told the FCA that the vessels would be used on the short sea.¹²⁴
- 5.18 We also considered that Stena RoRo might have bid for the *Rodin* in an auction given that it had submitted a sealed bid for the *Rodin* in the liquidation process. Stena RoRo told us that it did not have any plans to operate the *Rodin* itself or to enter the short-sea market, and had Stena RoRo’s bid for the *Rodin* been successful, it would have either sold the *Rodin* on the open market or sought to charter it to another ferry operator around the world. We considered that Stena RoRo would have had the same strategy if it had acquired the *Rodin* in an auction. We further considered that if Stena RoRo had acquired the *Rodin* and chartered it, the operator most likely to charter it would have been DFDS/LD given the *Rodin*’s suitability for use on the short sea.
- 5.19 We consider it unlikely that a public auction would have attracted any new bidders who had not already come forward in the liquidation process for the following reasons:
- (a) Other than the bids by DFDS/LD and the SCOP, there were no credible bids for SeaFrance during the receivership.¹²⁵
 - (b) The receivership and subsequent liquidation of SeaFrance was public knowledge, and had been widely reported, so potential bidders would have known of the opportunity to acquire the assets.¹²⁶
 - (c) A shipbroker had been appointed to assist with the liquidation and made contact with over 40 potential bidders.
 - (d) The sale process had been publicized on the Internet and Lloyd’s List.

¹²⁴ FCA decision document no. 11-DCC-189.

¹²⁵ We understand that a company called Being Bang also submitted a bid but it did not have financing in place.

¹²⁶ A London-based shipbroking firm confirmed to us that the Vessels had been widely marketed by the shipbroking firm appointed by the Court and it believed that all prospective buyers would have been aware of the sales process.

- (e) There had been a reasonable period of time for bids to be submitted in the liquidation process and we see no reason to believe that other bidders would have come forward in a public auction.
- (f) The SCOP told us that it thought it was unlikely that there would be any interest from ferry operators other than DFDS in acquiring the *Berlioz* and the *Rodin* because of the limited number of short routes that required day ferries (ie without cabins) and the cost of the modifications that would be required for them to operate on routes other than Dover–Calais or Dover–Dunkirk.

5.20 In conclusion, we consider that had the Court taken this approach, DFDS/LD would have been the most likely purchaser of the Vessels given that it had a strong commercial reason to acquire the Vessels and its revised bid demonstrated its willingness to offer more than any other bidder who had shown interest in acquiring them in the liquidation process (other than GET). We also considered that DFDS/LD would have been likely to have operated the *Berlioz* and the *Rodin* on the Dover–Calais route in conjunction with the three vessels it operated on the Dover–Dunkirk route. The same result is likely to have occurred if Stena RoRo had acquired the *Rodin* and chartered it to DFDS/LD and DFDS/LD had acquired the *Berlioz*. If Stena RoRo had acquired the *Rodin* and deployed it outside the short sea, then it is likely that DFDS/LD would have acquired the *Berlioz* and operated it on the Dover–Calais route in conjunction with one of its existing vessels.

Approach 2: the Court considered only the initial sealed bids

- 5.21 The second approach we considered was one in which the Court took into account only the initial sealed bids placed before the deadline.
- 5.22 Considering only these initial bids, it appears that a combination of DFDS/LD's bid for the *Berlioz* of €30 million and Stena RoRo's bid for the *Rodin* of €30 million would have produced the highest gross proceeds of €60 million. However, we considered that the Court might have had a concern with the bid by Stena RoRo. This is because, as discussed in paragraph 5.18, Stena RoRo did not have any plans to operate the *Rodin* itself and did not have any plans to enter the short-sea market, and had its bid been successful, it would have either sold the *Rodin* on the open market or sought to charter it to another ferry operator around the world.¹²⁷ The Court minutes recorded that the shipbroker managing the sale described Stena RoRo's bid as speculative and it was apparent that the Court wanted to discourage a purchaser acquiring the Vessels for speculative purposes as the Order authorizing the sale to GET stated that '... in order to avoid any speculative transaction to the detriment of creditors, [the Vessels] shall be declared inalienable for a period of five years ...'.
- 5.23 We considered that if the Court had been willing to accept the bid from Stena RoRo, it would have been likely to have placed a similar restriction regarding the transfer of the *Rodin* on Stena RoRo as it placed on GET,¹²⁸ and the likely outcome would have been either that Stena RoRo would have withdrawn from the transaction or that it would have proceeded with the acquisition of the *Rodin* and would have chartered it to another operator. In the latter case, we considered that the operator most likely to have chartered the *Rodin* would have been DFDS/LD given the *Rodin*'s suitability for the short sea and DFDS/LD's interest in acquiring the use of this vessel.

¹²⁷ [Stena Line's submission](#) to CC, 29 November 2012.

¹²⁸ This restriction is discussed in detail in Appendix J.

- 5.24 We considered that DFDS/LD's bid of €50 million for the *Berlioz* and the *Rodin* would not have caused the same concerns for the Court. DFDS told us that it planned to operate the vessels itself rather than sell or charter them to another operator and that it would have been willing to offer the Court an undertaking not to transfer the vessels to another operator.¹²⁹ DFDS/LD's bid also had some prospect of meeting the Court's criteria for preserving opportunities for employment, because DFDS/LD planned to use the vessels on the short sea (see paragraph 5.17). In addition, we note that DFDS/LD planned to operate the vessels under the French flag¹³⁰ and therefore any tax liability that might have arisen if the *Berlioz* had been reflagged would not have been triggered. (This tax issue is discussed in Appendix J.)
- 5.25 In our view, had DFDS/LD acquired both vessels, it is likely that it would have operated them both on the Dover–Calais route. As discussed in paragraph 5.20, the same result is likely to have occurred if DFDS/LD had acquired the *Berlioz* and Stena RoRo had acquired the *Rodin* and chartered it to DFDS/LD. Had Stena RoRo acquired the *Rodin* and deployed it outside the short sea, then it is likely that DFDS/LD would have acquired the *Berlioz* and operated it on the Dover–Calais route, in combination with one of its existing vessels.
- 5.26 Therefore, we considered that if the Court had taken this approach, the most likely outcome is that DFDS/LD would have operated two ships on the Dover–Calais route, being the *Berlioz* and either the *Rodin* or one of its existing chartered vessels.

Conclusions

- 5.27 Having considered two potential approaches that might have been available to the Court, and our views on these approaches set out in paragraphs 5.20 and 5.26, our conclusions are that under both approaches DFDS/LD would have been likely to have acquired the *Berlioz* and may have also acquired (or chartered) the *Rodin*, and that the appropriate counterfactual is that DFDS/LD would have operated two vessels on the Dover–Calais route in conjunction with three on the Dover–Dunkirk route. Given our view that there would have been an alternative purchaser of the Vessels to GET, we do not accept GET's contention that the exiting firm conditions were satisfied. As the two approaches we have considered do not make a material difference to our assessment of the counterfactual, we consider that further detailed investigation of the counterfactual is not required.¹³¹ We note that ultimately, the counterfactual assessment requires us to form a view on the most likely outcome in the absence of the merger, and that the process by which this is achieved is not determinative, given the inherently hypothetical nature of the counterfactual assessment.

6. Market definition

Introduction

- 6.1 The purpose of market definition is to provide a framework for the CC's analysis on the competitive effects of the merger. The relevant market (or markets) is the market within which the merger may give rise to an SLC. It contains the most significant

¹²⁹ DFDS response to PFs, paragraph 3.3

¹³⁰ The Court minutes record that only GET's bid specified that the vessels would be operated under the French flag. DFDS told us that because of its concerns about the application of TUPE, its bid referred to the possibility that the vessels might be used for a period on routes other than Dover–Calais but that its long-term intention was to use the vessels on the Dover–Calais route. The FCA's decision document (11-DCC-189) confirms that DFDS was planning to use the vessels on the short sea.

¹³¹ CC2, paragraph 4.3.6: when it considers that the choice between two or more scenarios will make a material difference to its assessment, the CC will carry out additional detailed investigation before reaching a conclusion on the appropriate counterfactual.

competitive alternatives available to the customers of the merger companies and includes the immediate determinants of the effects of the merger. However, market definition is not an end in itself, and the boundaries of the market do not determine the outcome of the CC's analysis of the competitive effects of the merger in any mechanistic way. The CC may also take into account constraints outside the relevant market (or markets).¹³²

6.2 In line with normal practice, we examine in this section two dimensions of market definition:

- (a) the product dimension (paragraphs 6.3 to 6.16); and
- (b) the geographic dimension (paragraphs 6.17 to 6.34).

Product market

6.3 Eurotunnel transports passengers and freight separately in specially-designed shuttle carriages. Both passengers and freight are transported with their vehicles.¹³³

6.4 Ferry operators often carry both freight and passengers on the same vessels, although some vessels are purpose specific. Ferry operators offer freight services for unitized freight¹³⁴ that can be carried on roll-on/roll-off (ro-ro) vessels or lift on/lift off (lo-lo) vessels. Freight transported on lo-lo vessels is containerized. Freight transported on ro-ro vessels can be either accompanied, with the trailer crossing together with the road tractor and driver, or unaccompanied, with the trailer crossing independently of the road tractor and driver. Ferries operating between Dover and Calais are all ro-ro vessels and over 95 per cent of freight is accompanied.

6.5 GET submitted that:

- (a) There were distinct markets for freight and passenger transport services.
- (b) Lo-lo ferries, accompanied and unaccompanied ro-ro ferries, and the tunnel shuttle services for the transport of freight were all part of the same market.
- (c) Low-cost airlines, Eurostar, Eurotunnel services and ferries for the transport of passengers represented a competitive constraint that should be fully taken into account.

6.6 GET's internal documents give some indication of the company's perception of competitive constraints and therefore can assist in defining the economic market or markets in which it operates. We noted that documents prepared by the Passenger division of Eurotunnel refer to the 'Short Straits' market and that the division monitors the prices of short-sea ferry competitors. Air travel is listed on occasions in the Passenger division's papers, as part of the analysis of the wider environment. GET's Registration Document 2011¹³⁵ states that: 'it is in direct competition with ferry operators on the Short Straits market. The transport services for passengers travelling without their vehicle provided by the airlines and to a lesser extent by Eurostar constitute a marginal and indirect source of competition to the Passenger Shuttle

¹³² CC2, paragraphs 5.2.1 & 5.2.2.

¹³³ Initial submission, Appendix 12(1).

¹³⁴ Freight which is stored in various standardized forms such as driver-accompanied vehicles, unaccompanied vehicles and containers.

¹³⁵ A document containing the Annual Report and other submissions required in accordance with French financial regulations to be filed with the *Autorité des marchés financiers* (French market authority). Prior to 2011 it was called the Reference Document.

Service.’¹³⁶ Similarly, analysis carried out by consultants for GET refer to the ‘short straits market’ for passengers, with air travel being seen as an indirect constraint that impact on the overall growth of passenger demand. The consultants’ analysis of the competitive environment for freight emphasized the significant competitive advantages of ro-ro accompanied transport across the Short Strait compared with other options and other routes. GET told us that the wider constraints affected customer choice but they were not taken into account when setting prices. [X]

- 6.7 DFDS considered that the market for freight transport should include all modes of transportation by sea and train. For passenger transport, the relevant product market comprised all of the existing means of transportation between England and Continental Europe, for both ‘tourist’ as well as ‘business’ passengers, given the decline of air transport prices over the last several years. DFDS also acknowledged the viability of assessing competition on the basis of a short-sea maritime transport market, on the basis that air transport was not a viable alternative for those passengers wishing to take their own vehicles with them.
- 6.8 P&O did not think that it operated in the same market as low-cost airlines or Eurostar rail services, though there was some degree of competition for shares of the ‘leisure pound’. For tourists, it considered that the market which the tunnel and ferry operators focused on was the transportation of passengers with vehicles.¹³⁷

Freight versus passenger markets

- 6.9 The assets operated by GET and its primary competitors consist of ferries and shuttles which provide transport services between the UK and Western Europe. Prior investigations of these markets by the OFT and the CC have distinguished between freight and passenger transport services.¹³⁸ This is because there are significantly different demand- and supply-side considerations for the two markets. On the demand side, the two groups of customers have very different requirements for transport services. For example, freight customers are generally intermediaries providing transport and logistics services that operate in a business-to-business environment and have relatively stable demand over the year. Passenger customers, on the other hand, often travel for leisure and have a highly seasonal demand pattern. On the supply side, most of the ferry services on the short sea are based on ro-ro operations with either some or a large degree of flexibility to supply either freight or passenger demand. However, there are specialized providers of ferry services to freight customers, and the modes of transport available to freight and passenger customers differ significantly.¹³⁹ These issues are analysed in more detail below.
- 6.10 The above factors indicate that the competitive effects analysis should distinguish between the freight and passenger markets. This is also in line with the submissions of the parties and with previous decisional practice of the UK competition authorities.

¹³⁶ Paragraph 6.5.2, p35.

¹³⁷ P&O third party hearing.

¹³⁸ The most recent OFT cases include DFDS/LD, 7 August 2012: (www.of.gov.uk/shared_of/mergers_ea02/2012/DFDS.pdf); DFDS/Norfolk (http://ec.europa.eu/competition/mergers/cases/decisions/M5756_20100617_20212_802533_EN.pdf), 17 June 2010; CC Stena/DFDS, 29 June 2011 (www.competition-commission.org.uk/assets/competitioncommission/docs/2011/stena-dfds-merger-inquiry/stena_dfds_final_report.pdf).

¹³⁹ For example, freight operators have the choice of various modes within the ferry market (lo-lo and ro-ro accompanied or unaccompanied) whereas the options available to passengers are quite different.

Freight: substitution from accompanied to unaccompanied services (ro-ro)

- 6.11 Switching from an accompanied to unaccompanied operation implies switching from an operation where the driver travels with the vehicle on the ferry crossing to one where the trailer is left at the port of departure, and then picked up by another tractor unit and driver at the destination port.
- 6.12 Large freight customers we spoke to indicated that for some customers this might not be difficult but for others it would not be a readily viable option. For example, it was noted that many of the European hauliers driving into the UK did not have a domestic operation in the UK from which to supply tractor units and drivers to pick up or drop off unaccompanied trailers on the UK side of the crossing.

Freight: substitution from ro-ro to lo-lo

- 6.13 The lo-lo mode of transport involves unloading containerized freight from the haulage vehicle at the port of origin and then loading on to a ferry suitable for transporting containers without trailers. At the port of destination, the container will be offloaded from the ferry, and ultimately uplifted by another haulage vehicle. Lo-lo services require specialized equipment (in particular, container cranes) that are not required for ro-ro operations.
- 6.14 Large freight customers told us that switching to lo-lo was not a viable option on the short sea and that it was not easy to switch to that mode of transportation. One customer told us that it had considered switching to lo-lo but had found that service frequency and transit times did not meet its requirements and it had incurred significant costs when conducting trials. Another customer commented that lo-lo was a specialist business. The distinctiveness of the ro-ro accompanied mode of operation was also emphasized in a consultants' report prepared for GET in 2008: 'The ro-ro accompanied market is the fastest and most flexible option to transport goods between the UK and the Continent. In particular, it is the best option for time-sensitive goods. In the future, it should continue to over perform other transport modes, driven by the increasing importance of speed delivery.'¹⁴⁰

Passengers: evidence on intermodal competition

- 6.15 We analysed data from Ferrystat¹⁴¹ to understand the travel choices that passengers have been making and the extent to which these choices have had an impact on Eurotunnel and ferry services between the UK and the Continent. The statistics showed that:
- (a) As well as being the predominant mode of travel, air travel had grown strongly over the last decade up until the time of the financial crisis, at which point it fell sharply and is only recently recovering to the levels of 2004.
 - (b) Despite strong economic growth (prior to the economic crisis in 2008) and an expanding population in the UK, the total number of passengers crossing the channel by ferry and Eurotunnel over the last decade has declined overall, with periods of decline being interrupted by years of modest growth or relatively little change.

¹⁴⁰ []

¹⁴¹ The statistics include: the volume of passenger journeys taken on ferry services between the UK and Western Europe; on Eurotunnel; on Eurostar and by air between the UK and Western Europe for the period from 2003 to 2011; surveys of travellers asking the reasons why passengers prefer rail/ferry over air travel. Source: Ferrystat April 2012.

(c) Passenger rail travel (by Eurostar) has shown steady growth over most of the last decade and of the three modes of transport is the only mode not to have recorded a significant fall in traffic between 2008 and 2009.

(d) The reasons why short-sea travellers prefer the ferry, Eurotunnel or rail travel (by Eurostar) over flights include the independence of driving their own cars, flexibility in timings, favourable pricing and lack of luggage restrictions, among others.¹⁴²

6.16 Overall, the data is consistent with the view that the total volume of passenger demand is influenced by macroeconomic and demographic trends, and interacts at the margin with consumer trends that include, to a certain extent, movement towards (and more recently away from) options such as air travel. However, the data also shows that despite significant changes in the usage of alternative travel modes (ie passenger air and rail travel) and major negative macroeconomic shocks, the overall level of passenger demand for ferry services has been relatively stable. In addition, the reasons given by passengers for preferring ferry, Eurotunnel or rail travel over air travel suggest that there will be limited substitutability between short-sea crossings and air travel for many passengers. These observations are consistent with GET's view of the market as expressed in its internal documents.¹⁴³

Geographic market

6.17 As explained in paragraph 3.1, Eurotunnel's services link Folkestone in the UK to Coquelles in France. MFL provides services between Dover and Calais. The Dover–Calais and Dover–Coquelles routes are part of a group of routes crossing the English Channel that are referred to as the 'short sea' or 'short straits' (defined in paragraph 2.1).

6.18 Figure 1 illustrates the boundaries of the 'short sea'. The north-eastern boundary is defined by the Ramsgate–Ostend route, while the western boundary is defined as being at the Newhaven–Dieppe route. The boundary points are relatively arbitrary but are not particularly critical, as traffic on the boundary routes is small, accounting for less than 4 per cent of volume on the short sea.¹⁴⁴

6.19 The main competitors with significant business volumes which operate on the flanking routes to the short sea are Stena Line, which operates from Harwich to the Hook of Holland, DFDS (Felixstowe–Rotterdam), Cobelfret (London to Belgium and Holland), P&O which has a limited volume service from Tilbury to Zeebrugge, and Brittany Ferries which operates a number of Western Channel routes, the most significant of which is Caen–Portsmouth.

¹⁴² Continent Ferry Survey. The survey asks ferry, Eurotunnel and rail passengers about their reasons for choosing rail or ferry over flying. The passengers' answers to all questions were then allocated to the mode of transport last taken. The aggregated answers therefore do not map exactly on to the most recent mode of travel. For example, a customer who last travelled on Eurostar will be classified as a rail passenger, but may indicate that ability to take their own car is one of the reasons for not flying.

¹⁴³ See paragraph 6.6 above.

¹⁴⁴ DfT UK Port Freight Statistics 2011.

FIGURE 1

Short-sea routes



Source: Operators.

- 6.20 GET submitted that the relevant geographic market was wider than the short sea, including the Western Channel (which comprised routes between ports on the south coast of England and ports on the north coast of France) and the North Sea (which comprised routes between the ports on the east coast of England and ports in Belgium and the Netherlands).¹⁴⁵
- 6.21 We reviewed documents prepared by Eurotunnel’s Passenger and Truck divisions, as they could be indicative of the company’s view of where the boundaries of the market or markets it operates in lie. We noted that:
- (a) In the case of the Passenger division, the documents refer to the ‘Short Straits’ market.
 - (b) [redacted] in respect of both divisions. The Truck division also monitors [redacted]. Similarly, market shares are calculated on the basis of a short-sea market.

¹⁴⁵ GET also submitted that there was potential for supply-side substitution across routes. We note, however, that entry on to the short sea requires significant investment. We therefore consider the ability of operators to constrain prices by redeploying (or the threat of redeploying) ships on to the short sea in the section on entry and expansion (see paragraphs 8.138–8.169).

- 6.22 P&O told us that in relation to passenger services, it did not consider the North Sea and Western Channel routes to be in the same market as the short-sea routes. This was because the destinations served by these routes were distant from the short-sea ports. P&O did not monitor activity on the Western Channel routes, as it was no longer active in that geographic sector. It did monitor competitive activity on the North Sea but only because it was itself active on North Sea routes. In the freight market, routing choices were decided upon through modelling (considering driving miles and cost of crossing, for example). P&O thought that there was a wider range of options for shipping to the UK available for freight shipments travelling from further away, as there were more options for routings.
- 6.23 The CC notes and agrees with GET's submission that the question is one of substitution at the margin, and whether there is evidence of material customer switching in response to small changes in the relative attractiveness of the services available on different routes. Our approach to this question has been to look for evidence of actual substitution across routes in our 'event analysis' (see Appendix C) and to look for evidence of similar pricing trends across routes in our 'price analysis' (see Appendix D). We discuss this evidence further in paragraphs 6.30 to 6.34.

Capacity

- 6.24 Most ferry crossings to the Continent are carried on the short sea. Table 9 shows that including Eurotunnel, short-sea freight capacity is 68 per cent (measured in 'feu' or 40-foot equivalent units) of total freight capacity across the short sea, Western Channel and North Sea. For accompanied traffic only, the short sea contributes about 83 per cent of capacity.¹⁴⁶ UK–Continent traffic statistics from the Department for Transport (DfT) present a similar picture, with 65 per cent of total traffic transported through the short sea and 87 per cent for accompanied traffic only.¹⁴⁷

TABLE 9 Freight capacity by region, 2010

	<i>Short-sea Eurotunnel</i>	<i>Short-sea ferries</i>	<i>Western Channel</i>	<i>feu North Sea</i>
Ro-ro accompanied	1,493,881	3,625,520	348,475	702,776
Ro-ro unaccompanied	-	-	-	1,162,565
Lo-lo	-	-	-	224,889
Total	1,493,881	3,625,520	348,475	2,090,230
% of total	19.8%	48.0%	4.6%	27.7%

Source: PRB Associates.

Transport costs

- 6.25 For freight operators, a factor in deciding whether to switch routes is the likelihood that changing route would involve driving additional road miles. Heavy freight vehicles have significant operating costs that are distance related. This fact was reflected in the presentation to the CC by GET during its site visit, which noted that one of the reasons that Eurotunnel can sustain a premium price over ferries is

¹⁴⁶ 2010 Report by PRB Associates. Freight traffic on routes to Spain/Portugal, beyond Bristol on the Western Channel and beyond Manchester in the North Sea are excluded.

¹⁴⁷ DfT Statistics 2011. Short-sea data includes Eurotunnel and Ramsgate but not Newhaven. Western Channel includes all ports on the south coast, west of Folkestone. North Sea includes all ports on the east coast, north of and including the Thames estuary.

because the Folkestone location saves 'almost 20km in time and money, an estimated €[redacted] direct saving per crossing (driver hours & fuel costs)' when compared with driving to or from Dover. This reflects a cost of driving in the region of €[redacted] per kilometre. Major freight customers also told us that the Eurotunnel premium largely reflected cost differences related to the time and distance savings associated with Eurotunnel's Folkestone entry point.

- 6.26 [redacted] A hypothetical increase in price of [redacted] post-merger would therefore imply an increase in price of approximately €[redacted]. This suggests that an increase in price of this scale would justify at most driving an additional [redacted] kilometres (less than 10 miles) in search of a lower-cost crossing option, even assuming that there were no other additional costs associated with using the alternative routes (such as fewer crossings increasing total journey time). Compass Lexecon (on behalf of GET) reported academic studies suggesting that the value of time for freight in Western Europe was in the order of €17/hr. This suggests that switching to routes with fewer crossings in response to a small but significant non-transitory increase in prices would be unattractive if the hauliers' desired travel time was not already closely aligned with scheduled departures on alternative routes.

Freight customers' evidence

- 6.27 We received only 189 responses to a questionnaire that we sent to 3,119 freight customers. Because of this low response rate and our corresponding concern about the potentially unrepresentative nature of the sample, the survey results cannot be considered to provide a reliable guide to the likely behaviour of the broader customer base, but give an indication of certain freight customers' views on their ability to switch away from the short sea to other routes. We found that in response to a hypothetical price increase on Eurotunnel and short-sea ferries:

- (a) 63 per cent of respondents who were either customers of Eurotunnel or a short-sea ferry in 2012 said that they would not divert any volumes if prices on both Eurotunnel and all short-sea ferries went up by 10 per cent.
- (b) 21 per cent would divert more than 25 per cent of volumes away from the short sea following the 10 per cent price rise. 16 per cent would divert less than 25 per cent or were not sure how much.

- 6.28 We held hearings with five freight customers. They identified factors that constrained their ability to switch away from the short sea:

- (a) the high frequency of departure on the short sea and short duration of the crossing: one customer stated that 'just-in-time' deliveries were becoming more prevalent, as companies sought to carry less stock;
- (b) driver working hours and remuneration terms: where drivers were paid a fixed rate, longer, cheaper crossings could be more appealing; and
- (c) the very limited numbers of driver-accompanied slots on the sailings on the North Sea route, which made it difficult to move significant amounts of self-drive trucks away from the short sea to the North Sea.

- 6.29 Together the survey evidence and hearings with freight customers suggest that only a small proportion of volume could be switched away from the short sea in response to a price rise. This is consistent with the comments that we have seen in GET's internal documents. In particular, the report prepared by LEK for GET in 2008 stated: 'Growing trend towards time-sensitive goods ... Limited threat of alternative routes

development: ... with only a few departures a week, alternative routes will remain less convenient and flexible than the Short Straits' [✂] (slide 36).

Event analysis

- 6.30 We analysed the movement in the volume of passenger and freight traffic over time. We found that the short sea has been gaining share of freight volume over time when compared with the North Sea and Western Channel routes. The Western Channel in particular appears to be in steady decline. For both freight and passengers, the short sea accounts for the majority of traffic.
- 6.31 To understand the extent to which short-sea routes are substitutable with more remote routes, we examined movements in traffic which followed three events that significantly altered the nature of supply on the short sea since 2008: a fire that resulted in the closure of the tunnel in September 2008; a strike that affected SeaFrance services in March 2008; and the exit of SeaFrance in November 2011, followed by the launch of the DFDS Dover–Calais service in February 2012.
- 6.32 Starting with the fire, we observed that this event coincided with the economic downturn. Our analysis showed that the fall in freight traffic that occurred on the short sea at that time was primarily caused by a general fall in demand for freight transport, which was likely to have resulted from the economic downturn, rather than substitution to other routes. This was further reinforced by the observation that freight volumes on the North Sea and Western Channel also fell over this period. Similar trends could be observed for passenger traffic. The evidence also suggested that all the freight volumes diverted from Eurotunnel benefited ferry operators and remained almost exclusively on the short sea. The other two events similarly appeared not to have resulted in any material movement of freight traffic to routes outside of the short sea (see Appendix C, paragraphs 13 to 30).

Pricing analysis

- 6.33 We examined average yearly prices charged to freight customers by Eurotunnel, and ferries operating on the short sea, Western Channel and North Sea. We noted that the pricing trend on the short sea has been quite different from that on the North Sea and Western Channel. Short-sea ferry prices have decreased steadily since 2008, whereas North Sea and Western Channel prices have increased over time. This observation is inconsistent with the North Sea and Western Channel being in the same economic market as the short sea.¹⁴⁸
- 6.34 Similarly, we note that the trend in pricing to passengers on the short sea have been quite different from that on the North Sea and Western Channel. Short-sea ferry and tunnel prices have been stable since 2008, whereas North Sea and Western Channel prices have increased over time. This observation is consistent with the North Sea and Western Channel being in the same economic market as the short sea.¹⁴⁹

Conclusions on market definition

- 6.35 We found that transport services for freight and transport services for passengers are two separate product markets.

¹⁴⁸ If the regions were in the same economic market, price levels might differ, but we would expect price trends to be similar.

¹⁴⁹ See footnote to previous paragraph.

- 6.36 We found that the appropriate geographic market in both cases is the short sea. In reaching this view we attached more weight to our quantitative event and pricing analyses than the qualitative evidence we received from freight customers. This is because the response rate to our customer survey was low and because we place more weight on the revealed preference of customers than their stated preference.
- 6.37 We have no evidence that it is possible to switch from an accompanied to an unaccompanied mode of operation on the short-sea routes, but even if it were, it would not protect freight customers from a price rise, as the competitors who supply unaccompanied services are the same as those who supply accompanied services.¹⁵⁰ As well as switching modes, freight customers would therefore also have to switch routes to the North Sea or Western Channel. Given our finding that the geographic market is no broader than the short sea, as set out above, we do not need to take a view on whether unaccompanied ro-ro services are in the same market as accompanied ro-ro services.
- 6.38 Similarly to the case of switching to an unaccompanied mode of operation, switching to lo-lo on the short-sea routes would not protect freight customers from a possible price rise. Rather, the mode switch would need to be combined with a switch in route to a route where lo-lo operation offered a cost advantage,¹⁵¹ most likely on a North Sea route where lo-lo is more commonly observed.¹⁵² Given our finding on geographic market definition, we do not need to take a view on whether lo-lo services are in the same market as ro-ro services.
- 6.39 Bringing together the two dimensions of market definition, we conclude that the relevant markets in which to consider the competitive effects of the merger are:
- (a) transport services to passengers on the short sea (the passenger market); and
 - (b) transport services to freight customers on the short sea (the freight market).
- 6.40 In assessing the effect of the merger (see Section 8), we consider constraints operating within these two relevant markets, but also take account of competitive constraints that may come from outside the relevant markets.

7. Nature and evolution of competition

- 7.1 In order to assess the impact of the merger in the relevant markets we have defined above as compared with the counterfactual, it is first important to understand how competition has unfolded in the relevant markets in recent times. In this section, we describe the process of competition in the relevant markets. In particular, we examine:
- (a) the approach to competition taken by suppliers on the short sea, including the perception of the various operators of their competitive strength and that of their competitors (paragraphs 7.2 to 7.8); the nature of negotiations between freight customers and operators (paragraphs 7.9 to 7.15); and marketing to passengers (paragraphs 7.16 to 7.18); and

¹⁵⁰ If GET were to increase prices post-merger unilaterally, freight customers could switch to competing ferries without the need to change the mode of travel.

¹⁵¹ On longer North Sea routes, the cost of additional port handling is offset by the saving from not having large numbers of trailer units unutilized during the crossing and in spatial efficiency gains by the ferry operator (ie due to the ability to stack containers, more freight can potentially be carried on a particular sailing).

¹⁵² See Table 9.

(b) the analysis of the intensity of competition on the short sea (paragraphs 7.20 to 7.41), including relationships between the prices charged by the various suppliers on the short sea and the extent of constraints that the various short-sea routes exert on each other as illustrated by the volume of traffic they carry and also the extent of substitution between routes and services, as evidenced by our events analysis and customer survey.

Approach to competition

7.2 We asked GET, P&O and DFDS each to identify its main competitors on the short sea, as well as the strengths and weaknesses of those competitors. We also asked them to describe their negotiations with freight operators and marketing to customers.

Positioning of the key operators

GET's evidence

7.3 GET told us that Eurotunnel's approach to competition was based on the benefits of the differentiated service it offered to customers, in particular the speed, ease and reliability of its service, as well as the cost savings available to freight operators due to the extra mileage between the port of Dover and Folkestone on the way to/from the London area. GET told us that in order to recover its lost custom after the 2008 fire (see paragraph 7.24 below), it undertook a number of measures: [REDACTED]. GET said that none of these activities was targeted at any particular ferry operator, but all these activities had contributed to bringing Eurotunnel's share back to pre-fire levels during 2011. We noted that [REDACTED]. This evidence shows that Eurotunnel's service is differentiated and that GET has an ability to trade price and volume at the margin for small customers—that is, Eurotunnel is able to set a standard price (and not negotiate discounts) that is higher than the ferry price without fear of losing large amounts of business to the ferries whether or not the ferry operators respond to the Eurotunnel price increase with their own price increase. We saw further evidence of the high differentiation of the tunnel from ferries (both on the passenger and the freight side) in research carried out by consultants for GET.

7.4 GET told us that the actions taken by ferry operators to induce Eurotunnel customers to switch had mainly been focused on increasing the price difference between Eurotunnel and the ferries, and there had also been an increase in ferry operators' capacity. GET suggested that Eurotunnel had endeavoured where possible to adapt its own prices to retain volume and prevent customers from switching, and that freight customers would regularly play off Eurotunnel and ferry operators against each other, switching demand (or threatening to do so) as part of price negotiations. GET told us that P&O and DFDS had a competitive advantage over Eurotunnel and MFL because they were able to offer 'land-bridge'¹⁵³ packages to freight customers, offering them rates and route packages between Continental Europe and the UK and the Republic of Ireland. GET also referred to DFDS's ability to bundle short-sea routes with North Sea and Western Channel routes.

DFDS's evidence

7.5 [REDACTED] It believed that its reputation for reliability across its network did work to its advantage on its short-sea routes. It considered that the Dover–Dunkirk service it

¹⁵³ DFDS offers combined 'land-bridge' tickets for travel from the Republic of Ireland via Great Britain and then to Continental Europe: www.dfdsseaways.co.uk/ferry-routes/combined-ferry-tickets, in collaboration with Stena Line.

offered was particularly appealing to traffic heading to or from the North-East on the Continent.

- 7.6 DFDS identified Eurotunnel and P&O as strong competitors, MFL as a strong potential competitor, and Transeuropa Ferries¹⁵⁴ as a weak competitor.
- 7.7 DFDS told us that [REDACTED]. It thought that pricing on Dover–Dunkirk was constrained by pricing on Dover–Calais but that the reverse was not true. It also explained that the Dover–Dunkirk sailings were up to an hour longer than those between Dover and Calais, which meant that more fuel was used on each journey. The longer sailing time also meant that a ship operating this route could do fewer round trips than a ship deployed on the Dover–Calais route. The combination of these two factors meant that a sailing between Dover and Dunkirk was [REDACTED] per cent more expensive than a sailing from Dover to Calais.¹⁵⁵

P&O's evidence

- 7.8 P&O identified Eurotunnel as its strongest competitor, citing its speed advantage, large capacity, weather reliability, strong brand and costs that were not impacted by raising fuel prices. P&O identified DFDS on Dover–Dunkirk route as a medium to strong competitor, and DFDS on Dover–Calais route as a medium competitor. P&O emphasized that looking at the combined DFDS operations, it reached a scale similar to P&O and therefore the combined operation must be seen as a very strong competitor. P&O stated that currently it viewed MFL as a weak competitor, which had a potential to be strong if it was financially, operationally and commercially supported by GET.

Nature of freight contracts and competition for freight customers

- 7.9 Freight represents around [REDACTED] per cent of revenue for ferry operators and [REDACTED] to [REDACTED] per cent for Eurotunnel.
- 7.10 GET told us that [REDACTED] per cent of Eurotunnel's freight customers, who were the larger customers in volume terms, had individually negotiated rates. As a proportion of total volume (as measured in number of vehicles), negotiated accounts also represent a high proportion of P&O and DFDS.¹⁵⁶ Eurotunnel provides its services to a sizeable number of 'standard rate' customers who account for around [REDACTED] per cent of volume and around [REDACTED] per cent of its [REDACTED] freight customer accounts. These customers have a credit account open with Eurotunnel, pay a standard rate, and do not negotiate their prices directly. The proportion of standard rate customers for ferries is very small (around [REDACTED] per cent by volume).
- 7.11 Distributors¹⁵⁷ play a relatively more important role for P&O and DFDS than for Eurotunnel—they account for about [REDACTED] per cent of ferry freight volume for both, whereas for Eurotunnel this percentage is around [REDACTED] per cent. Table 10 shows a breakdown of the types of accounts for Eurotunnel and P&O.

¹⁵⁴ Now in administration.

¹⁵⁵ [Summary of hearing with DFDS](#) held on 4 January 2013.

¹⁵⁶ DFDS informed us that in 2007 to 2012, on average, [REDACTED] per cent of its freight volumes were sold at negotiated rates, distributors accounted for [REDACTED] per cent and standard rates applied to [REDACTED] per cent.

¹⁵⁷ Distributors are independent third-party freight agents. They act as sales agents in markets where operators have no sales force presence. An end client may book to travel with a ferry operator through an agent—the agent is then the customer of the ferry operator.

TABLE 10 Types of accounts by volume, 2007 to 2012

Operator	2007	2008	2009	2010	2011	per cent
						2012 Jan–Oct
<i>Eurotunnel*</i>						
Negotiated account	[X]	[X]	[X]	[X]	[X]	[X]
Standard rate	[X]	[X]	[X]	[X]	[X]	[X]
Distributor	[X]	[X]	[X]	[X]	[X]	[X]
<i>P&O</i>						
Negotiated account	[X]	[X]	[X]	[X]	[X]	[X]
Standard rate	[X]	[X]	[X]	[X]	[X]	[X]
Distributor	[X]	[X]	[X]	[X]	[X]	[X]

Source: Eurotunnel and P&O, CC calculations.

*For Eurotunnel the type of account was provided as of 2012.

- 7.12 Expected volumes are taken into account during the annual negotiations but there are no compulsory volume commitments imposed by Eurotunnel, DFDS or P&O. There is no penalty for not meeting expected volume targets, but if a customer deviates from projected volume significantly, this may be taken into account during the following year's negotiation and may lead to a price increase for this customer. Eurotunnel does not apply volume-based rebates as such, whereas P&O applies rebates based on achieved volumes.
- 7.13 GET, DFDS and P&O also told us that they considered it to be relatively easy for freight customers to switch operators. DFDS told us that customers' actual decisions to switch would depend on a variety of factors that might be more or less important to them, such as: price, time of travel, frequency, capacity availability and service level. Customers that were particularly time sensitive or required significant frequency were less likely to switch from Eurotunnel's service to use a ferry operator, while the availability of volume discounts might also discourage switching for freight customers.
- 7.14 P&O suggested that switching could be immediate subject to contract terms—the only delay might be opening an account with an alternative operator, although most customers had accounts with all the different operators. In addition to this, volume discounts are often passed on in the form of retrospective rebates, so if a customer is forced to switch operator, there would be a risk that the rebate would not be achieved.
- 7.15 GET suggested that since there were no obligations on any freight customers to use Eurotunnel's services, they were free to switch. GET claimed that customers with significant cross-Channel traffic to place would seek to achieve the best price conditions for their expected annual volume, which might be all or only part of the total volume that the customer needed to place. If a customer ended up not reaching this volume, Eurotunnel could revise the price to reflect actual use, at which point the customer could decide whether the cost economics of using the freight shuttle or the ferries had changed and could take the opportunity to switch traffic around if required to achieve the best solution. GET claimed that in practice, [X].

Sales to passengers

- 7.16 GET told us that the majority of sales to passengers with cars were made directly with Eurotunnel though its website or the in-house contact centre. Prices were set by [X].

- 7.17 Coach traffic is almost entirely based on negotiated contracts. Coach and tour operator prices are negotiated and agreed with significant lead times as these prices need to be incorporated into the package price of the coach/tour operator in advance of brochure/website marketing and the commencement of end-user sales.
- 7.18 Ferries, as well as Eurotunnel, display their public tariffs on their respective websites. Ferry operators also use yield management systems for passenger prices. Prices are adjusted based on the capacity available, target revenue requirements and publicly visible competitor activity.

CC analysis of the intensity of competition between suppliers on the short sea

Share of traffic of various routes and operators

- 7.19 As shown in Section 2, Table 4, market shares of services on the short sea are unevenly distributed between the various routes: the tunnel, Dover–Calais and Dover–Dunkirk routes account for 98 to 99 per cent of traffic. We therefore consider that the other short-sea routes (Dover–Boulogne, Newhaven–Dieppe, Ramsgate–Ostend¹⁵⁸) are highly unlikely to exert a material competitive constraint in the market and we have not seen any evidence to suggest that market shares are a poor indicator of the competitive constraint exerted by these routes. Rather, the small market shares appear to be the result of the limited attraction of these routes to customers, and of the unfavourable supply-side implications of the longer crossings involved.

Events analysis

- 7.20 The short sea has experienced a number of significant events in 2007 to 2012 that are helpful in assessing the intensity of competition in the market for freight and passenger services (see Appendix C). In Section 6 (paragraphs 6.30 to 6.32), we used these events to define the economic markets in which Eurotunnel and MFL operate. In this section, we use these events to analyse the competitive interaction between services provided via the tunnel and those provided by ferries, and to analyse the extent of competitive interaction between the short-sea routes and other neighbouring ferry routes.

Freight market

- 7.21 For the freight market, we have examined the following events: (a) the exit of SeaFrance in November 2011 and the subsequent entry on to the Dover–Calais route of DFDS in February 2012 and MFL in August 2012; (b) a strike by SeaFrance staff in March 2008, and (c) the fire in Eurotunnel in September 2008.
- 7.22 Our analysis shows that immediately following the exit of SeaFrance (December 2011 to January 2012), 33 per cent of SeaFrance’s freight volumes diverted to P&O, 37 per cent to Eurotunnel and 30 per cent to DFDS’s Dover–Dunkirk route. Approximately two-thirds of traffic substituted to competing ferry operators both on the Dover–Calais and the Dover–Dunkirk routes, while one-third diverted to Eurotunnel. We note that Eurotunnel captured a smaller proportion of SeaFrance volumes than its market share would predict. This may have been affected by short-run capacity considerations, as both P&O and DFDS increased their capacities immediately following SeaFrance exit; while Eurotunnel capacity utilization in December to January was quite high. When DFDS started its Dover–Calais service and P&O expanded

¹⁵⁸ We understand that operations on the Ramsgate–Ostend route ceased in April 2013.

capacity in 2012, volume gained on the Dover–Dunkirk route following the exit of SeaFrance transferred almost immediately back to the Dover–Calais route (see Appendix C, paragraph 58 and Table 13).

- 7.23 Examining the effect of the SeaFrance staff strike in March 2008, our analysis estimates that SeaFrance lost volume of 35,900 single trips in March 2008, of which 51 per cent of the total was diverted to Eurotunnel, 31 per cent to DFDS's Dover–Dunkirk service, and only 18 per cent to P&O. If we compare these ratios with actual market shares of these operators in the six months preceding the strike (excluding SeaFrance), we note that during this event P&O captured a much smaller proportion of SeaFrance customers than its market share would suggest, and the biggest 'winner' was DFDS, which captured 31 per cent of SeaFrance lost volumes compared with its existing share of 17 per cent. However, we understand that the strike involved blockades of the port of Calais, which would have negatively affected the level of diversion to P&O and inflated the level of diversion to DFDS's Dover–Dunkirk service.
- 7.24 Analysis of the diversion following the tunnel fire in September 2008 must also have regard to the economic crisis which was developing at this time. According to our analysis, in September 2008 to February 2009, SeaFrance captured 47 per cent of volumes diverted from Eurotunnel, followed by P&O (38 per cent) and DFDS (14 per cent). We note that Eurotunnel's market share suffered significantly following the fire, falling from 38 per cent in August 2008 to 26 per cent in September 2008, and it was not until December 2010 that Eurotunnel managed to regain its pre-fire market share. However, as explained in more detail in paragraph 7.29 below, Eurotunnel raised its prices relative to ferries in February 2009, which was likely to have worsened its position in the market and to have led to loss of volumes.
- 7.25 Our analysis of these events indicates that:
- (a) There is no significant evidence of diversion of volumes outside the short sea in response to any of these events.
 - (b) There is significant diversion between Eurotunnel and the short-sea ferry operators.
 - (c) There is some evidence that the Dover–Dunkirk route is a relatively close substitute for Dover–Calais crossings.
 - (d) There is significant diversion between the short-sea ferry operators.
 - (e) Entry and exit of ferry operators directly affects Eurotunnel's volumes.

Passenger market

- 7.26 For the passenger market, we analysed the exit of SeaFrance in 2011, entry of DFDS and of MFL on the Dover–Calais route in 2012, and the tunnel fire in 2008. Our overall conclusion remains the same as for the freight market (see Appendix C for more details).

Pricing analysis¹⁵⁹

7.27 In Section 6 (paragraphs 6.33 and 6.34), we analysed prices to freight customers and passengers to define the economic markets in which Eurotunnel and MFL operate. In this section, we use the evolution and comparison of freight and passenger prices to assess the intensity of competition between suppliers. Table 11 shows average yearly freight prices expressed in Great Britain pounds (GBP) for one single-leg vehicle.¹⁶⁰ These average prices include all account types and all vehicle types.

TABLE 11 Average freight prices, 2007 to 2012

Operator	£					
	2007	2008	2009	2010	2011	2012 Jan–Oct
Eurotunnel	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
P&O	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DFDS Dover–Dunkirk	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DFDS Dover–Calais						[REDACTED]
MFL						[REDACTED]

Source: Operators, CC calculations.

7.28 Regarding freight, the new entrants on the Dover–Calais route [REDACTED] the DFDS price is [REDACTED], between August and October 2012 MFL has been [REDACTED].

7.29 Figure 2 shows that there is significant premium of Eurotunnel’s price over DFDS and P&O prices. In 2009, the premium increased significantly. Irrespective of currency movements, Eurotunnel’s price went up relative to ferry operators in 2009, from [REDACTED] per cent in 2008 to [REDACTED] per cent, and then fell again in 2010, and has remained relatively stable since then.

FIGURE 2

Eurotunnel’s ‘premium’ over the freight prices of DFDS and P&O, per cent, 2007 to 2012

[REDACTED]

Source: Operators, CC calculations.

Note: DFDS price includes only the Dover–Dunkirk route.

7.30 Eurotunnel told us that the price increase in 2009 [REDACTED] at about the time the tunnel returned to normal operation following the fire in 2008. The price increase appears to have contributed to an inability of Eurotunnel to recover the market share lost during the period of restricted operation following the fire. [REDACTED] the relative price of the tunnel slowly returned to levels similar to those that applied before the tunnel fire.

7.31 We examined the ratio of Eurotunnel’s price to the average price of P&O on Dover–Calais and DFDS on Dover–Dunkirk, and how this ratio is related to Eurotunnel’s market share (see Appendix D, Figure 7). This analysis suggests that while the initial drop in market share that Eurotunnel experienced in September 2008 can be explained by the fire, the extended period of low market share was at least partially precipitated by the price ratio rising significantly following the period affected by the

¹⁵⁹ See Appendix D for more detailed analysis.

¹⁶⁰ These are not prices billed in GBP only, but average prices where all revenue is recalculated into GBP using average monthly exchange rates, and then divided by total volume (excluding internal traffic).

fire.¹⁶¹ Another factor that may have contributed to the loss of market share by Eurotunnel after the fire was customers' realization that they needed to diversify the modes of transport they use on the short sea and not be so reliant on the tunnel.¹⁶²

- 7.32 Regarding passenger prices, Eurotunnel's premium over ferry prices has been more stable over time. Table 11 shows average yearly prices in GBP for a car trip. Eurotunnel is [redacted] per cent more expensive than P&O, and [redacted] per cent more expensive than DFDS.

TABLE 12 Average yearly prices per crossing (passenger cars), 2007 to 2012

Operator	£					
	2007	2008	2009	2010	2011	2012 Jan–Oct
Eurotunnel	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
P&O	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
DFDS Dover–Dunkirk	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
DFDS Dover–Calais						[redacted]
MFL						[redacted]

Source: Operators, CC calculations.

- 7.33 Our analysis of monthly prices for a crossing by a car (see Appendix D, Figure 16) shows that prices follow a highly seasonal pattern, with increases in August, January and around holidays. Historically, the Dover–Dunkirk route has been cheaper for passengers than Dover–Calais. New entrants on Dover–Calais (MFL and DFDS) set their passenger prices on a similar level to those of P&O. Unlike in freight, the ratio of Eurotunnel's prices to the average price of ferry crossings has been fairly stable.
- 7.34 The general conclusion from the pricing analysis is that Eurotunnel prices its services at a premium, which is notably higher for passengers than freight. Ferry prices on the short sea seem to move quite closely together, including on the Dover–Dunkirk route.
- 7.35 The Dover–Dunkirk service has an inherent cost disadvantage [redacted]: historically, the Dover–Dunkirk route has been [redacted].¹⁶³ This, combined with [redacted], suggests that if prices increased on the Dover–Calais route, DFDS would not respond by seeking to increase volume on the Dover–Dunkirk route, but [redacted]. Additional capacity on the Dover–Dunkirk route would not be added until prices rose sufficiently across the short sea to cover the full cost of operating more vessels on the Dover–Dunkirk route. This would therefore only occur when prices across the short sea were significantly higher than the cost of operating a ferry service on the Dover–Calais route.

Customers' views

- 7.36 The CC contacted a range of freight customers for their views of competition in the freight market. We sent a web-based questionnaire to all freight customers of Eurotunnel and MFL, as well as to customers on SeaFrance customer lists acquired by GET. Additionally, large freight customers were sent extended paper-based questionnaires. Due to the low response rate, we cannot treat the responses as represen-

¹⁶¹ GET told us that the reason for this increase was that [redacted].

¹⁶² This factor has also been mentioned by GET.

¹⁶³ Our analysis of pricing was further confirmed by DFDS. On the passenger side, although pricing for passengers is based on a 'fluid pricing model' and each departure is in principle evaluated on its own merits, between January and March 2013, passengers were priced on average €[redacted] on both routes. On the freight side, prices are based on individually negotiated contracts and the price on the Dover–Dunkirk route was only [redacted] per cent higher than on the Dover–Calais route (€[redacted] versus €[redacted] per freight unit).

tative of the general population (in a statistical sense) and therefore the results need to be taken as illustrative (qualitative) rather than quantitative evidence. In particular, due to the lack of statistical significance we cannot use the responses to calculate the actual levels of price sensitivity or route switching that might be expected on the short sea. Our events analysis has been used to assess actual customer behaviour in response to specific market events.

- 7.37 The main findings based on the freight customers' views are as follows. The freight market is mostly limited to accompanied ro-ro in the short sea, with very limited use of unaccompanied freight, lo-lo and freight trains, and limited ability of freight customers to divert to the Western Channel or North Sea. Many customers multi-source by using several transport operators, with Eurotunnel being the first choice for time-sensitive goods. At the same time, most of the volumes are available to all operators, as only a limited share of freight is restricted to a particular mode of transportation.
- 7.38 Around half of customers stated that it was very easy or quite easy to switch supplier of transport services. Freight customers' responses showed that switching was likely between Eurotunnel and ferries (and vice versa) following a 10 per cent price increase in either on the short sea, but the estimates of the diverted volumes varied. P&O seems to be the main choice for switching following a hypothetical price increase by Eurotunnel. Most ex-SeaFrance freight customers stated that they had diverted their volumes to P&O and Eurotunnel, on average in comparable proportions. Some customers would divest a proportion of their volume if there was a price rise both on Eurotunnel and short-sea ferries.
- 7.39 Many freight customers already use Eurotunnel for one leg of a journey and the ferry for the other leg, and would be interested in a discounted offer of shuttle plus MyFerryLink, but it is difficult to estimate total volumes that would be diverted to such a bundle.
- 7.40 The general sentiment of large customers was that for non-time-sensitive cargo, ferries and Eurotunnel were quite substitutable and customers did regularly use both and easily switch between them. Eurotunnel was highly preferred for 'just-in-time' freight. Most respondents agreed that 'the frequency of service provided by a ferry operator is extremely important and changes of frequency would be a consideration in switching to another operator'.
- 7.41 Similar general points to those expressed by freight customers can be derived from the questionnaire responses of coach and tour operators, except that these customers generally have little interest in a bundle of shuttle and ferry services.

Conclusions

- 7.42 Over the past five years, there have been freight and passenger transport services across six routes on the short sea. Only three, however, account for 98 to 99 per cent of traffic: Folkestone–Coquelles, Dover–Calais and Dover–Dunkirk.
- 7.43 Our analysis shows that there is substantial diversion of volumes between the short-sea ferries and Eurotunnel, and between the short-sea ferries themselves. Entry and exit of ferry operators directly affect Eurotunnel's volumes. There is little evidence of diversion of volumes outside the short sea in response to any of the analysed events. (see paragraphs 7.25 and 7.26).
- 7.44 The pricing analysis shows that although Eurotunnel provides its shuttle services at a premium price, if it raises its price too high or for an extended period it loses market share to the ferries. Evidence from customers supports the view that most of the

competition on the freight side of the market is for providers of accompanied ro-ro transport services on the short sea. Customers view short-sea ferries and Eurotunnel as close competitors; it is very common for freight customers to multi-source and they agree that switching operators is easy, but strongly prefer Eurotunnel for urgent cargo. Although the price of a large proportion of freight volume is negotiated, this is accounted for by only a small proportion of customers.

- 7.45 Our events analysis showed that in response to significant disruptions of supply (eg the fire in the tunnel, the exit of SeaFrance), some volume of traffic will divert to the Dover–Dunkirk route. We note, however, that when DFDS started its Dover–Calais service and P&O expanded capacity, volume gained following the exit of SeaFrance transferred almost immediately back to the Dover–Calais route. As explained in paragraph 7.35 above, [X] its Dover–Dunkirk route [X] is a higher-cost route to serve (see paragraph 7.7), which shows that the geographic differentiation from operating to Dunkirk (as described by DFDS in paragraph 7.5) is [X]. We therefore consider that Dover–Calais services exert a strong constraint on the Dover–Dunkirk route, whereas the Dover–Dunkirk services do not impose a similar constraint on the Dover–Calais services.
- 7.46 Our analysis of the share of traffic and pricing and events analysis together indicate that other ferry routes within the short sea (Dover–Boulogne, Newhaven–Dieppe, Ramsgate–Ostend) exert no material competitive constraint on either the Dover–Calais services or the Folkestone–Coquelles service.

8. Assessment of the competitive effects of the merger

Introduction

- 8.1 In Section 5, we concluded that the appropriate counterfactual against which to assess the effect of the merger was a situation in which DFDS would be operating five ships across the Dover–Calais and Dover–Dunkirk routes in competition with Eurotunnel and P&O.
- 8.2 In Section 6, we defined two relevant economic markets:
- (a) transport services to passengers on the short sea (the passenger market); and
 - (b) transport services to freight customers on the short sea (the freight market).
- 8.3 In Section 7, we analysed the nature of competition in the relevant markets prior to the transaction.
- 8.4 We now consider whether the merger has substantially lessened, or may be expected to substantially lessen, competition in these markets by reference to the counterfactual situation. In doing so, as well as considering constraints operating within the relevant markets, we also take account of competitive constraints that may come from outside the relevant markets.
- 8.5 The CC’s guidance states¹⁶⁴ that it will:
- consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. When levels of rivalry are reduced, firms’ competitive incentives are dulled, to the likely detriment of cus-

¹⁶⁴ CC2, paragraph 4.1.3.

tomers. Some mergers will lessen competition but not substantially so because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. A merger gives rise to an SLC when it has a significant effect on rivalry over time, and therefore on the competitive pressure on firms to improve their offer to customers or become more efficient or innovative.

Views of parties

8.6 GET told us that the merger would not result in an SLC for the following main reasons:

- (a) MFL's market shares were currently very small and therefore the market share increase was de minimis.
- (b) There was differentiation between Eurotunnel and MFL services. MFL was a new operator with a different customer proposition from Eurotunnel in its frequency of service, crossing times and price. MFL was a much closer competitor to the other ferry operators than to Eurotunnel.
- (c) The transaction had enhanced competition on the short sea. There were now more competitors and capacity on the short sea than would have been the case under the counterfactual.
- (d) Rival ferry operators operating on the short sea were strong competitors. In particular, DFDS was a material competitor with a strategy to continue to expand and grow its network. It was progressively growing volume on the short sea.
- (e) Ferry operators had considerable spare capacity to be able to accommodate switching demand from customers and, unlike Eurotunnel, had wide route networks. They were therefore able to offer their freight customers route and pricing bundles extending across their other routes, with which Eurotunnel was not able to compete. [✂]
- (f) The short sea could accommodate three ferry companies and there were no objective reasons to believe that DFDS would cease operating on the Dover–Calais route.
- (g) GET also competed with airlines and Eurostar. In addition, GET faced competitive constraints from operators on routes on the Western Channel and North Sea.
- (h) There were low barriers to entry, as shown by the speed with which MFL and DFDS had started operating and the fact that Euroferries was planning to begin operating on the short sea in 2013. Existing operators on the short sea all had the ability quickly to increase their operating capacity.
- (i) Ferries were mobile across routes and were readily available. Large network operators, such as P&O and DFDS, could and did move ships across routes.
- (j) Customers faced no barriers to switching and readily switched and threatened to switch to avoid price rises. Freight customers generally used several operators to maximize flexibility.

8.7 In response to our provisional findings, GET further argued that the CC needed to address the substantive reasons why the FCA cleared the merger, as the FCA and

CC had reviewed the likely impact of the merger in exactly the same product and geographic markets. It noted in particular the following aspects of the FCA's findings:

- (a) The FCA did not consider that the transaction could lead to a level of capacity that could lead to the exit of an operator.
- (b) The FCA noted that the market was a differentiated market. It did not calculate formal diversion ratios and placed more emphasis on determining the identity of the closer competitor of Eurotunnel.
- (c) The FCA conducted a very careful analysis of overcapacities and concluded that the level of spare capacity was such that unilateral effects were unlikely to occur following the transaction.
- (d) The FCA investigated the possibility that following the transaction, GET could implement anticompetitive bundling practices and accepted undertakings from GET which alleviated possible bundling issues.

- 8.8 In response to our provisional findings, GET also argued that there were a myriad of possible industry responses to overcapacity which should have been evaluated in detail by the CC.
- 8.9 DFDS told us that it believed that Eurotunnel's aim was to force DFDS off the Dover–Calais route and that, if this was achieved, it would immediately allow the company to increase prices for its rail shuttle business. [REDACTED]
- 8.10 [REDACTED]
- 8.11 DFDS believed that there was a natural distinction between those customers who wanted to use the ferry and those who wanted to use the tunnel. This, it believed, made the possibility of tacit collusion between Eurotunnel and P&O more likely. There was a high degree of transparency of pricing in the freight market, as customers would, as part of the negotiating process, reveal offers received from rivals. It was also possible that prices could be revealed to competitors through the negotiations on prices contained in interoperability agreements.
- 8.12 In its submission to the OFT, P&O referred to the reuse of the former SeaFrance vessels and related assets on exactly the same Dover–Calais short-sea route, combined with Eurotunnel's already existing pre-eminent position on the short sea pre-merger. This would, P&O stated, inevitably enable Eurotunnel to pursue an aggressive pricing policy which would allow it to establish progressively dominant market positions in the markets for freight and passenger vehicles on the short sea. P&O considered that as a result of the creation of such dominance, the transaction would lead to a material loss of competition between Eurotunnel and rival ro-ro ferry operators (P&O and DFDS/LD).
- 8.13 We spoke to a number of freight customers. Some expressed concerns that the ability of GET to bundle Eurotunnel and MFL services would enable GET to apply pressure on customers to use MFL in exchange for the best rates on tunnel services. GET submitted that the freight customers were supportive of the acquisition because it increased frequency, choice and capacity and almost certainly lowered prices and offered the best prospect of increasing the choice of ferry operators on the short sea. GET did not, however, substantiate this claim. In general, we received few complaints from freight customers. We note that cross-Channel services are likely to represent a small proportion of most freight companies' overall cost base.

- 8.14 Commenting on our provisional findings, the FCA made a number of observations on our analysis,¹⁶⁵ in particular:
- (a) It considered that the situation that would have resulted had the Court taken a different decision could not be accepted as a credible counterfactual because it was too hypothetical. We deal with this comment in paragraph 5.11(d).
 - (b) It did not consider overcapacity in the market to be an effect of the transaction as it had pre-existed the transaction and suggested that the level of overcapacity could reduce as a consequence of P&O redeploying its ships to other routes. We consider the likelihood of P&O reducing capacity to accommodate new operators in paragraphs 8.49 to 8.51.
 - (c) It stated that the evidence that was at its disposal at the time of its decision did not suggest that DFDS would soon withdraw from the Dover–Calais route and suggested that we had not taken sufficient account of GET’s level of indebtedness. We set out our evidence and views on these points in paragraphs 8.53 to 8.79.
 - (d) It considered that our quantification of the unilateral effects of the transaction should be based on alternative assumptions to those we have made and that GET would not be able to raise prices because of the considerable level of overcapacity among ferry operators. We explain the basis for our assumptions in paragraphs 8.115 to 8.121 and Appendix G and comment on the effect of overcapacity on GET’s ability to raise prices in paragraph 8.114.

Approach taken to the analysis

- 8.15 We do not consider that an analysis of the effect of the merger based on the current competitive positions of the various operators, as advocated by GET, would be appropriate because the current competitive situation does not appear to be a reliable guide to how rivalry can be expected to be affected by the merger over time. MFL and GET’s evidence suggests an expectation of a rapid build-up of market share in the first two years of operation, so the current competitive position of MFL, less than nine months after the operation started, is unlikely to be informative about the level of rivalry in the markets in the medium term.
- 8.16 GET told us that its commercial aspiration for MFL was ultimately to develop a share of [%] per cent of passenger services and [%] per cent of freight services on the short-sea route within [%]. In the course of our inquiry, GET told us that it had revised MFL’s market share target for 2013 down to [%] per cent for freight. The target for passenger services [%] per cent. GET told us that it had no agreed market share targets beyond this. MFL told us that its objective was to reach [%] per cent for both passengers and freight¹⁶⁶ by the end of 2013 and it expected to be profitable within the next [%] years.
- 8.17 The original business plan for MFL, dated 11 April 2012, anticipated a [%]-year build-up of market share starting in 2012 and stabilizing at [%] per cent for freight and [%] per cent passengers by [%]. This was later revised and the latest MFL budget (and scenario analysis), dated 16 November 2012, forecasts a market share

¹⁶⁵ www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/autorite_de_la_concurrence_comments_on_remedies_notice_and_pfs.pdf.

¹⁶⁶ We note that its current capacity could easily accommodate this.

of [redacted] per cent for freight and [redacted] per cent for passengers (both coaches and cars) as of [redacted].

- 8.18 Given these specific circumstances, we considered it appropriate to assess the effect of the acquisition in a three-year time frame, ie to 2015/16. We note that the 2013 market share figures that GET quoted to us (see paragraph 8.16 above) were at the lower end of the targets set in all its internal documents and we therefore concluded that they were unlikely to be representative of the likely competitive position of MFL in the time frame within which we considered it appropriate to assess the effect of the transaction. This is particularly the case as GET's internal documents show that such market shares would result in [redacted] for MFL.
- 8.19 In our statement of issues,¹⁶⁷ we identified three ways in which the acquisition could give rise to an SLC (the three theories of harm):
- (a) *Horizontal unilateral effects.* Eurotunnel may have an incentive to increase prices following the transaction because it would be likely to lose a smaller proportion of its sales as a result of a price rise. This is because a proportion of the sales that would have been previously lost to its ferry competitors would be likely to divert to MFL and thus the associated profit would be retained within GET.
 - (b) *The exit of an operator induced by the acquisition.* If only two strong ferry competitors are viable on the short sea and the purchase of the SeaFrance assets by GET results in the displacement of another operator, this may result in a reduction in the number of major operators from three (GET, DFDS and P&O) to two (GET including MFL, and P&O), thus potentially leading to higher prices.
 - (c) *The bundling of ferry-based services.* By offering a bundle of Eurotunnel shuttle services and MFL ferry services, GET may be able to disadvantage customers and other ferry operators.
- 8.20 In practice, these three theories of harm are interlinked: the size of any unilateral effects resulting from the merger will depend, in our view, on how the relevant markets will develop. This includes the market shares MFL is likely to achieve over time and the number of competitors that can be expected to continue to operate in the markets following the merger, and in particular whether the competitive interactions on the Dover–Calais route would result in the exit of an operator from that route. In turn, the ability of GET to bundle Eurotunnel and MFL services may have a role to play in this outcome.
- 8.21 In our statement of issues, we also stated that we were not proposing to investigate in detail three further ways in which the merger might have an impact on competition, including vertical effects arising because of a bid that was expected to be made by GET to manage the ports of Calais and Boulogne (from which GET has since withdrawn).¹⁶⁸
- 8.22 Regarding the relevance of the findings made by the FCA, we note that it conducted a phase 1 investigation, at a different point in time (in particular, before the impact of MFL on the profitability of the DFDS service could be measured) and using a different evidence base. In particular, the FCA told us that it had not seen any of the internal GET documents that had been referred to in the CC's provisional findings

¹⁶⁷ www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/eurotunnel_issues_statement.pdf.

¹⁶⁸ The other two theories of harm we identified concerned predatory pricing and interavailability agreements. For the reasons set out in our statement of issues, we did not carry out detailed investigations of these theories.

report. Although these facts alone could explain in principle why the two authorities would reach different conclusions, where appropriate we address directly key analytical and evidential differences between our findings and those of the FCA in our assessment (see paragraphs 8.75 and 8.114).

- 8.23 In the rest of this section, we consider how rivalry in the relevant markets can be expected to evolve over time. Given that the Dover–Calais route accounts for the vast majority of freight and passenger volume carried on ferries on the short sea (see Table 4), and given that the recent significant increase in capacity following the expansion of DFDS on to this route and launch of MFL has centred on this route, a large part of our analysis is focused on this route.
- 8.24 Our analysis, as set out in the following paragraphs, involved the following aspects which together assess the theories of harm set out in paragraph 8.19:
- (a) We first considered what size of operation would be required to sustain a competitive service and what share of the markets was implied by this (minimum efficient scale) (paragraphs 8.27 to 8.35).
 - (b) We then assessed whether, given the level of demand, capacity and projected growth, it would be possible for both MFL and DFDS to operate on the Dover–Calais route in the short to medium term (paragraphs 8.36 to 8.52).
 - (c) Having reached conclusions on (b), we then considered which of the current operators would be most likely to withdraw capacity (paragraphs 8.53 to 8.103).
 - (d) Having made this assessment, we examined the effects of the merger, given this new industry structure (paragraphs 8.104 to 8.137).
 - (e) We then looked at the likelihood of entry and expansion (paragraphs 8.138 to 8.161).
 - (f) We also considered whether buyer power could counteract the effect of the merger (paragraphs 8.162 to 8.169).
- 8.25 In deciding on the balance of probability whether the acquisition has resulted or may be expected to result in an SLC, we examined in detail all the above factors. In line with our guidance and accepted practice,¹⁶⁹ we did not reach a view on the probability of each aspect separately, but on the overall probability of an SLC arising in this case.
- 8.26 Throughout this section, when commenting on the adverse effects of the transaction on customers, we use the terms ‘price’ and ‘prices’ as proxies for any adverse effect of the transaction on customers, including on service quality.

Minimum efficient scale

GET’s views (including MFL)

- 8.27 GET told us that it believed that two ferries were sufficient to operate a service, but that this number still led to some difficulties in relation to frequency of service.

¹⁶⁹ CC2, [paragraph 2.3](#), and Court of Appeal Case C1 2008/3053, paragraph 69.

- 8.28 GET's board considered this issue on 11 April 2012. One board member noted that at least two ships would be necessary to ensure operations. The board discussed the benefits of having a third ship in the event of a breakdown. A member of the board pointed out the synergies with the tunnel which should serve as a third ship.
- 8.29 MFL said that it would be possible to operate with two passenger ships, but that for freight customers a third ship would be needed to maintain the level of frequency on the Dover–Calais route when one ship was out of service for maintenance reasons and ships would need to be operated 24 hours a day, seven days per week. This would be equivalent to a total of 20 crossings (or 10 returns) per day.

Views of other parties

- 8.30 We received evidence on the minimum efficient scale needed to operate on the Dover–Calais route from DFDS, P&O and one freight customer:
- (a) P&O told us that a passenger and freight ferry company would need to have a fleet of at least two vessels.
 - (b) DFDS told us that it planned to operate a total of five or six vessels, split between the Dover–Calais and Dover–Dunkirk routes, in order to achieve reasonable economies of scale and to provide the required level of flexibility for customers. The split of vessels between the Calais and Dunkirk routings could be adjusted during the year depending on the requirements of its customers. DFDS considered that the minimum required frequency of service was between eight and ten departures per day to each of the ports. This meant that at least two vessels were needed on the Dover–Calais route and three on the Dover–Dunkirk route.
 - (c) [X] told us that cross-Channel ferry operators needed to have three or four vessels, to provide the required flexibility of service on the short sea.

CC analysis

- 8.31 The above comments suggest that 16 to 20 sailings per day are required in order to deliver the minimum level of frequency that is considered to be acceptable to both passengers and freight customers. We noted that the latest financial projections for the MFL business assume that from 2013 onwards MFL will be operating an average of [X] crossings per day.¹⁷⁰ We also noted that DFDS offers [X] crossings on the Dover–Calais route to its customers. Taking into account the above evidence, we therefore consider that in practice a minimum of 20 crossings per day is required to compete effectively in the passenger and freight markets.
- 8.32 On the Dover–Calais route, which is particularly short, this requires at least two ships. We have been told consistently that freight customers value service reliability. An additional ship is needed to cover periods of maintenance or unexpected breakdowns, so access to three ships is required. We therefore consider that the minimum efficient scale of operation requires two fully operational ships and access to one additional ship for back-up.¹⁷¹
- 8.33 The analysis underpinning MFL's 2012 budget shows that [X].

¹⁷⁰ It currently advertises 26 crossings per day.

¹⁷¹ We note that MFL is operating three ships: two combined passenger/freight vessels and one vessel for freight only.

- 8.34 In order to establish what market shares were required to break even, we also modelled on a range of assumptions and based on cost information provided by DFDS, the volume of passengers and freight that would need to be carried on the Dover–Calais route in order to break even, assuming a frequency of 20 sailings per day overall.¹⁷² Our calculations showed that a [5–15] per cent share of passengers on the short sea (including the tunnel) and a [10–20] per cent share of freight volume would be required assuming 20 sailings.¹⁷³ This was consistent with DFDS’s own estimate of the additional amount of volume that it would require to transport on the Dover–Calais route in order to break even.¹⁷⁴ We note that these figures do not include sales and marketing costs or central overheads and are therefore likely to be conservative.
- 8.35 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.

Viability of three ferry operators on the Dover–Calais route

GET’s views (including MFL)

- 8.36 GET told us that it believed there was room to accommodate three well-managed ferry operators on the short sea, as the freight market would be growing at a rate of 2 to 3 per cent. It argued that the reason that SeaFrance had experienced financial difficulties was because it was poorly managed remotely from Paris. It supported its view by reference to an article in which an unnamed source was quoted, saying that ‘P&O, SeaFrance and DFDS have substantial businesses. There is room for three big ferry companies, plus Eurotunnel, if competition is based on realistic pricing, rather than suicidal pricing’.¹⁷⁵
- 8.37 However, we noted an interview given by [§], the CEO of the SCOP and a manager of MFL, on 2 February 2012 in which he emphatically stated that the Dover–Calais route could not support three ferry companies sustainably.¹⁷⁶

Other parties’ views

- 8.38 DFDS considered that there was too much capacity on the Dover–Calais route. It also noted that over the 15 years prior to its liquidation, SeaFrance had only made a profit in one year and that it had been subsidized by its parent company, SNCF, and provided evidence submitted by P&O and the FCA to the European Commission in support of this statement.
- 8.39 P&O told us that in the medium term, there would have to be a reduction in the number of ferry operators or the number of ferries being operated on the short sea,

¹⁷² In the model, break-even is achieved when revenues on the route (from ticket sales and onboard sales) equal the operating costs on the route, not including any allocation of sales and marketing costs or central overheads). For modelling purposes the vessels are assumed to be chartered and therefore the cost of the vessels is reflected in the assumed charter payments (and there are no additional financing or depreciation costs).

¹⁷³ For modelling purposes we assumed that the ratio of passenger market share to freight market share would be consistent with the passenger and freight market shares achieved by DFDS in January–April 2013.

¹⁷⁴ As at 25 January 2013, DFDS estimated that, based on its forecast at that time for 2013, it would achieve a market share of [§] per cent of freight and [§] per cent of passenger, that an increase of [§] freight units ([§] per cent market share) and [§] passengers ([§] per cent market share) would be required to break even on Dover–Calais—or in terms only of freight, an additional [§] freight units ([§] per cent market share).

¹⁷⁵ Lloyd’s List, 24 August 2010.

¹⁷⁶ La Voix du Nord, 2 February 2012: [§], pressenti pour diriger la coopérative, multiplie les rencontres à Calais jusqu’à ce soir: ‘... [§] est catégorique quand on lui demande si la ligne Calais-Douvres peut accueillir durablement trois compagnies maritimes: “Non, clairement non”.’

as the required level of demand was not present to sustain the current market situation. It thought that, currently, there was around three ferries' worth of capacity in excess of demand.¹⁷⁷ There was sufficient capacity on the short-sea routes following the SeaFrance exit so, with the reintroduction of the vessels acquired by Eurotunnel, there was now excess capacity.

- 8.40 [Customer C] considered that the current situation of excess capacity on the short sea, in a market where the only growth was derived from taking volume away from the Western Channel and North Sea routes through a price war, could not last. The rates had been decreasing on the Channel year-on-year for five years and the situation was not thought to be sustainable.

CC analysis

- 8.41 Evidence and analysis of the level of excess capacity on the short sea is set out in detail in Appendix E.
- 8.42 We note that GET's comments as to the sustainability of three operators relates to the short sea (including notably the Dover–Dunkirk route), rather than just the Dover–Calais route. Although SeaFrance was loss making, at least in the period since 2008, we are not in a position to establish the extent to which this was due to excess capacity on the short sea or poor management. DFDS's comments in its October 2011 bid for the SeaFrance business are, however, consistent with GET's perception that SeaFrance was not efficiently managed. The evidence and analysis set out in Appendix E, Table 3, suggests that the poor performance of SeaFrance in 2008 and 2009 was at least partly caused by excess capacity, which was addressed in 2010 and consequently led to an improvement in its load factors.
- 8.43 We first considered whether the Dover–Calais route had historically supported three operators. We noted that between 1998 and 2012, there had been only two operators of ferry services on that route: P&O¹⁷⁸ and SeaFrance. Following the exit of SeaFrance, DFDS/LD and MFL both entered on the route in 2012. Since then, P&O has also replaced two of its vessels with larger ships which could potentially have an impact on the viability of other operators on the route.
- 8.44 To understand this issue better, we examined the overall change in the level of supply and demand on the key short-sea routes since 2007 and extrapolated these figures for 2013, based on the operators' projections (see paragraph 2.9 for projections of demand). Table 13 shows the aggregated capacity figures and load factors across the routes. The underlying calculations can be found in Appendix E, Table 3. The table shows that there has consistently been spare capacity on ferry services on the short sea over the past five years. The significant increase in the level of capacity operated on the short sea in 2013 has been driven by an increase in capacity on the Dover–Calais route. It also shows that the level of capacity utilization across short-sea operators in 2013 has returned to a level similar to that in 2009 (before SeaFrance's restructuring) and that the level of capacity utilization across ferry operations is now substantially lower than at any time in period from 2009 to 2011.

¹⁷⁷ P&O told us that assuming a maximum practical level of capacity of 74.1 per cent, the re-entry of the former SeaFrance with two or three multipurpose vessels resulted in a drop in utilization to 56 per cent. The difference between the two illustrates the current level of overcapacity.

¹⁷⁸ P&O and Stena Line operated a joint venture between 1998 and 2002.

TABLE 13 Average daily capacity and load factors on the key short-sea routes*

	<i>Lane metres</i>						
	2007	2008	2009	2010	2011	2012	2013
<i>Capacity</i>							
All operators	374,489	346,483	361,013	344,463	342,604	349,569	388,214
Ferries	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Dover–Calais ferries	[X]	[X]	[X]	[X]	[X]	[X]	[X]
<i>per cent</i>							
<i>Utilization</i>							
All operators	54	56	47	51	54	54	49
Ferries	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Dover–Calais ferries	[X]	[X]	[X]	[X]	[X]	[X]	[X]

Source: Ferry operators, GET, CC analysis.

*Includes Dover–Calais, Dover–Dunkirk and Folkestone–Coquelles.

- 8.45 As explained in Appendix E, paragraph 2, there are inherent difficulties in estimating and interpreting capacity and capacity utilization figures across operators. We therefore asked both P&O and DFDS for their views of the level of spare capacity across operators on the short sea and of what was a sustainable level of capacity. Their analysis and views are set out in Appendix E, paragraphs 13 to 16. Although actual load factors calculated by P&O were considerably higher than those calculated by us, using GET's model, the analyses consistently showed that capacity utilization in 2013 on the short sea, and on the Dover–Calais route in particular, would be considerably lower than in the past three years.
- 8.46 Using load factors achieved in 2007 as a suitable benchmark (see Appendix E, paragraph 32) against which to compare current capacity utilization levels, we concluded that the level of excess capacity on the short sea was currently equivalent to between two and three ferries. (See the analysis in Appendix E, paragraphs 30 to 32.) This is consistent with the fact that both DFDS and MFL anticipate considerable losses on their short-sea services in 2013.
- 8.47 Since both DFDS and MFL operate two vessels that transport both passengers and freight between Dover and Calais¹⁷⁹ and are at or close to the minimum level of scale necessary to operate on that route, removal of this excess capacity on the Dover–Calais route could not be achieved through the independent reduction of capacity by either operator. We consider further in paragraphs 8.91 to 8.94 whether DFDS would be likely to withdraw the capacity from its Dover–Dunkirk route instead.
- 8.48 We next considered whether growth in the market in the short to medium term could be sufficient to support the continuation of DFDS's and MFL's services profitably. Based on the various forecasts we received (see paragraphs 2.9 and 3.46), we assumed that the freight market would grow at a rate of 2 to 3 per cent (averaged to 2.5 per cent a year) in the short to medium term, and that the passenger market would remain flat. As indicated in paragraph 8.35 above, a market share of [5–15] per cent of the passenger market and [10–20] per cent freight market would be required to break even. Given the current level of excess capacity, it is unlikely that market growth would result in a level of demand sufficient to support both MFL and DFDS in the short to medium term. Over a period of four to five years, this level of growth would potentially add volume to the short-sea freight market that would be equivalent to a 10 to 13 per cent share of the freight market in today's terms. It seems reasonable to assume that market growth would be distributed across the

¹⁷⁹ MFL also operates the *Nord Pas-de-Calais*, which transports freight only and represents [X] per cent of the estimated capacity operated by MFL in 2013.

operators broadly in proportion to their individual shares of the freight market,¹⁸⁰ rather than accruing to a single operator. In other words, it could be expected that between them P&O and Eurotunnel would capture 68 to 70 per cent¹⁸¹ and DFDS's Dover–Dunkirk service would capture 13 to 14 per cent of the additional volume, thus leaving around 17 to 18 per cent of the potential 10 to 13 per cent volume growth to be shared between MFL and DFDS on the Dover–Calais route. This is equivalent to a potential market share increment of around 2 per cent to be shared between them in five years' time.¹⁸² In addition, no growth is envisaged in the passenger market, and, as noted in paragraph 8.35, a share of [5–15] per cent of this market is also needed for a service transporting both freight and passengers to be viable.¹⁸³

- 8.49 We also considered whether P&O would be likely to reduce its level of capacity in the short to medium term as a response to the current level of competition. GET told us that as of January 2013, P&O was in the process of reducing the number of vessels on the short sea from six to five. Our calculations show that the level of capacity (measured in lane metres, which take account not only of the number of ships but also their capacity and frequency of sailings) operated by P&O in 2013 is higher than it was in 2011, while 2012 was a year of transition during which P&O withdrew old ships and introduced new ships with periods of overlap, which distorted capacity trends.
- 8.50 GET further argued that as the largest operator P&O may be expected to have the greatest incentive to take out 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.
- 8.51 We note that P&O has recently increased its capacity through the replacement of older vessels by larger ships, thus making the reduction of capacity more difficult, as customers value frequency. In addition, as the largest ferry operator with a long-established presence on the short sea, we consider that P&O has a strong incentive to maintain its level of capacity in the short term in the expectation that one of the smaller operators will exit the route. Our view does not preclude the possibility that P&O might reduce capacity in response to changes in demand conditions or after one of the other two operators has left the route if P&O judged this necessary to improve profitability. In the short term, P&O is unlikely to remove a significant amount of capacity (ie equivalent to two to three ferries), as doing so would increase the probability that both MFL and DFDS continue operating on the Dover–Calais route, with likely worse consequences for P&O's own profitability in the long term. In this respect, we note that:
- (a) When SeaFrance and Norfolkline increased the capacity they operated on the short sea between 2004 and 2006, P&O maintained its level of capacity for a period of three years before slightly reducing it in 2010.
- (b) SeaFrance described the reaction of its competitors, including P&O, to the decline in demand and situation of overcapacity in its 2009 annual accounts in the following terms:

¹⁸⁰ For the same reasons as market shares are a good proxy for diversion ratios. See Appendix C and Appendix G, paragraphs 56 & 57.

¹⁸¹ GET argued that Eurotunnel was likely to [REDACTED]. [REDACTED] as noted in paragraph 3.45, it told us that it had enough capacity [REDACTED] and in any event, the evidence we have received from GET on this particular issue is inconsistent (see paragraphs 3.45–3.59). [REDACTED]

¹⁸² Assuming market growth of 2.5 per cent, over five years: $18\% * 13\% = 2.3\%$. This uses the share of the key routes achieved by MFL and DFDS in March and April 2013.

¹⁸³ This assumes the same ratio of passenger to freight market shares as that achieved by DFDS in the first four months of 2013.

faced with a global demand that was in significant decline, the actions of the competitors of SeaFrance have not been to reduce capacity proportionately to the level they supplied, thus resulting in a worsening of the level of overcapacity ... With a 10 percent increase in the level of capacity it offered, the company that is most directly in competition with SeaFrance [P&O], adopted an aggressive commercial strategy focused on volumes, thus succeeding in maintaining its leadership position in the market for freight on the short sea.

- 8.52 On the basis of the above analysis, we consider that there is significant excess capacity which is likely to be removed through either the exit of MFL from the Dover–Calais route or the reduction of DFDS’s capacity, either on the Dover–Calais route or on the Dover–Dunkirk route. We first considered which of MFL or DFDS was most likely to withdraw its Dover–Calais service (paragraphs 8.53 to 8.87), then whether DFDS might instead withdraw capacity on its Dover–Dunkirk service (paragraphs 8.91 to 8.94).

Which operator is more likely to withdraw capacity?

GET’s views

- 8.53 GET told us that it saw no reason to believe that, simply because it had acquired the Vessels and other assets, there was any realistic prospect of DFDS or P&O being excluded from the short-sea market or even the Dover–Calais route. In reaching this view, GET took account of DFDS’s public statements about its group strategy for its route network, DFDS’s comments to the press¹⁸⁴ and the press commentaries about DFDS’s success on the short-sea operation, as well as publicly available information on DFDS’s business from its most recent annual report and an analyst report.¹⁸⁵ GET noted that DFDS launched its operation on the Dover–Calais route before it was known who would buy the Vessels from the liquidator and that it would have been irresponsible for any listed company to have done so on an assumption that it would then win the tender process to buy the Vessels and/or that no other bidder would, if successful, wish to run the Vessels on the short sea.
- 8.54 GET further argued that its financial strength was more limited than that of its competitors, and in particular that DFDS benefited from huge financial backing and that its performance had not been affected by the entry of MFL and that this was unlikely to have a material adverse effect on DFDS’s financial performance in the 2013 financial year. It also noted that with a 20 per cent share, DFDS now was the second largest ferry operator on the short sea. GET stated that the market share achieved by DFDS in January showed that the company was close to reaching break-even point, while MFL’s market share in January remained very low.
- 8.55 Finally GET stated that the FCA did not consider that there was any risk that DFDS might exit the Dover–Calais route.
- 8.56 For these reasons, it concluded that [REDACTED].

¹⁸⁴ For example, DFDS interviews with *Le Nord Littoral* and *Le Journal de la Marine Marchande*.

¹⁸⁵ November 2012 Nordea report.

DFDS's views

8.57 [REDACTED]

8.58 [REDACTED] It was not considered a viable option to wait until the decisions of the competition authorities had been reached before deciding whether to acquire another vessel, as the offering of a one-ship service on Dover–Calais was not acceptable to most customers.

8.59 [REDACTED]

8.60 [REDACTED]

CC analysis

8.61 In order to reach a view on this issue, we considered evidence relating to:

(a) the size of losses sustained by MFL and DFDS and their expectations/plans;

(b) the financial strength of DFDS and GET;

(c) whether the ability to bundle services could have an impact on the outcome; and

(d) the economic and strategic incentives of GET and DFDS.

Size of losses and companies' expectations/plans

8.62 In its projections for the MFL business as set out in its 11 April 2012 [REDACTED]¹⁸⁶ from 2012 [REDACTED] to cover negative cash flow [REDACTED] million inflow was expected from the SCOP, so the net investment required by GET was expected to be €[REDACTED] million. However, early trading was disappointing: MFL incurred EBITDA losses of €13 million for the period from 20 August to 31 December 2012; and as at January 2013, MFL expected that it would lose €25 million in first 18 months of operation.¹⁸⁷

8.63 GET told us that it did not expect MFL to break even before the end of [REDACTED]. MFL confirmed that it would take [REDACTED] years for the business to reach profitability.

8.64 [REDACTED] Its current projections show significant losses [REDACTED] on the Dover–Calais route in 2013.¹⁸⁸ [REDACTED] DFDS told us that whilst January 2013 had been very encouraging, this had now changed and in February and March it had lost a significant amount of existing volume to its competitors, including MFL.¹⁸⁹

8.65 The report prepared by DFDS for its 15 January 2013 board meeting set out a number of expectations for 2013, including that MFL would have a negative impact on profitability, that two vessels would be operated by itself on the Dover–Calais route [REDACTED]. It also expected to achieve [REDACTED] on the short sea. It anticipated an improvement in its share of short-sea freight and passenger volume [REDACTED]. The minutes of the board meeting held on 27 February 2013, commenting on our provisional findings that the transaction may be expected to result in an SLC, stated that CC remedies were 'by no means the solution to the very significant challenges

¹⁸⁶ Draft global offer for the acquisition of the operating assets of SeaFrance.

¹⁸⁷ www.lloydsloadinglist.com/freight-directory/sea/eurotunnel-expects-25m-mfl-loss/20018017346.htm;jsessionid=67DACA025ECAEEBB016248CF53BF8A62.49f4d07bb55175180e5453a50ae76331b9143bfd.

¹⁸⁸ Assumes an exchange rate of €1 = DKK7.46.

¹⁸⁹ We note that P&O told us that its January share of the passenger market was always the lowest performance of the year.

on the Dover–Calais route but it may be seen as a necessary but not decisive precondition for a successful operation of that route’.

- 8.66 DFDS told us that it had told its investors that by 2014, either the business would be close to break-even or would have ceased operating on the Dover–Calais route. It told us that the statements it made to the press aimed to reassure customers that they could choose DFDS in order to counter allegations made by MFL/GET that DFDS would withdraw, as DFDS had done in 2011 with its Irish Sea operation. It added that the market presence of DFDS would be undermined if it did not consistently and publicly maintain this view officially.
- 8.67 Considering the performance of DFDS’s Channel (ie Dover–Calais and Dover–Dunkirk) business in the context of its entire Shipping Division (which groups all its ferry operations), we noted that in 2012, the short-sea operations accounted for 17 per cent of the division’s revenue. In 2010, 2011 and 2012, the Channel business generated the lowest return on invested capital of any of the division’s businesses. In 2012 the Channel business made an EBIT loss of DKK 132 million (equivalent to €17.7 million), its ROIC was –10.9 per cent and the EBIT shortfall compared with DFDS’s ROIC target of 10 per cent was DKK 261 million (€35 million).¹⁹⁰ The report stated that in the first year of operation the Dover–Calais route had incurred a considerable loss and that following the CC’s decision on the ‘legitimacy of Eurotunnel’s entry into the ferry market’ a review of the Channel’s business structure would be conducted. We also noted an internal email sent to GET’s senior management team on 19 November 2012,¹⁹¹ which contained an analysis and projections by Nordea of DFDS’s losses on the Dover–Calais route for years 2012 to 2014. The email drew the attention of GET’s senior management to the fact that DFDS’s Dover–Calais route performance for 2013 had been revised down and that losses of €18 million, €16 million and €15 million were estimated for 2012, 2013 and 2014. In our view, the content of this internal email is not consistent with GET’s representation to us that DFDS was close to reaching break-even point.
- 8.68 Throughout our inquiry DFDS consistently argued that it would withdraw its Dover–Calais service [REDACTED] if competition from MFL continued. We found that evidence to be credible, and DFDS’s public financial statements, internal analysis of the financial performance of the route and board minutes all support this position. We do not consider that the fact that DFDS is generally expanding and is a successful ferry business is relevant to the question of whether it would continue to operate its Dover–Calais service, as the performance of each route is evaluated on its own merits, taking account of local conditions, and this approach is reflected in DFDS’s financial statements. 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. In this respect, we also note that there have been some apparent inconsistencies between GET’s own statements to the press and between those statements and its internal documents.¹⁹²
- 8.69 In order to assess GET’s statement that, based on January market shares, DFDS was close to reaching break-even point, whilst MFL’s market share remained very low (see paragraph 8.54), we obtained monthly market share information for the main

¹⁹⁰ Based on ROIC targets that apply both to the group overall and each division.

¹⁹¹ [REDACTED]

¹⁹² See Mr Gounon’s comments on target market shares made in Nord Littoral (22 March 2013) and GET’s latest business plan projections and Mr Giguët’s comments in *Journal de la Marine Marchande* (22 February 2013). GET told us that the figures used in its plan and the figures quoted by Mr Gounon were hypotheses used in different contexts and it did not explain why they were inconsistent. GET identified only one internal document [REDACTED], in which it referred to its revised [REDACTED] per cent market share target for freight for 2013.

short-sea routes (Folkestone–Coquelles, Dover–Calais and Dover–Dunkirk routes) for the first four months of 2013. This is shown in Table 14.

TABLE 14 Volume share of freight and passengers on the key short-sea routes

	<i>per cent</i>				
	<i>Eurotunnel</i>	<i>P&O</i>	<i>DFDS (D-D)</i>	<i>DFDS (D-C)</i>	<i>MFL</i>
<i>Q4 12</i>					
Freight	43	36	14	6	1
Passengers	55	27	10	5	3
<i>Jan 13</i>					
Freight	41	33	13	10	4
Passengers	56	22	11	7	3
<i>Feb 13</i>					
Freight	39	31	14	10	7
Passengers	56	26	9	6	3
<i>Mar 13</i>					
Freight	38	30	15	8	9
Passengers	53	27	12	4	4
<i>Apr 13</i>					
Freight	39	29	14	9	9
Passengers	52	28	10	6	5

Source: IRN research.

Note: Passenger volume is measured in car-equivalent units (CEU). Freight figures are for accompanied traffic only.

- 8.70 This showed an improvement in the freight market shares of both DFDS's Dover–Calais route and MFL compared with 2012: whilst DFDS improved its position in January and then broadly maintained it, MFL experienced growth consistently for three months and by April 2013, both companies had a 9 per cent share of freight. On the passenger side, DFDS improved its position in January, but its share has since then declined to 6 per cent in April, whilst MFL has progressively improved its position to a 5 per cent share in the same month.
- 8.71 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.¹⁹³ In addition, we note that, based on the data available to us, DFDS does not appear to be in a phase of growth. 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 near future.
- 8.72 Over the first four months of 2013, both P&O and Eurotunnel lost shares of traffic to the other two operators, although following a significant dip in January P&O's position on the passenger side had returned to the position it had held in the fourth quarter of 2012 by April 2013.
- 8.73 P&O told us that passenger market shares were strongly seasonal, with its January share being always the lowest, although in 2013 this was exacerbated by the presence of more operators on the short sea and the fact that it operated one less ferry than in 2012.¹⁹⁴ We noted that P&O, however, suffered a more significant and sustained decline in the freight market over the first four months of 2013.

¹⁹³ This is particularly the case as the overall break-even point for a ship (which combines both passengers and freight) needs to be higher than the combination of the lower ends of the two ranges.

¹⁹⁴ We discuss P&O's withdrawal of capacity between 2012 and 2013 in paragraph 8.49.

- 8.74 P&O told us that it had not adjusted its prices in response to its loss of market share. We consider this to be a rational response to the competitive situation in the short term. Based on its past competitive behaviour (see paragraph 8.51), we would expect that P&O would in the medium term seek to protect its position through a more aggressive pricing strategy.
- 8.75 Finally we do not consider the FCA's finding on this matter (see paragraphs 8.7(a) and 8.14(c)) to be relevant to our consideration, as the FCA gathered evidence and carried out its analysis well before the impact of the MFL service on DFDS's performance could be assessed. The FCA also told us that it had not carried out a detailed review of internal documents and therefore based its views on a less extensive range of evidence.

Financial strength of DFDS and GET

- 8.76 Having found that both MFL and DFDS are loss making on the Dover–Calais route, we considered whether either DFDS or GET would be unable to sustain losses on this route for a period of time. In reaching our view, we reviewed the financial results of both companies.
- 8.77 With a turnover of about €1.6 billion¹⁹⁵ in 2012, the DFDS Group is significantly larger than GET in revenue terms, but its EBITDA margin is significantly lower (9 per cent in 2012). DFDS is nevertheless a profitable company and with a debt to EBITDA ratio of 1.8 times (at 31 December 2012) it has a relatively low level of debt. In the 12 months to 31 December 2012 its free cash flow was €143 million.¹⁹⁶ DFDS reported a decline in profitability in 2012 compared with 2011, which it stated was mainly due to lower profitability in its North Sea and Channel businesses and its logistics division.
- 8.78 GET's 2012 turnover was over €1,023 million and its EBITDA margin was 45 per cent. In the 12 months ended 31 December 2012, its free cash flow was €133 million.¹⁹⁷ Although GET has a high level of debt, with a debt to EBITDA ratio of 8.7 times at 31 December 2012, and repayments start in 2013, it is expected to have no difficulty meeting its banking covenants in 2013.
- 8.79 We considered that DFDS and GET both had the financial strength to sustain losses on the Dover–Calais route for a period of time. We noted that GET's business case for MFL assumed that it would support a negative cash flow [X] and that none of its internal documents we reviewed revealed any concern about the company's ability to fund these losses.

Bundling

- 8.80 We considered whether the ability of GET to bundle Eurotunnel and MFL services or the ability of DFDS to bundle services across routes might give either party a competitive advantage that would be sufficiently large to contribute materially to the exit

¹⁹⁵ Assumes an exchange rate of €1 for DKK 7.46.

¹⁹⁶ Free cash flow is calculated as cash flow from operating activities, less tax, less net cash flow from investing activities, less net interest costs.

¹⁹⁷ Free cash flow is as shown in GET's 2012 Registration Document, section 10.8, and is calculated as net cash flow from operating activities after tax, less net cash flow from investing activities (excluding the initial investment in new activities and the acquisition of shareholdings in subsidiary undertakings, less net interest costs).

of the other party. The analysis underpinning our conclusions on this matter is set out in detail in Appendix F.¹⁹⁸

- 8.81 The possibility of offering bundled services is mainly relevant in the freight market, and for the reasons given in Appendix F is likely to take the form of ‘mixed’ bundling, where the services can be acquired on a bundled or stand-alone basis. One of GET’s stated rationales for the merger appears to be somewhat akin to a ‘mixed’ bundling strategy (see paragraphs 3.38 to 3.44). We note that DFDS has actively pursued a ‘mixed’ bundling strategy in the past.
- 8.82 We note that a proportion of freight customers value highly the combination of speed and frequency that the tunnel provides: it was estimated by GET that about [X] per cent of the freight market was accounted for by customers for whom crossing times were critical. These customers may therefore be considered to be ‘captive’ to Eurotunnel and therefore more likely to be pressured to purchase a bundle. Most third parties we talked to thought it unlikely that GET could force a bundle on customers. [X]
- 8.83 Given the mixed evidence that was available to us, we could not establish whether [X]. We note that GET is, however, currently restricted in its ability to bundle services across its tunnel and ferry operations for a period of five years by undertakings it has given to the FCA.¹⁹⁹
- 8.84 We therefore conclude that the ability of GET to bundle services across its Eurotunnel and MFL operations is unlikely to have a material impact on competition on the short sea in the short to medium term.

Analysis of incentives

- 8.85 We considered the strength of the incentives of GET and DFDS to continue to operate the Dover–Calais route, based on a number of dimensions that we believed to be material to their decision either to continue to sustain losses or withdraw from the route. This included their ability to recoup losses in the long term; the strategic importance of the Dover–Calais route to their businesses; the visibility of losses to their shareholders; size of exit costs; and nature of their business model.
- 8.86 DFDS stated publicly, following the launch of the Dover–Calais route, that it was strategically important in the long run and would be initially loss making. However, the launch of MFL had an adverse impact on the profitability of the Dover–Calais route and in such circumstances it would be normal commercial behaviour to keep route performance under review in terms of ongoing viability. We noted that its 2012 annual report gave a degree of prominence to the performance of its short-sea services and highlighted that it would conduct a review of the Channel business, thus signalling its readiness to take significant action to tackle losses. In addition, ferry operators deploy their assets flexibly across routes, responding to opportunities where they see them arise and closing down services in response to local conditions. We noted that DFDS had withdrawn from the Irish Sea in 2011, which suggested to us that it would be willing to take such actions on other routes if circumstances required and that its exit from the Dover–Calais route would not incur material costs, since it had chartered vessels and was using its existing operation centre in Dover.

¹⁹⁸ The appendix explores this issue in the context of the theory of harm that was set out in our statement of issues. We consider that this theory of harm is only relevant to the extent that it would contribute to the exit of one of the operators from the Dover–Calais route.

¹⁹⁹ www.autoritedelaconurrence.fr/pdf/engag/12DCC154engagements_version_publication.pdf.

8.87 As explained in paragraphs 3.64 to 3.67, we consider that the main objective behind GET's decision to acquire the SeaFrance assets was to prevent DFDS from acquiring them and entering into vigorous price competition on the short sea. We noted that the GET board had an expectation that it would be able to increase the Eurotunnel yield by €[REDACTED], equivalent to €[REDACTED] million a year, which we estimated to be equivalent to a net present value (NPV) of €[REDACTED] million over five years.²⁰⁰ Given that it expects to make a net investment of €[REDACTED] million in the MFL business over the next [REDACTED] years, it seems to us that GET is expecting to be able to recoup its losses through improved yield in its Eurotunnel business. In addition, MFL has signed up to a [REDACTED]-year contract with the SCOP,²⁰¹ and it cannot either sell or charter the vessels for a period of five years from the date of the Court Order without authorization from the Court under a clause in the Order (the Inalienability Clause—see Appendix J, paragraphs 12 to 20) and its business is closely associated with the short sea and the Calais economy. GET pressed upon us the difficulties it would face if it were to apply for the inalienability clause to be lifted. It also told us that it had not envisaged the possibility that it might need to resell the Vessels, thus implying a strong commitment to the MFL business. We therefore consider that its exit costs from the MFL venture, including political costs, could be substantial and that its approach, including its expectation of significant losses over the next [REDACTED] and absence of any contingency plan, suggest an apparent willingness to continue to operate the MFL business notwithstanding that it would sustain losses for [REDACTED].

Would DFDS also exit the Dover–Dunkirk route?

8.88 DFDS told us that [REDACTED].

8.89 We noted that the route had been started in 2000, that its share of the short-sea traffic has progressively increased to 15 per cent and that it had met a customer need that might otherwise be expected to be met by a competitor if DFDS decided to withdraw from the route.

8.90 However, we have received mixed evidence on the level of profitability of this route. The financial data provided by DFDS suggests that the returns it provides are below the company's target and insufficient in the long run. These numbers are, however, not consistent with those included in DFDS's bid for SeaFrance, which show an EBIT margin of 10 per cent. The projections included in this document show that the profitability of the route is expected to decline significantly in Year 4 (2015) to an EBIT margin of 5 to 6 per cent. The company anticipated that increased fuel prices and the sulphur regulations would negatively impact profitability. DFDS told us that at the time of making the bid, it was overly optimistic on the future developments on the Dover–Dunkirk route. However, DFDS gave us no indication that it was considering exiting the Dover–Dunkirk route over the short to medium term.

Would DFDS exit from the Dunkirk route but remain on the Calais route?

8.91 We considered the scenario in which DFDS would withdraw from the Dover–Dunkirk route but remain on the Dover–Calais route. We noted that due to its characteristics, the Dover–Dunkirk route had a higher cost base than the Dover–Calais route, but DFDS [REDACTED], while from a demand perspective the Dover–Dunkirk and Dover–Calais routes are close substitutes, at least for the marginal customers on the Dover–Dunkirk route.

²⁰⁰ Assuming a 10 per cent discount rate.

²⁰¹ [REDACTED] In addition, GET has pre-purchased a number of crossings. In practice, this means that GET is committed to the contract for a period of at least [REDACTED].

- 8.92 Against these facts, we noted that GET told us that its research indicated that some [X] per cent of Eurotunnel's freight traffic passed Dunkirk on the way to Calais. For these customers, using the Dunkirk route would save more than 20 km of driving, although the crossing time from Dunkirk to Calais is then longer and departures are less frequent. This suggests that the Dunkirk option offers lower road costs (diesel and running cost savings) but increased time-based costs (the cost of driver time in particular). However, a freight customer noted that it was more common for drivers working for Eastern European hauliers to be paid a fixed daily rate. Longer, cheaper crossings could be more appealing in these circumstances. This suggests that a significant number of freight customers may prefer the Dunkirk route as being more cost effective for some of their requirements than using Dover–Calais. In turn this implies that the Dover–Dunkirk route has some ability to retain a certain volume of short-sea business irrespective of what services are provided on the Dover–Calais route, even if a price differential cannot be supported. In this respect, we noted GET's Commercial Director's comment that 'the rationale for proposing a logical, transparent pricing policy is to ... leave low value Eastern volume to DFDS on the Dunkirk–Dover route'. Together, this evidence would suggest that DFDS has an incentive to maintain its operation on Dunkirk as, if it migrated its entire operation to Calais, it would have no assurance of retaining much of the business that it currently carries from Dover to Dunkirk.
- 8.93 The evidence provided to us by DFDS was that it intended to maintain its Dover–Dunkirk service while expanding on to the Dover–Calais route. We note that when DFDS entered the Dover–Calais route in early 2012, it did not choose to migrate all its operations to Dover–Calais in the period between the exit of SeaFrance and commencement of operations of MFL.
- 8.94 None of the third parties we spoke to or the analyst reports we reviewed suggested that DFDS was likely to exit the Dover–Dunkirk route in favour of operating solely on Dover–Calais.

Conclusions

- 8.95 Both companies anticipated losses on the Dover–Calais route in the next 12 months. We note that GET anticipated that it would continue to fund losses until the end of [X]. We have seen no evidence to suggest that DFDS would be prepared to sustain losses for as long a period of time.
- 8.96 Based on our review of the two companies' financial positions, we consider that they both have the financial strength to sustain losses on the Dover–Calais route.
- 8.97 Although both companies view the Dover–Calais route as strategic, for the reasons given in paragraphs 8.85 to 8.87 above, we consider that GET has significantly stronger incentives than DFDS to continue operating a loss-making service on the route. GET would also incur significantly greater exit costs.
- 8.98 Our view is that on the balance of probabilities, DFDS will exit the Dover–Calais route, if the MFL service continues in its current form and ownership. Given the size of the losses being incurred by DFDS on this route, we expect this outcome to be reached in the short term and as early as [X]. Given the strength of the evidence we have seen in support of this conclusion, we do not consider it necessary to examine in detail other hypothetical ways in which capacity might be reduced (although, as discussed in paragraphs 8.49 to 8.51, we consider it implausible that P&O would reduce its capacity to accommodate both DFDS and MFL).

- 8.99 As a result of the expected exit of DFDS, 5 per cent of the passenger market and 9 per cent of the freight market²⁰² would become available. Even assuming that MFL captured a significant proportion of this volume, this may not be sufficient on its own to enable it to reach its critical mass. However, the removal of uncertainty linked to the current unsustainable level of competition on the Dover–Calais route would make it a more credible supplier in the eyes of freight customers, and, as noted in paragraphs 8.16 and 8.17, MFL continues to forecast reaching a target market share enabling it to sustain profitable operations by [REDACTED].
- 8.100 The evidence we have received [REDACTED] the evidence does not lead us to reach an expectation that it (DFDS) is likely to do so (exit the Dover–Dunkirk route) in the short to medium term. We reached the view that it was unlikely that DFDS would exit the Dover–Dunkirk route while remaining on the Dover–Calais one.
- 8.101 Our analysis leads to the conclusion that the current excess capacity following the entry of MFL would result in the exit of DFDS from the Dover–Calais route, and that this is likely to occur by [REDACTED]. This in turn would result in significant changes to the market structure:
- (a) Assuming that MFL meets its market share aspirations (of [REDACTED] per cent of freight and [REDACTED] per cent of passengers—see paragraph 8.16), GET’s position in the relevant markets would strengthen significantly. In the freight market, the tunnel currently has a share of approximately 40 per cent by volume which, combined with [REDACTED] per cent forecast for MFL, would lead to a combined share of [REDACTED] per cent. GET’s value share would be higher still, likely to exceed [REDACTED] per cent of the freight market. In the passenger market, GET’s position would be stronger, with a volume share of approximately [REDACTED] per cent and value share likely to be close to [REDACTED] per cent of the market.
- (b) As a result of the merger, DFDS’s competitive position in the relevant markets would be significantly weakened from that of a relatively strong competitor, with shares of around 25 per cent in each relevant market²⁰³ and a sustainable position on the relatively high-frequency and low-cost Dover–Calais route, to a distant third player with a market share of 15 per cent by volume on the higher-cost Dover–Dunkirk route.
- 8.102 We note that the analysis in paragraph 8.101(a) does not depend specifically on the exit of DFDS but only on MFL attaining a sustainable share of the relevant markets. Any other scenario leading to the same outcome, for example one in which P&O retrenches, would give rise to the same concerns. Only the point made in paragraph 8.101(b) depends specifically on the exit of DFDS from the Dover–Calais route.
- 8.103 In the following section, we analyse whether the transaction would more likely than not result in unilateral effects, given this market structure.

Unilateral effects

- 8.104 Having found that as a result of the merger, DFDS could be expected to withdraw from the Dover–Calais route by [REDACTED], but would be likely to continue to operate the Dover–Dunkirk services in the short to medium term, we considered whether the

²⁰² Based on April 2013 figures. See Table 14.

²⁰³ Based on the share of passengers and freight achieved by DFDS on its Dover–Dunkirk route combined with GET’s market share aspirations for MFL.

merger could be expected to increase the ability of GET to raise prices unilaterally by comparison with the counterfactual situation.

8.105 As explained in paragraph 3.65, GET's rationale for pursuing the merger included two key elements: preventing DFDS/LD from acquiring the Vessels, and the rationalization of capacity on the short sea. The board estimated that the merger would enable Eurotunnel to improve its yield by €[REDACTED], thus increasing revenues for the company by €[REDACTED] million annually.²⁰⁴ We estimate that the five-year NPV of this price increase is €[REDACTED] million, assuming a 10 per cent discount rate. In addition, GET has not identified material cost savings resulting from the transaction that might be passed on to customers and thus offset the potential adverse effects of the merger.

8.106 GET did not contest that its board had weighed the cost of the Vessels against a yield increase as part of its decision to pursue the acquisition. It did, however, argue that an increase in yield (as opposed to prices) should not be portrayed as an increase in price, as it might arise because its customer profile might change. We did not accept this argument for the following reasons:

(a) 'Yield' is the term used by Eurotunnel to describe the average price across its customer base. In drawing a distinction between yield and price, GET appears to suggest that the effect of the merger should be evaluated by looking at its effect on each individual price rather than average prices. We think this wrong in principle, and further it is not a practical approach, particularly given that prices are set dynamically, using a yield-management system.

(b) A change in customer profile that would result in a yield increase (without increasing the price paid by a particular customer group) would be likely to be achieved by redirecting low-value customers to its MFL services. This could be achieved either through pricing or by limiting the amount of tunnel capacity available to those customers. In either case, the effect is to move an identified group of customers to a lower-quality service (compared with the tunnel) which can be regarded as an adverse effect on those customers.

(c) Displacing lower-value customers from the tunnel would have the effect of lowering total revenue, so would not result in the overall €[REDACTED] million increase estimated by the board, unless either remaining customers paid a higher price or GET increased the volume of customers carried that are paying more than the average price. Both scenarios are equivalent to an average price increase.²⁰⁵

8.107 We therefore considered the comments recorded in GET's 6 January 2012 board minutes to be reliable evidence that the board of GET had an expectation that one effect of the acquisition would be to enable Eurotunnel to implement a material increase in the average price it charges to its customers.

8.108 We noted the importance of the Dover–Calais route compared with other routes on the short sea. As shown in Tables 4 and 5, it is by far the most popular ferry route both with passengers and freight customers and accounts for approximately 70 per cent of traffic carried on ferries on the short sea. Although it has grown its share of traffic, the Dover–Dunkirk ferry route suffers from being longer and unable to support a high level of frequency. Other ferry routes are marginal and cannot be expected to

²⁰⁴ 'The Board considered the average cost of purchasing these vessels and the potential full-year impact of a yield variation of [REDACTED].' Given the words used in the French minutes, which act as the official set of minutes, we believe that the word 'considered' means 'weighed' in this context.

²⁰⁵ An increase in revenue could occur through increasing the number of lower-value customers, but this cannot be the explanation as this would result in a fall in the average yield.

pose a material competitive constraint on Dover–Calais. Against this background, it seemed to us that any weakening of the level of competition on the Dover–Calais route would result in a weakening of overall ferry competition on the short sea. This is analysed in paragraphs 8.128 to 8.137.

- 8.109 The evidence set out in paragraphs 7.3 and 7.20 to 7.34 suggests that although it is subject to competitive constraints from ferry operators in the short sea, Eurotunnel has a unique competitive position that is derived from a differentiated product that could not be replicated in the foreseeable future.
- 8.110 We compared the increase in GET’s market shares following the merger to the likely market shares of DFDS under the counterfactual. We noted that the merger would result in a previously strong competitor reaching a share of both relevant markets that would exceed [redacted] per cent. By contrast, under the counterfactual, DFDS would improve its position from that of a relatively weak competitor with a 15 per cent share of the markets achieved on a suboptimal route²⁰⁶ to a stronger competitor better able to pose a competitive constraint on Eurotunnel and P&O. Indeed, P&O commented that in isolation, the Dover–Dunkirk route had moderate frequency, and did not operate to the first choice of French port, but that the combination of the Dover–Dunkirk and Dover–Calais routes would make DFDS a strong competitor. By contrast, P&O perceived Eurotunnel to be a dominant force in the market in its own right.

TABLE 15 Comparison of market shares between the post-merger situation and counterfactual

		<i>per cent</i>		
<i>Post-merger</i>	<i>MFL*</i>	<i>ET</i>	<i>GET combined</i>	
<i>Volume</i>				
Freight	[redacted]	40	[redacted]	
Passenger	[redacted]	45	[redacted]	
<i>Value</i>				
Freight	[redacted]	[redacted]	[redacted]	
Passenger	[redacted]	[redacted]	[redacted]	
<i>Counterfactual</i>	<i>DFDS–DC</i>	<i>DFDS–DD</i>	<i>DFDS combined</i>	
<i>Volume</i>				
Freight	[redacted]	15	[redacted]	
Passenger	[redacted]	15	[redacted]	
<i>Value</i>				
Freight	[redacted]	[redacted]	[redacted]	
Passenger	[redacted]	[redacted]	[redacted]	

Source: CC analysis of volume and revenue data provided by the operators.

Note: GET’s commercial aspirations for MFL in a two- to three-year time frame (see paragraph 8.16). We do not consider the 2013 target that GET relayed to us ([redacted] per cent [redacted]) to be relevant as we view the current competitive situation to be unsustainable. We note that GET aims ultimately to achieve market shares of [redacted] per cent for freight and [redacted] per cent for passengers (forecasts made in its April 2012 plan) and that its November 2012 budget forecasts that [redacted] with shares of [redacted] per cent of freight and [redacted] per cent of passengers.

- 8.111 Against this background, we examined the effect of the merger on the incentives of Eurotunnel and the ferry operators to increase prices. We considered two possible effects:

- (a) an ‘internalization effect’, resulting from the retention of lost profit within GET following a price rise by Eurotunnel; and

²⁰⁶ The costs of the route are significantly higher than that of Dover–Calais: bunker costs are 57 per cent higher on the Dunkirk route; and the utilization of assets is 25 per cent higher on the Dover–Calais route. The higher utilization results from the practical number of trips per 24 hours being ten per ship on Calais–Dover and eight on Dunkirk–Dover.

- (b) a ‘competition-weakening’ effect due to the changed incentives resulting from a change in the competitive pressures exerted on all ferry operators in the relevant markets.

‘Internalization’ effect

8.112 This effect is explained in detail in Appendix G. In principle, following a merger, it can be expected that a price rise would become less costly to the merging parties because the proportion of the revenue (and associated profit) that would have been lost prior to the merger as a result of being diverted to the acquired business would be retained within the merged entity following the transaction.

8.113 This effect on tunnel prices following the acquisition of MFL is possible because tunnel services are differentiated from ferry services, which enables Eurotunnel to set prices at the level where marginal customers would switch to ferry operators if prices increased further. Because there is no or very limited differentiation between ferry operators, a merger between two ferry operators would not lead to this effect.²⁰⁷

8.114 In commenting on our provisional findings, the FCA suggested that GET would not be able to raise prices because of the considerable level of excess capacity among ferry operators, which would enable P&O to acquire a significant share of the demand that could be diverted from the tunnel if GET increased tunnel prices. We note that the FCA’s analysis of the effects of the transaction was mainly qualitative. We explain in Appendix G, paragraphs 49 and 50, our views on the impact of spare capacity among ferry operators for our analysis. The incentives on GET described in paragraph 8.98 would only be affected if MFL did not have sufficient spare capacity to accommodate its share of diverted traffic following a price rise on tunnel services. Our calculations show that MFL would be able to do so:

- (a) CompassLexecon on behalf of GET estimated that the maximum volume of business that could be lost before a 5 per cent price rise became unprofitable on the tunnel was [redacted] lane metres of traffic.
- (b) Assuming a [redacted] per cent diversion ratio to MFL, this would require MFL to have (up to) approximately [redacted] lane metres of spare capacity.
- (c) This equates to around [redacted] per cent of MFL’s expected capacity in 2013.

The level of spare capacity on other ferries would not affect GET’s incentives, but we note that if there were capacity constraints on other ferries, an increase in tunnel prices would be likely to result in an increase in ferry prices, thus resulting in a more widespread and larger price rise following the transaction.

8.115 The strength of the ‘internalization’ effect can be estimated and will depend on the amount of revenue that can be expected to be diverted to the acquired business (the diversion ratio) and the profit margin of the acquired business. (See Appendix G, paragraphs 2 to 4, for more detail.)

8.116 MFL has only been operating for a brief period, and is expected by GET to grow over time. We therefore do not have direct evidence of the likely diversion ratio between Eurotunnel and MFL based on historical analysis of events on the short sea. To deal

²⁰⁷ This is discussed further in Appendix G, paragraphs 40–44 & 51–52. In particular, we consider whether under the counter-factual scenario DFDS would have an incentive to increase prices because of internalization effects and conclude that it would not (paragraph 52).

with this issue, we calculated diversion ratios from Eurotunnel to MFL based on GET's target shares for MFL. We used the target that it expects to reach by the end of 2013, the target it expects to reach to become EBITDA positive by [redacted] and the target that it anticipates MFL will eventually reach and will then sustain.²⁰⁸

TABLE 15 Shares and diversion ratios

	<i>per cent</i>			
	<i>End 2013</i>	<i>2014</i>	<i>2015</i>	<i>Ultimate target</i>
<i>Shares</i>				
Freight market	[redacted]	[redacted]	[redacted]	[redacted]
Passenger market	[redacted]	[redacted]	[redacted]	[redacted]
<i>Diversion ratios</i>				
Freight market	[redacted]	[redacted]	[redacted]	[redacted]
Passenger market	[redacted]	[redacted]	[redacted]	[redacted]

Source: GET's internal documents, CC analysis.

8.117 Based on this analysis, we considered that it is reasonable to estimate that diversion ratios would be in the range of [redacted] to [redacted] per cent for both freight and passengers.²⁰⁹

8.118 GET argued that the diversion ratios we had used were not appropriate for four main reasons:²¹⁰

- (a) Market shares were not a good indicator of diversion ratios. It considered that such ratios should be based on capacity.
- (b) In any event, neither market share nor diversion ratios fully took into account the value placed by time-sensitive customers on high-frequency services.
- (c) The CC had wrongly used the market share aspirations of GET and should have instead used its forecast for 2013.
- (d) The CC had not taken into account the diversion of traffic to outside of the short-sea market that was implied from the customer survey.

8.119 We did not agree with GET's views for the following reasons, taking each one of its arguments in turn:

- (a) The use of capacity as the basis for calculating diversion ratios did not make a material difference to the analysis. GET's own calculation resulted in a diversion ratio of [redacted] to [redacted] per cent which was within our range.
- (b) As explained in Appendix G, paragraph 57, market shares in our view take into account differences in service quality, and in particular service frequency, and are therefore likely to be a good proxy for diversion ratios. We also note in paragraph 58 of the same appendix that GET's argument is not consistent with its submission that the price premium in the freight market is related to costs.

²⁰⁸ Targets for the period 2013 to 2015 were updated in November 2012, but ultimate targets were not. We therefore relied on the April 2012 target for this long-term target (which was at the time expected to be reached by 2015), but the November 2012 forecasts for other targets.

²⁰⁹ Diversion ratio estimates assume that ferries account for about 60 per cent of the freight market and 55 per cent of the passenger market.

²¹⁰ The representations made by GET on the unilateral effects of the merger are dealt with in more detail in Appendix G.

- (c) 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 [REDACTED]. In addition, MFL exceeded the 2013 market share target for freight in both March and April 2013. We note that we have nevertheless used GET's 2013 market share targets to define the bottom end of our range.
- (d) As discussed in paragraph 6.27, we do not consider the sample in our survey to be sufficiently representative to be able to draw robust conclusions from it. We have based our views on the lack of significant diversion of volume to outside the short sea both on our events analysis and GET's internal papers.
- 8.120 Using data on the actual margins achieved by other ferry operators and MFL's evidence, we took the view that a short-run margin of [65–85] per cent for passengers and [65–85] per cent for freight and a long-run margin of [REDACTED] per cent (across passengers and freight) would be appropriate measures for MFL. We consider that the short-run margin is more relevant for our analysis, as explained in Appendix G, paragraph 18, because the level of capacity available to MFL using its three ships would accommodate the share of market that it is aiming to capture, and because in the passenger market in particular, prices and volumes could be optimized in the short run across the tunnel and MFL. For these reasons, we do not consider that marginal gains in traffic on MFL following price increases on the tunnel would require investment in new vessels or additional crossings for the purpose of accommodating that traffic, and therefore long-run margins are not appropriate in this case.
- 8.121 GET argued that the appropriate margin to use was [REDACTED] per cent, as it did not include any costs associated with increased vessel numbers and only took account of the port utilization costs (€[REDACTED] per crossing) and of the price paid by MFL to the SCOP for each crossing made by the *Rodin* and the *Berlioz* (€[REDACTED] per crossing). We do not accept this argument: as explained in paragraph 8.114, based on the analysis provided by GET, the amount of volume that MFL could be expected to capture following a 5 per cent price rise on tunnel services accounts for approximately [REDACTED] per cent of the capacity operated by MFL. MFL would be able to absorb such a low increase in volume on its current services and would not therefore need to increase the number of crossings. Therefore, we consider that the only relevant costs for the quantification of the internalization effect in this case are the variable costs associated with adding more vehicles and passengers to existing crossings.
- 8.122 To understand better whether the effect of the merger could be expected to be substantial, we performed two sets of calculations using a range of assumptions consistent with the data set out in paragraphs 8.117 and 8.120 above: an indicative price rise (IPR) analysis and an upward price pressure analysis (GUPPI). The calculations are set out in Appendix G, paragraphs 19 to 36. The comments we received from GET and its economic advisers on our analysis are considered in detail in Appendix G, paragraphs 45 to 59.
- 8.123 It should be noted that it is the nature of IPR and GUPPI calculations that they answer a question about the incentive of a firm with market power, gaining control of partially substitutable products, to raise prices on the assumption that its rivals' prices are given. This is not a predictive exercise seeking to determine equilibrium prices, but rather an evaluative one which seeks to give a measure of the degree of upward pricing pressure resulting from the increased market share. In practice, any increase in prices would be expected to be higher, once rivals' responses are included.

8.124 The results of the IPR calculations are shown in Table 16. The figures in bold indicate our base case assumptions. The base case diversion ratios are based on the market share aspirations that GET has for MFL in a two- to three-year time frame (see paragraph 8.16) and are consistent with its latest market share forecasts for 2014.²¹¹

TABLE 16 IPR calculations

	<i>per cent</i>			
	<i>Diversion: [X]</i>	<i>Diversion: [X]</i>	<i>Diversion: [X]</i>	<i>Diversion: [X]</i>
<i>Freight</i>				
Margin: [X]%	[X]	[X]	[X]	[X]
Margin: [X]%	[X]	[X]	[X]	[X]
<i>Passengers</i>				
Margin: [X]%	[X]	[X]	[X]	[X]
Margin: [X]%	[X]	[X]	[X]	[X]

Source: CC analysis.

8.125 The results of GUPPI calculations are shown in Table 17.

TABLE 17 GUPPI calculations

	<i>per cent</i>			
	<i>Diversion: [X]</i>	<i>Diversion: [X]</i>	<i>Diversion: [X]</i>	<i>Diversion: [X]</i>
<i>Freight</i>				
Margin: [X]%	[X]	[X]	[X]	[X]
Margin: [X]%	[X]	[X]	[X]	[X]
<i>Passengers</i>				
Margin: [X]%	[X]	[X]	[X]	[X]
Margin: [X]%	[X]	[X]	[X]	[X]

Source: CC analysis.

8.126 The calculations indicate that the effect of the merger on the incentive to increase prices because of the internalization of a proportion of profits lost by Eurotunnel to ferry operators would be sufficiently large to give rise to competition concerns. This is particularly the case when considered alongside the evidence set out in paragraphs 8.105 to 8.110. GET's main rationale for the merger was to pre-empt aggressive price competition by DFDS and to achieve capacity rationalization. GET weighed the cost of the Vessels against a potential improvement in yield of €[X] and we have seen no evidence that the merger would result in any material efficiency savings that would be likely to be passed on to customers. We consider that together this body of evidence supports our expectation that the merger would lead to a price increase both in the freight and the passenger markets.

8.127 We also found that these findings were consistent with an analysis of yield, revenue and market share of Eurotunnel in the freight market under three scenarios that was carried out by Eurotunnel to assist the GET board's decision on whether to acquire the SeaFrance assets. The model that was presented to the GET board is discussed further in Appendix G, paragraphs 60 to 64, and shows that: [X].

'Competition-weakening' effects

8.128 Competition between ferry operators affects the price of ferry crossings on the short sea and in turn constrains the price that Eurotunnel can charge. The vigour of

²¹¹ Scenarii MFL suite au budget Novembre 2012, p3, makes the following market share hypotheses for 2014: [X] per cent for freight and [X] per cent for passengers.

competition between ferry operators therefore has an impact on the level of profit achieved by Eurotunnel. It follows that if GET manages Eurotunnel and MFL in a way that maximizes profits across the two businesses, it could be the case that MFL would compete less vigorously against other ferry operators in order to avoid damaging the profitability of Eurotunnel. This effect is set out in detail in Appendix G, paragraphs 37 to 44.

8.129 The level of differentiation between ferry operators on the short sea is perceived as small by freight customers.²¹² For this reason, a ferry operator could not sustain a substantial price premium over its ferry competitors without losing a significant number of freight customers to other ferry operators. As a result, intense competition between ferry operators will affect the overall level of prices for ferry crossings on the short sea. In turn, given the direct link between tunnel and ferry prices, broadly expressed as a €[X] premium on the average price per freight vehicle, intense price competition between ferry operators to gain market share would translate into lower tunnel prices. Therefore in setting prices (or the level of capacity) for MFL, GET would take account of the potential impact of its decision on the revenue and profitability of its tunnel operation. Given the respective sizes and likely margins of both businesses, all other things equal, GET/MFL would therefore have less incentive than an independent operator to set low ferry prices to fill its current capacity or to increase capacity. We note that MFL's pricing policy at launch involved a [X] prices to freight customers. Such a policy would seem irrational for an independent ferry operator in a similar competitive situation,²¹³ and can be largely explained by GET's incentive to protect Eurotunnel's revenue. This is also consistent with the rationale of the acquisition of the Vessels, which was to avoid aggressive price competition between ferry operators. Although under the counterfactual DFDS would also take into account the impact of its pricing or capacity decisions for its Dover–Calais service on its Dover–Dunkirk route, the incentive to compete less aggressively would be weaker than that of GET. This is due to the relative sizes of the two services for DFDS and the respective growth potential of the two routes—the Dover–Calais route being more important due to its size, cost structure and attractiveness to customers.

8.130 We note that Eurotunnel's Commercial Director, in a note to the GET board (that was discussed at the meeting during which GET decided to pursue the acquisition of the SeaFrance assets²¹⁴), took a similar view of the way the market could develop if GET adopted a coordinated pricing strategy across Eurotunnel and MFL. In particular, she proposed:

A coherent and aligned pricing strategy to drive both volume and yield growth

Ferry prices will be directly aligned to shuttle prices with a consistent €/£ differential related to time and mileage/km savings.

Furthermore Groupe Eurotunnel will explore the possibility of publishing a transparent pricing grid – the benefits would be to address any issues

²¹² Most customers have contracts with several operators, and/or perceive switching between operators as easy. Our pricing analysis shows that the prices charged by ferries are similar and have generally been following similar trends. Our events analysis also shows significant diversion between ferry operators. As explained in Appendix G, paragraph 40, because ferry operators' offerings are broadly homogeneous, we have not calculated IPR and GUPPI estimates for MFL. Our analysis has focused instead on MFL's incentives to compete vigorously.

²¹³ We might expect a smaller player with capacity to fill to price aggressively to gain market share in order to reach break-even point.

²¹⁴ GET told us that the board did not adopt the proposals put forward by the Commercial Director and that they played no part in the business case for the acquisition.

arising from possible market dominance and also to reduce negotiation exposure from the largest customers.

8.131 She concluded that:

The rationale for proposing a logical, transparent pricing policy is to:

1. Improve the structure, consistency and visibility of prices in the market
2. Allow P&O a corridor in which to position its standard prices between Groupe Eurotunnel's shuttle and ferry price positions
3. Leave low value Eastern volume to DFDS on the Dunkerque-Dover route.

8.132 Given its current position in the relevant markets, we do not consider that MFL would be able to maintain prices above the prices of other ferry operators. We consider, however, that the incentive described in paragraph 8.129 above would be likely to translate in the short term into the setting of prices in line with the market leader (which may in practice be a lower price, given that the level of service quality offered by the ferry operators may be different) and in the longer term into a voluntary restraint on increasing capacity by MFL to avoid the risk of vigorous price competition to fill spare capacity. We note that MFL has revised its original pricing policy and now sets its prices [REDACTED].²¹⁵

8.133 We considered the likely response of competitors to subdued competition by MFL. Both P&O and DFDS currently have spare capacity. 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.

8.134 We consider that as the largest operator of ferry services on the short sea, in principle P&O would be able to respond to MFL's strategy by setting lower prices to fill its spare capacity and gain a larger share of the relevant markets. However, P&O's behaviour is likely to be driven by a long-run profit-maximizing strategy and its perception of MFL's likely response. P&O told us that:

(a) In the medium term, there would have to be a reduction in the number of ferry operators or the number of ferries being operated on the short sea, as the required level of demand was not present to sustain the current market situation. It thought that, currently, there was around three ferries' worth of capacity in excess of demand. There was sufficient capacity on the short-sea routes following the SeaFrance exit so, with the reintroduction of the vessels acquired by Eurotunnel, there was now excess capacity.

(b) [REDACTED]

8.135 We consider that as the largest ferry operator in mature markets which are unlikely to attract new entry or expansion in the short to medium term (as explained in

²¹⁵ Indeed the 11 April board minutes record that one of the directors states that two ships are needed to provide the right level of capacity, and that the board discusses the benefits of a third ship being operated in case of breakdowns. One member of the board then goes on to say that the tunnel could be used as this third ship. [REDACTED]

paragraphs 8.138 to 8.161), P&O's incentive is to maintain its shares of the two economic markets, rather than to seek to increase them.

- 8.136 We therefore consider it likely that P&O would respond to subdued competition by MFL²¹⁶ 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.
- 8.137 Our above analysis on unilateral effects indicates that the merger may be expected to result in a substantial weakening of competition. We now consider the likelihood that entry and/or expansion might change GET's incentives to increase price.

Likelihood of entry and expansion

- 8.138 We considered whether new entry or expansion would be likely to prevent the substantial lessening of competition resulting from the acquisition.
- 8.139 In assessing whether entry and/or the threat of entry would offset any potential concerns that might otherwise arise as a result of a merger, the CC considers whether entry is likely, sufficient and timely (or whether it is perceived to be such, in the case of the threat of entry) in response to a small worsening of the incumbent's offer relative to the pre-acquisition prices and levels of service.²¹⁷
- 8.140 In general, the CC considers that for the threat of entry to act as a sufficient constraint to offset competitive concerns, it must be quick and relatively costless. This may be the case if entry does not involve substantial sunk costs and if entry can happen within a year. A constraint from potential entry may arise even if the CC does not expect that entry would actually occur. The important factor is whether the incumbent's behaviour is constrained by its perception of the threat of entry.
- 8.141 In this section, we first consider the history of entry (including entry by acquisition) on the passenger and freight markets. We then summarize the factors that affect the ease with which a ferry operator could start a new service on the short sea in competition with existing operators or could expand its existing services on the short sea, and the likelihood that it would do so.²¹⁸ These factors are discussed in more detail in Appendix H.
- 8.142 Our assessment of the ease and likelihood of entry and expansion was focused on the Dover–Calais route given that this is the route on which MFL operates, and our views that other short-sea routes (with the exception of the Dover–Dunkirk route) exert no material competitive constraint on this route (see paragraphs 7.45 and 7.46), and we do not foresee circumstances in which the competitive constraint exerted by these routes would increase in the short to medium term. In any event, most of the barriers to entry we have identified would also apply to other routes on the short sea.

History of entry

- 8.143 We found that ten companies have operated ferry services on the short sea at various times since 1980 and that in general the short-sea passenger and freight

²¹⁶ Under the counterfactual (and in direct competition with DFDS), these incentives would be different because of the presence of a third major competitor on the Dover–Calais route.

²¹⁷ See CC2, paragraphs 5.8.1–5.8.15.

²¹⁸ We have not discussed entry into the short-sea market by way of opening a new tunnel link between England and France as it is not a feasible option given that the construction of such a tunnel would need approval by the UK and French Governments and would take many years and very considerable financial investment.

markets have been characterized by exit and consolidation since the 1990s rather than entry and expansion.

- 8.144 We found that since 1998 the only entrant into the passenger and freight markets to have built and maintained a significant market share was Norfolk Line, which started a service from Dover to Dunkirk in 2000. Norfolk Line was acquired by DFDS in 2010. In 2011, the service accounted for 14 per cent of passenger car volume and 16 per cent of freight volume on the short sea.
- 8.145 Since 1998, there have been five other instances of new services on the short sea, of which two are still operating (albeit in one case by a different operator from the original entrant), and none of which has attained a significant and sustained market presence:
- (a) Transeuropa Ferries started a service from Ramsgate to Ostend in 1998 (to replace a service by an operator which had ceased business), initially for freight and subsequently expanded to include passengers. It ceased operations in April 2013.
 - (b) Transmanche Ferries started a publicly subsidized service from Newhaven to Dieppe in 2001 (to replace the private operator which had ceased operation on the route). The service was subsequently taken over by LD Lines.
 - (c) SpeedFerries started a catamaran service for passengers only between Dover and Boulogne in 2004. The service stopped in 2008 when SpeedFerries went into administration.
 - (d) LD Lines started a service between Dover and Boulogne in 2009 but ceased operating the route in 2010.
 - (e) DFDS/LD started a service from Dover to Calais in 2012.
- 8.146 Euroferries Limited told us that it was finalizing its commercial and operational plans to introduce a new service before spring 2013 to carry passengers, cars and luxury coaches between Ramsgate and Boulogne. It added that it had announced a service on this route in 2009 deploying another operator's vessel but it had not been able to start the service. We note that Euroferries does not intend to operate in the freight market and its passenger service will be differentiated from other ferry services on the short sea. In any event, at the time of writing Euroferries had not yet entered the passenger market.
- 8.147 Although the Dover–Calais route has a high volume of freight and passenger cars, there has been no entry by ferry operators on this route in at least the past ten years, other than by DFDS/LD and MFL in 2012. We consider the reasons for this to be the competition from Eurotunnel, which started services in 1994, competition from SeaFrance, which significantly expanded capacity before running into financial difficulties, and the expansion of capacity by P&O which announced in 2008 that it had ordered two 'super-ferries' which came into service in 2012,²¹⁹ and more generally the existing operators' low capacity utilization, declining prices and weak demand conditions. We note that Stena RoRo, which had submitted a bid for the *Rodin*, told us that it did not have any plans to enter the short-sea passenger and freight markets.

²¹⁹ See Appendix E.

- 8.148 Both Stena Line and Brittany Ferries told us that they were unlikely to expand on to the Dover–Calais route. They were also sceptical about the prospect of success of the planned Euroferries service.
- 8.149 Stena Line told us that it did not have any plans to offer a service between Dover and Calais and it would not be likely to consider this unless a situation arose where supply was significantly less than demand. It did not think that an exit by MFL or DFDS would give rise to such a situation.
- 8.150 Brittany Ferries told us that it had not considered launching a new service between Dover and Calais but that it was, at one stage, a candidate to purchase SeaFrance before it went into administration. It saw these as two quite different prospects. It thought that establishing a new service in a market where there was already overcapacity would be very difficult.
- 8.151 Regarding the prospective launch of a Ramsgate–Boulogne passenger route by Euroferries, Brittany Ferries told us that the existing levels of overcapacity on the short sea would make it hard for Euroferries to establish this new service. Brittany Ferries considered Ramsgate–Boulogne to be an ‘awkward’ route. Stena Line also considered that ‘these are not really the right ports to operate from’. DFDS did not believe that the proposed Euroferries service would be sustainable in the long term.

Considerations regarding entry

- 8.152 DFDS told us that, prior to the launch of its Dover–Calais service, it believed that it was the only company that had a chance of making a profitable entry on to the Dover–Calais route. This was on the basis DFDS already operated the Dover–Dunkirk route and only it could access the synergies associated with operating two routes from Dover. It did not believe that any other shipping line would be interested in operating the Dover–Calais route. In particular, DFDS said that the ‘very high’ fixed costs would make entry unappealing for a newcomer.
- 8.153 Stena Line told us that there were two main elements to the structural barriers to entry to this market: berth access/fit and access to suitable ships. Were a fourth company to attempt to launch a new service on the Dover–Calais route, it could also face difficulties concerning the availability of slots. Stena Line stated its view that, at present, ‘there wouldn’t be any new entrants at all given the overcapacity and the profitability outlook of the operation’.
- 8.154 The factors we identified that might affect the ease and likelihood of entry on the short sea are: the scale and credibility of the operator; financial risk and perception about the number of operators that is sustainable; the availability of berthing slots; and the cost and availability of suitable vessels. These factors are discussed in detail in Appendix H. Our view is that the most important of these factors are the scale and frequency of operation required to offer a competitive service, the likely lead time to build a viable market share, the financial cost associated with operating the required number of vessels while building market share and the perception of operators of the likely sustainability of additional competition given the low capacity utilization achieved by existing operators.
- 8.155 Thus it appears unlikely that entry would be attractive, given the relatively low level of capacity utilization currently achieved by the existing operators on the Dover–Calais route and the weak economic outlook.
- 8.156 The operator of the port of Calais told us that it would be difficult for the port to accommodate more than the number of vessels that were operating in December

2012. The capacity of the port will be increased by the Calais Port 2015 development scheme, which is intended to enable the port to accommodate the traffic forecast for 2020 to 2025, but the first berths are not expected to enter service until 2017/18.

- 8.157 We also considered whether the exit of one of the existing operators on the Dover–Calais route, particularly DFDS/LD, might make entry by another operator more likely. Although such exit might result in berthing slots at Calais and vessels becoming available, our view is that exit by DFDS/LD would be likely to deter prospective entrants as it would indicate that three efficient ferry operators could not all sustain viable operations on the Dover–Calais route. In this context, we note that in the ten years prior to 2012 there had been only two operators on the Dover–Calais route: P&O and SeaFrance.
- 8.158 While the preceding paragraphs have considered entry on the Dover–Calais route, we consider that most of the barriers to entry identified also apply (to an equal or greater degree) to other short-sea routes; and that this is borne out by the previous lack of significant and sustained entry on short-sea routes other than the Dover–Calais and Dover–Dunkirk routes.

Considerations regarding expansion

- 8.159 The considerations that might affect the ease and likelihood of expansion by an existing operator are discussed in detail in Appendix H. We concluded:
- (a) Expansion could be achieved by increasing the number of sailings made by each vessel, although the maximum number of sailings is limited by the speed with which ferries could cross the Channel, and the level of capacity utilization currently being achieved would not justify the additional costs.²²⁰
 - (b) Expansion could be achieved by adding new vessels, which would be subject to the same constraints as faced by a new entrant in relation to obtaining berthing slots and acquiring suitable vessels.
 - (c) It might be easier for an existing operator to expand than for a new entrant to enter a route because the existing operator would be known to the relevant port authorities and would already have an established relationship with customers on that route and therefore might need less time to build traffic volumes.
- 8.160 We consider it unlikely that P&O would expand in response to a price increase by GET (for the reasons set out in paragraph 8.134).²²¹ We also consider that in response to a price increase by GET, DFDS/LD would be more likely to increase its prices on the Dover–Dunkirk route rather than increase capacity, due to the higher cost of operating this route. DFDS indeed told us that a price rise on the Dover–Calais route could also benefit its Dover–Dunkirk route.
- 8.161 We considered whether DFDS/LD, once having exited the Dover–Calais route, might re-enter if pricing and/or demand conditions became more favourable. Our view is that re-entry would be unlikely because it would be difficult in these circumstances for DFDS/LD to establish credibility with freight customers²²² that it was committed to the route. We also note that prior to the exit of SeaFrance, DFDS/LD had been unsuccessful in its attempts to obtain berthing slots at Calais. DFDS also told us that it

²²⁰ See Appendix G, paragraph 30.

²²¹ We also note that P&O has no plan to expand its capacity by introducing larger vessels in the next five years.

²²² Based on the views of freight customers we have received.

would have considerable difficulties in expanding capacity on the short sea, either by lengthening existing vessels or increasing passenger carriage capacity, and it would need to bring additional ferries to the market, which would require substantial investment to suit the unique operational needs associated with the port of Dover.

Countervailing buyer power

- 8.162 GET argued that it was not the size of a freight customer that determined whether it enjoyed buyer power. In its opinion, it was much more important to assess what options were available to that customer, and the extent of spare capacity among ferry operators and the absence of costs or barriers to switching by freight customers meant that all freight customers, regardless of size, had buyer power in the sense that they could and did switch supplier in the face of price rises.
- 8.163 Our guidance states²²³ that buyer power can be generated by different factors. An individual customer's negotiating position will be stronger if it can easily switch its demand away from the supplier, or where it can otherwise constrain the behaviour of the supplier. Typically the ability to switch away from a supplier will be stronger if there are several alternative suppliers to which the customer can credibly switch, or the customer has the ability to sponsor new entry or enter the supplier's market itself by vertical integration. Where customers have no choice but to take a supplier's products, they may nonetheless be able to constrain prices by imposing costs on the supplier. Where a supplier is engaged in bilateral negotiations with each of its customers, the relative bargaining strength of the supplier and each of its customers is determined by their mutual dependency. In such situations, it may be easier for large customers to threaten to sponsor new entry or vertically integrate than it would be for smaller customers who could not commit a sufficiently large volume of purchases to make either viable. Conversely, small buyers may be in a better position to switch suppliers because of the lower volume of their purchases. Where individual negotiations are prevalent, the buyer power possessed by any one customer will not typically protect other customers from any adverse effect that might arise from the merger.
- 8.164 The passenger market (excluding coach operators) consists of small purchasers, most of whom purchase Eurotunnel or ferry services infrequently. As such, it is not likely that customers in the passenger market have any buyer power. Equally, however, we have not identified any barriers to switching in the passenger market, with market shares being determined by the quality of the service and price being offered by competitors on the short sea.
- 8.165 In the freight market, we received consistent evidence that freight customers typically multisourced and would switch suppliers in response to relative price or service quality changes. The only limitation on this willingness to switch was due to volume rebates: some customers indicated that they would be reluctant to commit to a new ferry operator until they were confident that the operator was committed and would be on the short sea for the long term. This was because if they diverted volume to a new operator which then exited the market, they would lose the benefit of the lower price that they might otherwise have enjoyed if they had given more business to an established operator. Aside from this caveat, however, the evidence supports the view that freight customers can and do switch suppliers, and most significant freight customers indicated that they considered that they had a good negotiating position.
- 8.166 As shown by our analysis in paragraphs 8.27 to 8.103, the merger and subsequent exit of DFDS from the Dover–Calais route can be expected to result in a market with

²²³ CC2.

only two competitors operating the Dover–Calais route. In this situation, achieving price transparency could, for the reasons noted above, significantly reduce the effectiveness of freight customers' ability and willingness to switch. This analysis is confirmed by the paper described in paragraph 8.130, in which GET contemplated strategies to decrease the negotiating strength of its freight customers following the merger.

- 8.167 In some markets, customers may be able to exercise buyer power and prevent price increases by sponsoring entry or through vertical integration. This is more likely to be a consideration where a customer's demand is large relative to the minimum efficient scale of a supplier. This is not the case in the freight market. The largest freight customers do not account for a large share of business: our calculations show that Eurotunnel's ten largest customers account for [X] per cent of freight volume transported through the tunnel. Beyond these customers, there is a very long tail of small customers. Our analysis suggests that most freight customers are relatively small, with [X] per cent of freight customers accounting for less than [X] per cent of Eurotunnel freight volume each. GET told us that [X] per cent of Eurotunnel's [X] freight customer accounts purchased freight tickets at the standard rate, which was not individually negotiated.
- 8.168 We note that the fact that large customers have individually negotiated contracts means the short-sea suppliers will have some ability to price discriminate, offering better terms to larger customers and those with more competitive options available to them. This means that the ability of large customers to negotiate favourable terms will not result in price protection for smaller firms.
- 8.169 We therefore conclude that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the vast majority of customers from the adverse effects we have found are likely to arise from the merger.

9. Conclusions on the competitive assessment

- 9.1 Given that the evidence we have received suggests that the current competitive situation on the short sea may not be a reliable indicator of future rivalry in the passenger and freight markets, our analysis has first focused on how the supply of ferry services to the relevant markets may evolve in the short to medium term, and in particular whether one ferry operator could be expected to withdraw from the Dover–Calais route and/or the short sea.
- 9.2 We found that because of the current level of excess capacity on the short sea, it is likely that one of MFL or DFDS will withdraw from the Dover–Calais route in the short term. We consider that GET and its subsidiary have stronger incentives to continue to operate on the route, and therefore we concluded that DFDS is more likely than MFL to cease operating services between Dover and Calais in the short term. Although we accept that DFDS may also exit the Dover–Dunkirk route in the longer term, we did not reach an expectation that it would do so in the short to medium term.
- 9.3 We next considered the unilateral effects that might result from the merger following the expected exit of DFDS from the Dover–Calais route. We found that the merger is likely to result in an increase in prices charged both to passengers and to freight customers by Eurotunnel as a result of the retention within GET of a proportion of the profits that would previously have been lost by Eurotunnel to rival ferry operators following a price rise. We also found that the merger is likely to result in the weakening of competition between ferry operators.

- 9.4 Given the past history of entry and expansion on the short sea, barriers to entry and the consequences of DFDS's withdrawal from the Dover–Calais route on the perception of ferry operators and freight customers regarding the likely success of future entry or expansion, we found that future entry or expansion in the relevant markets by ferry operators other than MFL or P&O is unlikely to occur within the time frame of our assessment.
- 9.5 We found that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the vast majority of customers from the adverse affects we have found are likely to arise from the merger.
- 9.6 In reaching our conclusions above, we have addressed the various arguments advanced by GET and set out in paragraph 8.6 above on the competitive effects of the transaction. In particular, our view on the competitive effects, based on the evidence and analysis we have carried out (as set out in Section 8 of this report), is that:
- (a) We did not consider it appropriate to use MFL's current market share for our analysis, as the current situation is not informative with regard to the way rivalry can be expected to be affected by the merger.
 - (b) The differentiation between Eurotunnel and MFL services is taken into account in the diversion ratios.
 - (c) The current level of competition on the short sea is unsustainable and we expect that there will be a rationalization of capacity on the Dover–Calais route in the short to medium term.
 - (d) We accept that the ferry operators competing with MFL on the Dover–Calais route are strong companies. We consider that the companies' incentives and their exit costs are likely to determine which operator decides to leave the route first.
 - (e) We agree that ferry operators have considerable spare capacity but this would not prevent Eurotunnel from increasing prices because of the internalization effect; it would not appear that having a wide route network gives them a material competitive advantage in the context of competition on the Dover–Calais route.
 - (f) We accept that the short sea can accommodate three ferry companies but the evidence and analysis we have considered provides cogent reasons to believe that DFDS would cease operating on the Dover–Calais route.
 - (g) We have seen no evidence of substitution between the short-sea services and airlines and Eurostar in response to actions taken by operators on the short sea, disruptions to supply or price increases. Similarly the evidence we have seen suggests that routes on the Western Channel and North Sea do not exert a material constraint on the short sea.
 - (h) We have found that a combination of factors is likely to deter entry, namely: the scale and frequency of operation required to offer a competitive service, the likely lead time to build a viable market share, the financial cost associated with operating the required number of vessels while building market share and market perception about the number of operators that is sustainable given the low capacity utilization achieved by existing operators.

- (i) It may be possible to source a vessel to operate on the short sea, but it would require modification (at a cost) and there may be a lead time.
- (j) We agree with GET that customers readily switch between suppliers, but we consider that the extent of buyer power in the relevant markets is unlikely to be sufficient to protect the vast majority of customers from the adverse effects we have found are likely to arise from the acquisition.

9.7 We considered the main areas of discrepancy between the FCA's decision and ours. This is set out in paragraphs 5.11(d) (approach to the counterfactual), 8.75 (likely exit of DFDS) and 8.114 (impact of overcapacity on GET's ability to raise prices). We saw no reason to alter our findings in the light of the FCA's analysis.

Conclusions on the SLC test

9.8 We conclude that the merger may be expected to result in an SLC in the market for the supply of transport services to passengers on the short sea and in the market for the supply of transport services to freight customers on the short sea. This may be expected to lead to a worsening (relative to the counterfactual situation) of the prices charged by both Eurotunnel and ferry operators in these two markets.

10. Remedies

10.1 Having concluded that the merger has resulted, or may be expected to result, in an SLC, we are required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC. This section discusses possible remedies to the SLC and its resulting adverse effects.

10.2 Section 35(3) of the Act places a duty on the CC to decide on three questions concerning remedial action, namely:

(a) Should the CC itself take action for the purpose of remedying, mitigating or preventing the SLC or any adverse effects resulting or expected to result from the SLC?

(b) Should the CC recommend the taking of action by others for the purpose of remedying, mitigating or preventing the SLC or adverse effects resulting or expected to result from the SLC?

(c) In either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented?

10.3 The Act requires that the CC, when considering remedial actions, shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it'.²²⁴ To fulfil this requirement, the CC will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly remedy that it considers to be effective. In accordance with the Act,²²⁵ the CC may also have regard to the effect of any action on any relevant customer benefits (RCBs) arising from the merger.

²²⁴ Section 35(4).

²²⁵ Section 35(5).

Remedy options

- 10.4 It is possible to distinguish two broad categories of merger remedies:
- (a) structural remedies, such as divestment or prohibition: these are generally one-off measures that seek to restore or maintain the competitive structure of the market through a direct change in market structure; and
 - (b) behavioural remedies: these are normally ongoing measures designed to regulate or constrain the behaviour of merger parties.
- 10.5 In merger inquiries, the CC will generally prefer structural remedies to behavioural remedies because:²²⁶
- (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies may not be effective and may create significant costly distortions in market outcomes; and
 - (c) structural remedies do not normally require monitoring and enforcement once implemented.
- 10.6 On 19 February 2013 we published a Notice of possible remedies (the Remedies Notice) and on 2 April 2013 we published a supplementary Notice of possible remedies (the Supplementary Remedies Notice). We invited views from interested parties on the following remedy options:
- (a) divestiture of MFL SAS;
 - (b) divestiture of the MFL business or assets;
 - (c) divestiture of the MFL business or assets after the expiry of the inalienability clause (as defined in paragraph 10.23);
 - (d) prohibition of operations on certain routes;
 - (e) short-term price controls;
 - (f) the remedy proposed by the SCOP which envisages the complete separation of the management of the MFL business from GET; and
 - (g) a recommendation to the OFT to open a market study.
- 10.7 We received comments on the Notices and held response hearings with GET, the SCOP and DFDS. GET and P&O proposed alternative remedy options to those set out in the Notices. At a late stage in the inquiry, on 7 May 2013, GET proposed a further remedy option which it supplemented with a note on 14 May 2013.
- 10.8 The remainder of this section is structured as follows:
- (a) in paragraphs 10.9 to 10.21 we discuss the CC's powers to remedy the SLC;

²²⁶ See CC8, [paragraph 2.3](#).

- (b) in paragraphs 10.22 to 10.30 we provide an overview of parties' responses to the Notices;
- (c) in paragraphs 10.31 to 10.122 we describe, and evaluate the effectiveness of, the possible structural remedy options that we have considered;
- (d) in paragraphs 10.123 to 10.141 we set out our consideration of the proportionality of the preferred remedy;
- (e) in paragraphs 10.142 to 10.173 we set out our assessment of the effectiveness of other remedy options;
- (f) in paragraphs 10.174 to 10.180 we set out our consideration of RCBs; and
- (g) in paragraphs 10.181 to 10.187 we summarize our decisions on remedies.

The CC's powers to remedy the SLC

- 10.9 GET has argued that the CC does not have power to make an order under section 84 of the Act in this case as this would be contrary to section 86 of the Act which states that an enforcement order made by the CC may extend to a person's conduct outside of the UK, if (and only if) he is (a) a UK national; (b) a body incorporated under the law of the UK or any part of the UK; or (c) a person carrying on business in the UK.²²⁷ GET maintains that none of the conditions is met in this case as:
- (a) GET, a French-registered company, is a group holding company which does not itself carry on any commercial activities.
 - (b) The *Berlioz*, *Rodin* and *Nord Pas-de-Calais* (the Vessels) are owned by three French-registered companies, the direct and indirect holding companies of which are all French-registered companies which do not carry on business in the UK.
 - (c) MFL SAS (the corporate entity through which MFL conducts business and which entered into the contract with the SCOP for the management and operation of the vessels) is a French-registered company, the direct and indirect holding companies of which are all French-registered companies.
 - (d) MFL Ltd, a UK subsidiary, is an unused shell company with neither staff nor activities.
 - (e) The SCOP is a French legal entity. Its only subsidiary which carries on business in the UK is Dover Calais Ferries limited, which provides sales and marketing services in relation to UK passengers.
- 10.10 We note that our preferred remedy, as described in paragraphs 10.88 to 10.98, directly addresses conduct in the UK (namely operations at Dover) and as a result, we consider that the limitations of section 86 of the Act are not relevant.
- 10.11 Even if the limitations of section 86 did have a bearing on any element of the remedy in this case, the CC does not accept GET's narrow interpretation of that provision. We consider that GET's approach involves an overly restrictive view of what constitutes 'carrying on business in the UK'. In addition, we consider that GET ignores the commercial reality concerning the provision of MFL ferry services between the UK

²²⁷ GET reiterated this position, noting the appeal (judgment pending) of Akzo Nobel N.V. to the CAT on a similar point.

and France, including to UK customers, in a way that is inconsistent with the approach taken in the Act as a whole. Whilst the assets and contractual rights relevant to the operation of the MFL business are split between different legal entities, it is clear that they are operated as a single commercial enterprise carrying on business partly in the UK and partly in France, and were intended to do so. In addition, the evidence in this case indicates that GET was directly involved in the acquisition of the SeaFrance business and ongoing operation of the MFL business. The evidence shows a similar pattern of involvement in the detailed operation of other GET businesses operating in the UK.

- 10.12 We have analysed evidence provided by GET that we consider shows that GET carries on business in the UK. It also describes how GET manages its subsidiaries, and the governance and operational arrangements of the GET group.

GET carries on business in the UK

- 10.13 GET, although incorporated in France, is a dual nationality company, as explicitly stated in the board minutes (for example, on [redacted]²²⁸). It is listed in Paris with a secondary listing in London and the board meetings are sometimes held in London (for example, on [redacted]). GET claimed that its 17 September 2008 board minutes were 'neither relevant to nor determinative of' the question of GET's carrying on business in the UK. GET also argued that all of GET's staff were French. Regarding its UK listing, GET noted that, since July 2012, its primary listing has been in France²²⁹ while its listing in London is secondary. Equally, GET denied that '5 board meetings of the last 64' being held in London means that GET is carrying on business in the UK.²³⁰ We consider that GET's board minutes, UK board meetings and UK stock listing are relevant factors for us to consider in deciding whether GET carries on business in the UK. GET's turnover is based on the invoicing of services to its subsidiaries, including subsidiaries themselves incorporated and carrying on business in the UK such as The Channel Tunnel Group and GB Railfreight. Such invoicing indicates that services are being provided by GET to UK entities and that GET charges for this. Provision of services otherwise than free of charge falls squarely within the definition of a business in section 129 of the Act. Accordingly we consider that GET's activities as a holding company do involve GET carrying on business in the UK in its own right and that we have jurisdiction to require it to procure that its subsidiaries comply with our remedies.
- 10.14 Even if this were not the case, it is clear that GET is directly involved in the operations of subsidiaries in the GET group that operate in the UK (whether alone or in combination with other group companies or related entities).
- 10.15 GET argued that its corporate structure and monitoring of its subsidiaries was 'normal for an entity which is the holding parent company of a group'.²³¹ We do not consider that this is relevant to the question of whether or not GET carries on business in the UK. We have looked at the nature and extent of its involvement in the activities of its subsidiaries and have concluded that this is one of the factors that indicates that GET carries on business in the UK.

²²⁸ GET offered a different self-definition, describing itself as a 'French registered company at the head of a bi-national group'.

²²⁹ Its regulator is AMF.

²³⁰ GET told us that translators regularly attended the GET board meetings as the main language of the board meetings was French but a number of the non-executive directors were English.

²³¹ GET reiterated this view in its meeting with the CC of 10 May 2013. GET claimed that its management of its UK subsidiaries was an exercise of oversight, which was natural for the head company in a multinational group.

Bid for the SeaFrance business

10.16 The GET board had been monitoring the position of SeaFrance since 2009. Board papers (see Appendix I) show detailed consideration of the difficulties faced by SeaFrance, the problem of overcapacity and the dynamics of competition in the market. From 21 December 2011 the board began discussing making an offer for the SeaFrance business. The team for the completion of the project was led by GET's Deputy Chief Executive Officer, Claude Lienard. Discussions continued in 2012, with detailed consideration of the structure of the offer, the relationship with the SCOP and how the various assets involved in the operation of the business would be held within the GET group. Profitability of the operations was discussed by the board on 26 April 2012 and issues relating to merger notification were discussed on 11 April and 20 July 2012. The agreements entered into to acquire the former SeaFrance assets and provide ferry services on the short-sea were those put to and approved by the GET board.

Corporate governance of the relevant subsidiaries and control of commercial strategy

10.17 The decision on the structure of the MFL operations, and the entities by which various assets would be held, and activities performed, was made by GET. The corporate constitutional documents of the various subsidiaries involved in the MFL business contain very little information about their respective activities. This reflects the fact that in practice, decisions are taken by the GET board and by the executive management of GET. (See Appendix I, Table 1.) Patrick Etienne is the sole director of each of the relevant entities in the ETM group,²³² including the UK subsidiary, MyFerryLink Ltd (prior to September 2012, GET's Deputy Chief Executive, Claude Lienard, was in office). The relevant corporate documents specify that [redacted] (the provision of his services by GET in this way therefore avoids a cost to the subsidiaries that an independently operating entity might expect to have to incur, but imposes a cost on GET that we would not expect it to be willing to incur if this did not provide it with benefits of control of the activities of that entity). [Patrick Etienne's] role has been described to us as a Director of Business Services and a member of the Executive Committee of GET. Mr Etienne's powers in relation to these subsidiaries are limited as the approval of the shareholder is required for any material decision. This includes: expenditure above €25,000 (we consider this to be a relatively low threshold for a business of this scale); sale or purchase of real estate or business; hiring of senior staff; any loan or leasing agreements; tender bids; decisions to increase staffing levels; and offering of guarantees. ETM Holding SAS is held 100 per cent by GET. All the other relevant subsidiaries involved in the provision of MFL ferry services are held directly or indirectly by ETM Holdings SAS and each of these subsidiaries has the same type of structure with a sole director (Mr Etienne) and with limitations of the decisions that he can take. As a result, all decisions of substance that do not fall within Mr Etienne's remit are required to be taken by GET as the ultimate shareholder.

Day-to-day operations

10.18 We were told that MFL was responsible for the pricing policy for passenger crossings but that it reached its decision in discussion with relevant personnel from the SCOP, and the SCOP (through its subsidiary Dover Calais Ferries Limited) marketed and sold short-sea ferry crossings to passengers as agent for MFL. For freight customers,

²³² ETM Holdings SAS is the parent company of the GET subsidiaries which own the Vessels (see paragraph 3.27).

Patrick Etienne, as CEO of MFL, would decide freight prices at the macro level, taking into account the views of Jean-Michel Giguet (CEO of the SCOP) and MFL's Commercial Freight Sales Director, Jean-Michel Copyans. Jean-Michel Giguet and Jean-Michel Copyans would see larger freight customers together. In addition, whilst the level of capacity to be run on the short-sea crossings has been decided contractually under the commercialization contract between MFL and the SCOP, if the SCOP were to advise that changes should be made, its views would carry weight, but the ultimate commercial decision lies with MFL.

- 10.19 We consider that in reality, the degree of involvement of GET as shareholder, and of a GET executive as CEO of MFL, together with the active involvement of the SCOP (which operates the ferry crossings for MFL and sells to passenger customers as agents for MFL) in decision-making, means that the legal entities involved in the provision of MFL services are acting together to carry on business in the UK (as well as partly in France) and that their activities cannot be viewed in isolation in the way advocated by GET.

Activities of interconnected bodies corporate, associated persons and those under common ownership or control

- 10.20 As indicated above, the assets and activities of the MFL business are carried out by a group of interconnected bodies corporate within the meaning of section 129(2) of the Act. In addition, we have found that GET and the SCOP are associated persons for the purposes of section 127 of the Act (see paragraphs 4.30 to 4.38). We have also found that GET has material influence over the SCOP as a consequence of the arrangements between them and the degree of economic dependence that the SCOP has on GET (see paragraphs 4.41 to 4.45). As a result, the GET subsidiaries involved in the MFL business (including the SCOP for these purposes) are under the common ownership or control of GET within the meaning of section 26 of the Act. We consider that these links mean that for the purposes of the Act, it is appropriate to treat these entities as together carrying on business in the UK.²³³

Similar patterns of GET involvement in its other UK operations

- 10.21 We have also reviewed GET board minutes to see how the way in which GET is involved in the MFL business compares with its other large operations in the UK (The Channel Tunnel Group and GB Railfreight). Details are set out in Appendix I. This shows that GET has a similar level of detailed engagement with these other operations.

Overview of parties' responses to the Remedies Notice and Supplementary Remedies Notice

GET's position

- 10.22 GET told us that it considered there to be no need for remedies in this case because it believed that no SLC could conceivably arise and that any divestiture remedy would lead to reduced customer choice, reduced capacity and likely higher ferry prices and therefore to the elimination of already-existing customer benefits.²³⁴

²³³ This is supported by section 127(1)(b) and (5) of the Act read together with Schedule 8, paragraphs 13(2) & 14 of the Act.

²³⁴ [GET's response to the Supplementary Remedies Notice](#).

- 10.23 GET also told us that it considered any divestiture remedy to be impracticable because of the terms of the Order made by the Court on 11 June 2012 which authorized the sale of the Vessels and certain other assets formerly owned by SeaFrance to GET. In particular, the Order contained a provision declaring the Vessels to be 'inalienable' for a period of five years (the inalienability clause) which prohibited their sale. We discuss the implications of the Order and the Inalienability Clause in the relevant sections of our assessment of the remedy options and also in Appendix J.
- 10.24 Later on in the remedies process, GET proposed the structural remedy discussed in paragraphs 10.99 to 10.109 and the behavioural remedy discussed in paragraphs 10.147 to 10.153. It also told us that it would be willing to offer the CC the same behavioural undertakings that it gave to the FCA (see paragraph 10.147).

Views of the SCOP

- 10.25 The SCOP told us that it considered that the launch of the MFL business had been pro-competitive with consequent benefits to customers from increased choice, service and competition and therefore no remedy was required. The SCOP also told us that it considered that any remedy which had the effect of removing the Vessels or the SCOP from the short sea (and from the Dover–Calais route in particular) would be impracticable and incapable of effective implementation because the effect of the inalienability clause was that any divestiture or long-term charter of the Vessels would be void and because the SCOP's rights to operate the Vessels was inextricably linked to the Court's decision to award the sale of the Vessels to GET.

Views of ferry operators

- 10.26 We summarize here the views of DFDS, P&O, Stena Line and Brittany Ferries. Their specific comments on the remedy options are noted elsewhere in this section.
- 10.27 DFDS told us that it considered that the divestiture of the MFL business or the assets employed in the business was likely to be the most effective and complete remedy in addressing the SLC. DFDS noted that the divestiture of the Vessels would fall within the scope of the inalienability clause but told us that it considered that there would be a good chance that the inalienability requirement would be lifted by the Court if GET so requested for a legitimate reason such as the order of a competition authority. DFDS acknowledged that obtaining the approval of the Court for any divestiture created uncertainties over the timescale within which a divestiture remedy could be implemented and told us that it considered that a practical and effective remedy, pending a divestiture, would be for MFL to cease operating on the short sea, or as a minimum on any routes into or out of Dover.
- 10.28 P&O told us that in its view it was not clear whether a divestiture remedy could be implemented in an acceptable time frame and that its preferred remedy would be for MFL to be prohibited from operating on the short sea.
- 10.29 Stena Line told us that it believed divestment of the Vessels would be the only effective remedy.
- 10.30 [✂]

The effectiveness of structural remedies

Introduction

- 10.31 As stated in paragraph 10.5, the CC generally prefers structural remedies to behavioural remedies because they can be a straightforward and comprehensive solution to an SLC and do not require ongoing monitoring. In defining the scope of a divestiture package, the CC's usual starting point is to identify the smallest viable stand-alone business that can be divested by the acquirer that competes successfully on an ongoing basis and includes all the relevant operations pertinent to the area of competitive overlap.²³⁵
- 10.32 Divestitures may be subject to a number of risks that may limit their effectiveness in addressing the SLC. As stated in the CC's guidelines, the CC typically considers three categories of risks:²³⁶
- (a) *Composition risks*: these are risks that the scope of the package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.
 - (b) *Purchaser risks*: these are risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser.
 - (c) *Asset risks*: these are risks that the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example through loss of customers or key members of staff.
- 10.33 In addition to the above categories of risk, in this case, there are particular risks associated with divestiture arising from the inalienability clause.
- 10.34 We now consider three issues of relevance to these risks: first, the composition of the MFL business; secondly, the implications of structural overcapacity on the short sea; and thirdly, the implications of the inalienability clause. We then consider the extent to which the risks that we have identified impact on the effectiveness of a number of different divestiture options.

The components of the MFL business

- 10.35 The assets and contractual agreements that are necessary for the commercial operation of the MFL-branded services on the short sea are held in a number of separate legal entities, some but not all of which are owned by GET:
- (a) The Vessels are owned by three separate legal subsidiaries of GET (Euro-transmanche SAS, Euro-transmanche 3Be SAS and Euro-transmanche 3NPC).
 - (b) The commercial decisions and risks are taken by another subsidiary of GET, MFL SAS.
 - (c) The labour force required to operate the ships is provided by the SCOP (which is not a GET subsidiary), which charters the Vessels from the three GET subsidiaries referred to above under three separate [✂] bareboat agreements. The SCOP is contracted by MFL SAS under a [✂] contract (the commercialization

²³⁵ CC8, paragraph 3.7.

²³⁶ CC8, paragraph 3.3.

contract) to supply a minimum number of ferry crossings each year for which it receives a fixed fee per crossing. The SCOP supplies the onboard shop and catering and retains the revenue from these sales subject to a commission paid to MFL SAS.

The implications of structural overcapacity for our assessment of purchaser suitability

10.36 In this case, as explained in paragraphs 8.41 to 8.52, we have found that there is currently a situation of structural overcapacity on the short sea, which we anticipate will be rationalized in the short term. Bearing this in mind, in considering the scope of the divestiture package we had regard to the various ways in which capacity on the short sea might develop or be rationalized following the divestiture:

- (a) in principle, a new owner might be prepared to compete with both DFDS/LD and P&O in the short term in the expectation that it will survive the period of intense competition;
- (b) a new owner might redeploy the Vessels to other routes, thus removing the excess capacity immediately following the divestment; and
- (c) if DFDS were the purchaser, it might replace some of the vessels DFDS/LD currently operates on the short sea with the more suitable ex-SeaFrance vessels.

10.37 We considered that in principle each of these outcomes could be equally effective in addressing the SLC but noted that each outcome could have different implications for the appropriate scope of the divestiture package and in particular whether it should include only the Vessels or a combination of the Vessels, commercial capability and labour.

The inalienability clause

10.38 As stated in paragraphs 10.23 and 10.25, GET and the SCOP respectively made representations that the effect of the inalienability clause was that GET was prevented by law from either reselling or chartering the Vessels to a third party for a period of five years. The SCOP further argued that in effect GET was also obliged to maintain its relationship with the SCOP for the same period. SCOP also argued at a very late stage that the scope of the inalienability clause obliged GET to operate at Dover. Our full consideration of these arguments is set out in Appendix J.

10.39 Our assessment is that, although the inalienability clause prohibits the sale of the Vessels for the duration of the clause, it does not place an absolute restriction on our ability to implement structural remedies for the following reasons:

- (a) The inalienability clause does not in its terms prohibit chartering of the Vessels as this is not a transfer of ownership.²³⁷
- (b) The two reasons given in the Order for the inalienability clause are to prevent a divestiture of the Vessels for speculative reasons and to prevent a change in the flagging of the Vessels which would give rise to a tax liability and:

²³⁷ We noted in paragraph 10.35 that the Vessels are owned by three subsidiaries of GET and have been chartered to the SCOP.

- (i) we consider that a divestiture ordered by a competition authority would not be speculative as it would not be carried out with the aim of profiting from the difference between the price paid in liquidation and the market value of the assets;²³⁸ and
- (ii) we have no reason to believe that a tax liability would now be incurred if the CC ordered the divestiture of the Vessels.²³⁹

10.40 Our analysis of the Offer made by GET to the Court, the Order and the Court minutes suggested to us that the inalienability clause is not directly linked to the issue of employment. We found it difficult to reconcile the broad interpretation put on the inalienability clause by GET and the SCOP with the terms of the Order which do not include any obligations as to the creation and maintenance of employment. The Order requires GET to provide a report on the labour situation but this is only a reporting requirement and only applies for two years whereas the term of the inalienability clause is five years. Therefore we consider that none of the structural remedies we are considering directly contravenes the terms of the Order regarding employment.

10.41 In any event, if the inalienability clause applies to a divestiture imposed by the CC, we note that it is open to GET to apply for the inalienability clause to be lifted by the Court. We consider that the Court would take into account the factors that were relevant to the imposition of the clause and the fact that a divestiture was ordered by the CC rather than being speculative on the part of GET would be likely to be relevant in the Court's assessment.

10.42 We accept, however, that there is some uncertainty as to the scope and effect of the inalienability clause which may have implications for the effectiveness of a divestiture remedy. As a result of this uncertainty, and the sanctions that could be applied for a breach of the clause, we accept that it would be reasonable for GET and any party seeking either to acquire or to charter the Vessels to seek the Court's approval. In addition, we note that the lifting of the inalienability clause would involve consultation by the Court with relevant French ministers which would add to the uncertainty over the timescale and outcome of the remedy process as we acknowledge that there may be social and political implications.

10.43 We therefore analysed the effect of the inalienability clause (the inalienability clause risk) on the structural remedies we identified alongside the risks typically examined by the CC (see paragraph 10.32).

Divestiture remedy options

10.44 We consider the extent to which the risks that we have identified impact on the effectiveness of a number of different divestiture options:

- (a) the divestiture of three alternative packages (see paragraphs 10.45 to 10.83):
 - (i) MFL SAS, ie the sale of the GET subsidiary which has entered into the commercialization contract with the SCOP (with the commercialization contract remaining in effect);

²³⁸ We note that the Court could require that part of any profit made by GET on a divestiture should be transferred to the liquidator for the benefit of the SeaFrance creditors.

²³⁹ We discussed the potential tax liability with GET and the SCOP and neither was able to provide evidence as to why a tax liability might still arise (see Appendix J, paragraph 19).

- (ii) the MFL business, ie the sale of MFL SAS together with the three subsidiaries which own the Vessels; or
 - (iii) the Vessels (the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*);
- (b) a delayed divestiture to take place at the end of the five-year period set by the inalienability clause (see paragraphs 10.84 to 10.87);
- (c) a prohibition on GET and its subsidiaries operating the Vessels or any other vessels (i) on the short sea or (ii) at the port of Dover (see paragraphs 10.88 to 10.98); and
- (d) the remedy proposed by GET (see paragraphs 10.99 to 10.109).

Divestiture of MFL SAS

- 10.45 We first considered the divestiture of MFL SAS. We considered that the divestiture of MFL SAS would in principle (and if backed by satisfactory long-term contractual arrangements) be a solution to the SLC we have identified and its adverse effects, as under this remedy GET would cease to have a financial interest in the commercial success of MFL SAS. However, we considered that there are four main problems with this remedy: identifying a purchaser; regulating the long-term contractual situation following the expiry of the bareboat charter and the commercialization contract; the inalienability clause risks; and the implications of GET continuing to own the Vessels. We expand on these issues below.
- 10.46 We first considered whether there would be likely to be any purchasers who would be interested in acquiring MFL SAS. We noted that by acquiring MFL SAS the purchaser would be taking over the commercialization contract with the SCOP under which MFL SAS purchases crossings on the Dover–Calais route. We considered that in view of our conclusions on the competitive situation set out in Section 8, it seems likely that the only potential purchaser of MFL SAS is DFDS. We thought it unlikely that another ferry operator would want to enter the Dover–Calais route in competition with P&O and DFDS/LD given the level of overcapacity and the difficulty it would face achieving a financially viable operation.²⁴⁰
- 10.47 Stena Line told us that it would not enter the Dover–Calais route if one of DFDS/LD or MFL exited and would not expect another operator to do so. [REDACTED]
- 10.48 DFDS told us that it would not be prepared to take over the commercialization contract with the SCOP.
- 10.49 The SCOP told us that it thought it was highly unlikely that a purchaser would want to take over the commercialization contract because another ferry operator would be likely to want to manage the crew and the operation of the Vessels directly and because the contract was very specific to the relationship between GET and the SCOP.
- 10.50 We considered that a number of contractual arrangements would be required to address issues associated with the time-limited nature of the existing contracts: for example (and depending on the precise structure of the transaction), GET should be required to renew the charters to the SCOP upon their expiry; the purchaser should be entitled to renew the commercialization contract with the SCOP; and GET should

²⁴⁰ See also Appendix H.

be prohibited from entering into any new commercialization contract with the SCOP or any other party for the operation of the Vessels and from operating the Vessels itself.

- 10.51 We considered how to address the inalienability clause risks under this remedy option. One way would be to structure the divestiture so that the purchaser of MFL SAS did not have the right to purchase the Vessels. Based on our analysis in Appendix J, we considered that although this remedy would result in the purchaser taking on the commercial risk of the MFL business, it would not breach the inalienability clause as it would not involve a transfer of ownership of the Vessels since MFL SAS does not own the Vessels. However, we also considered that a purchaser of MFL SAS might be concerned with an arrangement that envisaged GET remaining the owner of the Vessels as well as being a competitor to MFL SAS through Eurotunnel.
- 10.52 An alternative structure would be for the purchaser to acquire MFL SAS (again with the commercialization contract between MFL SAS and the SCOP continuing in effect), and also acquire the Vessels either immediately or when the existing charters between the GET subsidiaries and the SCOP terminate.²⁴¹ Based on our assessment in paragraph 10.39, it appears that the sale by GET of the Vessels would require the approval of the Court, with the related uncertainty over timescale and outcome that are described in paragraph 10.42.

- *Conclusion on effectiveness of divestiture of MFL SAS*

- 10.53 We considered that the divestiture of MFL SAS could be structured in a way which does not require the approval of the Court. However, based on our discussions with ferry operators, we found that DFDS is the only likely purchaser and that DFDS is not interested in a divestiture that involves taking over the commercialization contract with the SCOP. We also found that the SCOP thought it would be unlikely that a purchaser would want to take over the commercialization contract. Accordingly we considered it unlikely that a purchaser could be found for MFL SAS. We therefore concluded that the divestiture of MFL SAS is unlikely to be an effective remedy and we did not need to consider the composition risk further or the asset risk of this remedy option.

Divestiture of the MFL business

- 10.54 We considered that the divestiture of the MFL business (ie the sale of MFL SAS together with the three subsidiaries which own the Vessels) would in principle be capable of addressing the SLC, as the potential adverse effects we have identified arise as a result of GET operating the MFL business and under this remedy GET would cease to have a financial interest in the commercial success of the MFL business.
- 10.55 We considered that the divestiture of the MFL business raises the same concerns as discussed in paragraph 10.46: by acquiring MFL SAS the purchaser would be taking over the commercialization contract with the SCOP under which MFL SAS purchases crossings on the Dover–Calais route. We considered it likely that the only potential purchaser would be DFDS as it is unlikely that any other operator would want to enter the Dover–Calais route and DFDS has told us that it would not be interested in a divestiture that involved taking over the commercialization contract with the SCOP.

²⁴¹ The charters were signed on 29 June 2012 and were for a term of [X] from the delivery of the Vessels by GET to the SCOP.

The SCOP agreed that it was unlikely that a purchaser would want to take over the commercialization contract.

10.56 In addition, based on our assessment in paragraph 10.39, it appears that the sale by GET of the subsidiaries which own the Vessels would require the approval of the Court, with the related uncertainty over timescale and outcome that are described in paragraph 10.42.

- *Conclusion on effectiveness*

10.57 We considered that for the reasons set out in paragraph 10.55 it appears unlikely that a purchaser could be found. We also noted that a divestiture of the MFL business would be likely to require the approval of the Court. We concluded that the divestiture of the MFL business is unlikely to be an effective remedy and accordingly we did not need to consider the composition further or the asset risk of this remedy option.

Divestiture of the Vessels

10.58 We considered next the divestiture (or long-term chartering) of the Vessels.

10.59 In relation to this remedy we considered that the existing charter contracts between the GET subsidiaries which own the Vessels and the SCOP would have to be terminated, as otherwise the Vessels would remain subject to the charters and the purchaser would not have the ability to operate the Vessels itself. This implies that the commercialization contract between MFL SAS and the SCOP would also have to be terminated as the contract would have no purpose once the charters had been terminated.

10.60 We considered that the divestiture of the Vessels to a third party which is independent of GET would address the SLC, as it would result in GET not being able to operate the MFL business as a commercial ferry service and therefore the internalization and competition weakening effects that we have identified (see paragraph 9.3) that give rise to the SLC would not exist.

- *Composition risk*

10.61 GET told us that it considered that the divestiture of just one vessel, in particular the *Nord Pas-de-Calais*, would be sufficient to remedy the SLC identified by the CC. The basis of GET's argument was that, as we have concluded that the minimum efficient scale of operation on the Dover–Calais route requires two fully operational vessels and access to one additional vessel for back-up (see paragraph 8.32), an operator with only two vessels could not be in a position to operate effectively and therefore would not be able to operate a business of sufficient scale to give rise to an SLC.

10.62 We do not accept GET's argument as a matter of principle. The minimum efficient scale relevant for entry or for operations to be sustainable does not set the parameters for an effective remedy. The Act requires us to seek 'as comprehensive a solution as is reasonable and practicable' to the SLC resulting from the merger under consideration,²⁴² and our starting point for considering the appropriate divestiture package is to reverse the completed merger.²⁴³ The comprehensive nature of the remedy required means that we are not required to make fine judgements over when

²⁴² CC8, paragraph 1.7.

²⁴³ CC8, paragraph 3.6 & fn 30.

the SLC we have identified has been reduced to merely an ‘acceptable’ lessening of competition. Further, the guidelines say that the CC will seek remedies that have ‘a high degree of certainty of achieving their intended effect’, and that third parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects.²⁴⁴ In making this assessment, the CC will seek to ensure that there is no realistic prospect of the SLC remaining.²⁴⁵

10.63 In this case, reducing the scale of operation to below its minimum efficient scale does not, of itself, preclude any problem arising. For that to be so, we would require to be satisfied on two points:

- (a) that continued operation at below minimum efficient scale would not give rise to any realistic prospect of the effects of the SLC we have identified continuing to be felt; and
- (b) that there would be no realistic prospect that the operations conducted using business assets acquired as part of the transaction could, either immediately or at some future stage, be scaled back up so as once more to give rise to the SLC we have identified.

10.64 Further, on the facts:

- (a) We were not satisfied that the SLC would be addressed simply if MFL ferry services continued to operate at less than their minimum efficient scale:
 - (i) the internalization effect might be reduced but would not be eliminated as GET would continue to receive the revenues from the residual MFL operation; and
 - (ii) the competition-weakening effect might still materialize if, as a result of MFL’s continuing operation, DFDS/LD did not expect to achieve sufficient market share to become profitable and exited the Dover–Calais route.
- (b) We also considered that it would be easier for MFL to increase the scale of its operation above the minimum efficient scale at a future point in time if it had continued to have a presence on the Dover–Calais route and customers remained familiar with the brand than if it exited the route. Further, the more business assets that were retained, the less investment that would be required to scale up again.

10.65 We considered whether there was a remedy that did not require disposal of all the Vessels that might nonetheless be effective. Here we had regard to the characteristics of the Vessels themselves. We noted that the *Berlioz* and the *Rodin* are both modern combined-passenger/freight vessels, designed to operate on the short-sea route between Dover and Calais, but capable of operating elsewhere. The *Nord Pas-de-Calais* is a freight-only vessel, and is reaching the end of its useful life with an expectation that it will be decommissioned in 2015 once tighter emissions regulations enter into force. It had not proved readily saleable in the original court liquidation process, and while GET had purchased it, [REDACTED] (see paragraph 3.27). DFDS had said during the current remedy process that it was not interested in acquiring the *Nord Pas-de-Calais*, and no one else had expressed an interest in doing so. However, we were told by GET that in the period January to April 2013 the *Nord Pas-de-Calais*

²⁴⁴ CC8, paragraph 1.8(d).

²⁴⁵ This approach was upheld by the Competition Appeal Tribunal in *British Sky Broadcasting Group plc v Competition Commission and others* [2008], CAT 25, paragraphs 293–294.

accounted for 31 per cent of all MFL ferry crossings, and GET described it as ‘an integral part of MFL’s service offering’.²⁴⁶ GET also told us that the *Nord Pas-de-Calais* would not necessarily be decommissioned in 2015 if the introduction of stricter environmental controls was delayed.

- 10.66 Having regard to the characteristics of the *Berlioz* and the *Rodin* which make them attractive to operate on the Dover–Calais route and to their long remaining useful lives, we considered that were either to remain in the ownership of GET and capable of continuing to operate on the Dover–Calais route (whether alone or in combination with the *Nord Pas-de-Calais*), we could not be satisfied that the SLC would be remedied for the reasons set out in paragraph 10.64. Accordingly, we considered that the disposal of both the *Berlioz* and the *Rodin* would be a prerequisite to addressing the SLC.
- 10.67 We considered whether it would also be necessary to divest the *Nord Pas-de-Calais* along with the *Berlioz* and the *Rodin* to address the SLC. We noted the characteristics of the *Nord Pas-de-Calais* described in paragraph 10.65 and considered that it might not attract a purchaser even if GET were to try to sell it. Conversely, we also took into account GET’s submissions as to the continuing usefulness of the *Nord Pas-de-Calais*, as described in paragraph 10.65, and remained conscious of the risk that MFL might use the *Nord Pas-de-Calais* in conjunction with one or more other vessels to maintain or re-establish its ferry business and thereby prevent the SLC being satisfactorily addressed. However, we considered that the limited remaining useful life of the *Nord Pas-de-Calais* reduces this risk, and we were satisfied that with the addition of the anti-avoidance measures described in paragraphs 10.116 and 10.121 we could ensure that there would be no realistic prospect that the adverse effects of the SLC would not be satisfactorily addressed, making it unnecessary to insist on the disposal of the *Nord Pas-de-Calais* in addition to that of the *Berlioz* and the *Rodin*.
- 10.68 DFDS and Stena Line told us that divestiture of the Vessels was a more practicable remedy than the divestiture involving a larger package of assets because potential purchasers were likely to be existing ferry operators who would not want other assets such as the MFL brand or website and would already have the corporate infrastructure to support the operation of the Vessels.
- 10.69 DFDS told us that it would be more interested in acquiring the *Berlioz* and the *Rodin* outright than in chartering them because it envisaged that they would need some modifications²⁴⁷ and DFDS did not want to incur the cost of modifications or future upgrades of public areas on vessels that it did not own. DFDS noted that some of the disadvantages of chartering could in general be mitigated if the charter agreement provided options for the charterer to extend the term of the charter or acquire the *Berlioz* and the *Rodin* at the end of the initial charter period but had some specific concerns over GET as owner in such arrangement.
- 10.70 Stena Line told us that it thought there would be more interest from potential purchasers in acquiring the Vessels outright rather than chartering them because it would not be cost effective to modify them for use on other routes when they would be returned to the owner at the end of the charter period.
- 10.71 Brittany Ferries told us that it thought there might be more parties who would be interested in chartering the Vessels than acquiring them outright as chartering

²⁴⁶ GET submission, 14 May 2013, paragraph 3.1.

²⁴⁷ DFDS told us that the Vessels would need some modification to berth at Dunkirk and estimated the cost of these Dunkirk-specific modifications to be €0.5 million per vessel.

avoided the up-front capital cost, if the purchaser intended to use them on the short sea. It noted that the *Berlioz* and the *Rodin* were fairly modern vessels which had been purpose-built for the short sea. It thought a charter term of at least three years would be more attractive than a short-term charter.

- *Purchaser risk*

10.72 The SCOP told us that it thought it was unlikely that there would be any interest from ferry operators other than DFDS in acquiring the *Berlioz* and the *Rodin* because of the limited number of short-sea routes that required day ferries (ie without cabins) and the cost of the modifications that would be required for them to operate on routes other than Dover–Calais or Dover–Dunkirk.

10.73 DFDS told us that it would be interested in acquiring the *Berlioz* and the *Rodin* but not the *Nord Pas-de-Calais* because of its age and because it was a freight-only ferry. DFDS told us that if it acquired the *Berlioz* and the *Rodin* they would replace the *Norman Spirit* and the *Dieppe Seaways* (formerly the *Moliere*) that DFDS/LD was currently operating on the Dover–Calais route.

10.74 DFDS told us that it thought it was unlikely that there were any other potential purchasers who would operate the *Berlioz* and the *Rodin* on the short sea.

10.75 Although in paragraph 8.32 we noted that, to be seen as a credible operator on the short sea, a ferry operator would need two vessels operating full-time with some contingency arrangement to cover periods when one vessel is out of service, we noted that DFDS could provide this contingency cover for these vessels, given that it already operates on the Dover–Dunkirk route.

10.76 [X] Stena Line also told us that it thought, as there was a global market for ferries and the *Berlioz* and the *Rodin* are fairly modern vessels, there would be interest from other operators in acquiring them.

10.77 [X]

- *Asset risk*

10.78 We did not consider there to be a material risk that the competitive capability of the assets will be allowed to deteriorate in the period prior to a divestiture. We noted that the interim undertakings given by GET to the CC include an undertaking that the assets of the MFL business will be maintained and preserved.

- *Conclusion on effectiveness*

10.79 Based on paragraphs 10.59 to 10.78, we concluded that a divestiture of the Vessels to a third party independent of GET would address the SLC when accompanied by the anti-avoidance measures described in paragraphs 10.116 and 10.121. We then considered the outcome were GET to dispose of less than all three Vessels. We concluded that it would be necessary to dispose of both the *Berlioz* and the *Rodin* and that this was the smallest divestiture package that would be sufficient to address the SLC when accompanied by the anti-avoidance measures described in paragraphs 10.116 and 10.121). Regarding the *Nord Pas-de-Calais*, we noted GET's representations as to its continuing importance, but given its age and condition we considered that its retention by GET, if accompanied by the anti-avoidance measures, would not pose a risk to the effectiveness of the remedy, were the *Berlioz* and the *Rodin* to be divested.

- 10.80 We considered that divestiture of the Vessels by outright sale is a more attractive option than chartering as it would mean that GET would not continue to own the Vessels and there are likely to be more parties interested in acquiring the Vessels outright than chartering them. As noted in paragraph 10.42, we considered it likely that a party seeking to charter the Vessels would want the arrangements to be approved by the Court so chartering has the same inalienability clause risk as an outright sale.
- 10.81 We considered that DFDS is likely to be the only purchaser who would use the *Berlioz* and the *Rodin* on the short sea and that DFDS would not need the *Nord Pas-de-Calais* to provide a credible ferry service. We also considered that it is not necessary for the divestiture to be to a purchaser who would use the Vessels on the short sea in order for the SLC to be addressed and in this case the purchaser might not need the *Nord Pas-de-Calais*. This is consistent with our conclusion in paragraph 10.79 that the divestiture of the *Berlioz* and the *Rodin* is the smallest divestiture package that would address the SLC.
- 10.82 However, based on our assessment of the inalienability clause risk, we considered that there is uncertainty over the outcome and timescale of a divestiture process because of:
- (a) the likely need to obtain approval of the Court;
 - (b) the possibility that GET would not have the incentive to prepare an application for the lifting the inalienability clause, in a form satisfactory to the Court, in a timely manner;
 - (c) the uncertainty over the timescale in which the Court would consider an application, particularly given the need to consult government ministers; and
 - (d) the uncertainty as to whether the Court would grant approval.
- 10.83 The CC's guidelines state that the CC will seek remedies that have a high degree of certainty of achieving their intended effect and that customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects.²⁴⁸ In view of the uncertainty over the outcome and the timescale of a divestiture process of the *Berlioz* and the *Rodin*, we have concluded that this would not be an effective remedy.

Consideration of the effectiveness of delayed divestiture

- 10.84 In view of the conclusion we reached in paragraph 10.83, we next considered whether the divestiture of the *Berlioz* and the *Rodin* after the expiry of the inalienability clause on 11 June 2017 would be an effective remedy.
- 10.85 Our understanding is that there is no provision in French law for the extension of a restriction on alienation.
- 10.86 Although we had no reason to believe that the adverse effects of the SLC that we have identified would lessen over time, we considered that it was difficult to assess whether a divestiture remedy would be appropriate by the time the inalienability clause expires. Therefore the appropriateness and terms and conditions of a divestiture remedy and assessment of suitability of a purchaser would need to be con-

²⁴⁸ CC8, paragraph 1.8(d).

sidered at that time. Moreover a delayed divestiture would not address the SLC in the meantime. We therefore considered whether price controls on Eurotunnel services would address the SLC in the period prior to a divestiture, but we found that they might create market distortions and would be difficult to implement (see paragraphs 10.161 to 10.171). While some of these concerns might be reduced if price controls were only in effect for a short period, overall the disadvantages of price controls led us to consider that they would not be an effective remedy.

Conclusion on effectiveness

- 10.87 We noted that the CC's guidelines state that a remedy should address an SLC throughout its expected duration. A divestiture of the *Berlioz* and the *Rodin* after the expiry of the inalienability clause does not address the SLC prior to then. We considered whether price controls would address the internalization effect in the meantime but found a number of difficulties with this type of remedy that meant that it was unlikely to be effective. We also noted that it would not address the competition weakening effect that we have identified. Accordingly we concluded that delayed divestiture is not an effective remedy.

Prohibition of operations on certain routes

- 10.88 In view of the potential difficulties of implementing divestiture remedies, we considered possible remedies that would prohibit GET from operating ferry services on certain routes.²⁴⁹ We considered two possible remedy options:
- (a) prohibition of operations on the short sea; and
 - (b) prohibition of operations at the port of Dover.
- 10.89 GET told us that it considered that if MFL were prohibited from operating on the Dover–Calais route, MFL's strategic objectives would not be achievable and that MFL would have to stop all its commercial activities. GET also told us that it would consider a requirement for MFL not to operate on any short-sea route to be disproportionate.²⁵⁰
- 10.90 The SCOP told us that it considered that any remedy prohibiting MFL from operating on the Dover–Calais route or the short sea would result in severe job losses for the SCOP's members and would be incompatible with the Order and would be disproportionate.²⁵¹
- 10.91 P&O told us that its preferred remedy would be for MFL to be prohibited from operating on the short sea.
- 10.92 DFDS told us that it considered that a prohibition on MFL operating on the short sea, or as a minimum on any routes into or out of Dover, would be a practical and effective remedy pending a divestiture.
- 10.93 The Rail Freight Group told us that it supported this remedy as being the fairest way to reduce GET's market share on the short sea. It said that its preferred option would be for MFL to be prohibited from operating on the Dover–Calais route and to be

²⁴⁹ This should be taken to refer to GET and its subsidiaries and ferry services operated by the SCOP under the commercialization contract with MFL SAS.

²⁵⁰ GET's response to the Supplementary Remedies Notice, 9 April 2013, paragraphs 5.3–5.4.

²⁵¹ The SCOP submitted a legal opinion in support of this view.

prohibited from starting new services from any port in Kent to Calais, Dunkirk or Boulogne, but it acknowledged that that might be problematic because of the arrangements with the SCOP, and that as a minimum MFL should not be allowed to berth in Dover or Calais.

Our assessment

- 10.94 We considered that if GET were prohibited from operating ferry services on the short sea, this would address the SLC because GET would then no longer be operating ferry services in the same market as the Eurotunnel shuttle services (see Section 6) and Eurotunnel would have no incentive to raise prices due to the internalization effect and we would not expect the competition weakening effect to materialize.
- 10.95 On the short sea, the closest substitutes for the Eurotunnel services are the Dover–Calais and Dover–Dunkirk routes. As discussed in paragraphs 7.42 to 7.46, we found that in the event of a price rise by Eurotunnel we would expect freight volume to divert to both the Dover–Calais and Dover–Dunkirk routes but we would expect very little diversion to any other routes. Accordingly we considered that if GET did not operate ferry services on the Dover–Calais or Dover–Dunkirk routes the SLC would not arise, because Eurotunnel would have no incentive to raise prices due to the internalization effect and the competition-weakening effect would not materialize as DFDS/LD would be unlikely to withdraw from the Dover–Calais route.
- 10.96 Based on paragraphs 10.94 and 10.95, we considered that it would be sufficient to prohibit GET from operating ferry services at the port of Dover to address the SLC as GET would then not be able to operate services on the Dover–Calais and Dover–Dunkirk routes.
- 10.97 We considered the SCOP’s view that a remedy prohibiting the operation by GET of ferry services at the port of Dover would contravene the Order. As set out in Appendix J, we do not agree with the SCOP’s view because we do not accept that the Order requires the preservation of the employment of the SCOP’s members.

Conclusion on effectiveness

- 10.98 Based on paragraphs 10.94 to 10.97, we concluded that a prohibition on GET operating ferry services at the port of Dover is an effective remedy because it will address the SLC and can be implemented in a timely manner.

Structural remedy proposed by GET

- 10.99 Very late in the process, GET presented a structural remedy proposal on 7 May 2013 which it submitted would address the internalization effect. We subsequently discussed the proposal at a hearing with GET and GET submitted a further note on 14 May 2013. We noted that given that GET had the opportunity to submit remedy proposals in response to our Remedies Notice and the Supplementary Remedies Notice, there was no reason why this proposal could not have been made earlier. The main elements of the proposal are:
- (a) MFL SAS would agree to reduce over time the proportion of the available capacity on the ferry crossings operated by the SCOP that it purchases in order to reduce the internalization effect. The first reduction would be made after six months and there would be subsequent reductions over an unspecified timetable to be agreed to a specified percentage.

- (b) The specified percentage would be agreed but was anticipated by GET to be 'below but close to 50 per cent of the capacity on the Vessels'.
- (c) MFL SAS and the SCOP each would market, and set the prices for, its own share of the capacity independently. GET and MFL SAS would have no involvement in the commercial operations of the SCOP.
- (d) The per-crossing fee paid by MFL SAS to the SCOP (see paragraph 3.28) would be reduced in line with the proportion of the capacity purchased by MFL SAS.
- (e) The SCOP would need to procure its own funding independently of GET.
- (f) The existing commercialization agreement between MFL SAS and the SCOP would be amended to reflect the proposal.
- (g) GET would agree that in the event that the remedy could not be implemented within six months, it would cease ferry operations at the port of Dover (and may divest the *Berlioz* and the *Rodin*). If the remedy were implemented but the SCOP subsequently ceased operating the Vessels, GET would have six months to divest the Vessels and at the end of six months would be prohibited from operating ferry services at the port of Dover.

10.100 As GET's proposal is in effect a divestiture of part of the capacity of the MFL ferry services, we considered the risks associated with the proposal in accordance with the CC's guidelines (as set out in paragraph 10.32).

Composition risks

10.101 GET acknowledged that its proposal was an outline framework which needed to be developed in more detail. In particular, GET told us that the proposal had not been discussed with the SCOP and that it envisaged that the proposal would need to be developed through negotiations with the SCOP and the CC following the publication of our final report.

10.102 As set out in paragraph 10.99, GET told us that it envisaged that the share of the capacity on the ferry crossings purchased by MFL SAS would be reduced in stages to the specified percentage. We considered that the implication of this is that while the effect of the proposal might be to reduce the internalization effect over time, it would not be eliminated. GET would continue to receive a substantial portion of the revenues from the MFL operation over the transitional period and thereafter would continue to receive the revenues derived from its specified percentage of capacity for an indefinite period. We also considered that a consequence of the proposal is that GET would have an interest in the financial success of the SCOP: GET would continue to buy crossings from the SCOP and receive charter fees from the SCOP; and GET would depend on the SCOP to operate the ferry services as otherwise GET's ability to continue marketing its share of the capacity would be disrupted.²⁵² This produces an incentive effect comparable to the internalization effect giving rise to the SLC, in that while GET would not directly receive revenue benefits from the SCOP and its operations, it would benefit indirectly from contributing to the SCOP's continued financial well-being.

²⁵² Moreover, GET's proposal states that if the SCOP should cease operating the Vessels, GET would have six months to divest the Vessels and at the end of six months GET would be prohibited from operating ferry services at the port of Dover (see paragraph 10.99(g)).

10.103 We considered that compliance with the arrangements between GET and the SCOP would require ongoing monitoring.

Purchaser risks

10.104 We first considered the financial implications of the proposal for the SCOP. GET told us that as the per-crossing fees paid by MFL SAS to the SCOP would be reduced in line with the capacity purchased by MFL SAS, the SCOP would have to fund any shortfall between the reduced per-crossing fees it receives from MFL SAS and the costs of operating the ferry crossings from the revenue it generates from the sale of its share of the capacity on the ferry crossings. We noted in paragraph 8.63 that GET did not expect the MFL operation to break even before the end of [§], and therefore we considered that there is a risk that the SCOP would not be able to generate sufficient revenue to cover its costs and therefore would not be financially viable. The SCOP had previously told us that it did not have the financial capability to operate the MFL business independently because the operation was not profitable, and the SCOP did not expect to have such financial capability for [§]. We were also told that the SCOP behavioural remedy (see paragraphs 10.154 to 10.158) was designed as it was because the SCOP did not expect to have the financial resources to step in to MFL's shoes and take over MFL's operations and corresponding risks and liabilities within [§]. We discussed our concern with GET, which suggested that the SCOP may be able to reduce the costs of operating the ferry crossings.

10.105 We next considered whether the SCOP would be independent from GET. GET told us that it would have no financial interest in the SCOP and that legal framework of the arrangements would ensure that SCOP was independent. We noted that we had found that GET and the SCOP were associated persons in relation to the acquisition of the SeaFrance assets (see paragraph 4.38) and that GET had material influence over the SCOP (see paragraph 4.45). The SCOP would continue to be financially dependent on GET in significant respects (notably the charter of the Vessels and the purchase by GET of its share of capacity), and the SCOP and GET would have an ongoing need to agree on matters such as capacity on the route and any replacement for the *Nord Pas-de-Calais*. Further, as discussed in paragraph 10.102, the proposal would result in GET having a continuing interest in the SCOP's financial success.

10.106 We considered that the consequence of implementing this proposal would be the exit of an independent competitor, DFDS/LD, from the Dover–Calais route in the short term as the continued operation of the MFL ferry service would maintain excess capacity in the short-sea market. We consider that the inclusion in the proposal that GET would be prohibited from operating ferry services at the port of Dover in the event that the SCOP ceases to operate the Vessels (see paragraph 10.99(g)) would not give DFDS/LD sufficient incentive to remain on the Dover–Calais route as the timing of such an outcome would be highly uncertain. To offset the resulting competition-weakening aspect of the SLC, it would be necessary for the SCOP to stand as a wholly independent competitive force in the market. However, we considered that in so far as the SCOP continued to be under the material influence of GET and to take GET's interests into account in formulating and implementing its business plans, the SCOP would not have the necessary independence.

Asset risk

10.107 We did not consider that this proposal would result in a material risk that the competitive capabilities of the assets would be allowed to deteriorate.

Conclusion on effectiveness

10.108 The CC's guidelines state that the CC will seek remedies that have a high degree of certainty of achieving their aims. Further the scope and likely content of these remedies should be reasonably clear at the time our final report is published, so that a view can be formed as to their likely effectiveness. We do not consider it consistent with our statutory duties to negotiate or to develop the nature and content of the remedy in substantive respects following publication of our final report, in the manner suggested by GET. We have a number of substantial concerns over GET's proposals as they have been presented to us:

- (a) The proposal has not been discussed with the SCOP, without whose full and active support the whole scheme collapses at the outset. Further, even if the SCOP is supportive in principle, it would need to be in a position to finance its obligations, and we have considerable concerns over its ability to do so.
- (b) We do not consider that the proposal as presented would satisfactorily address the internalization effect of the SLC, either fully or in timely fashion, and consider that it would give rise to an additional incentive and effect comparable to internalization.
- (c) We have concerns over whether the SCOP would be wholly independent from GET under these arrangements, and any lack of independence would result in a failure of the proposed remedy to address the competition-weakening effect of the SLC.

10.109 Whether singly or in combination, these concerns are such as to lead us to conclude that there is not the requisite degree of certainty that this proposal will produce a comprehensive solution in addressing the SLC identified. Further, the proposal would impose additional costs of monitoring the remedy.

Overall conclusions on structural remedies

10.110 Based on our assessment of the structural remedy options we have identified, we considered that prohibiting GET from operating ferry services at the port of Dover is an effective structural remedy and is less restrictive than prohibiting GET from operating on the short sea. We found that divestiture remedies either would be unlikely to be attractive to a purchaser or would need the approval of the Court which creates uncertainties as to the effectiveness of these remedies (see paragraph 10.82).

10.111 We considered that the divestiture of the *Berlioz* and the *Rodin* would address the SLC but cannot be considered an effective remedy because of the uncertainties flowing from the need for Court approval over whether it can be implemented at all or in a timely manner. Without this uncertainty, we would have considered this remedy to be effective (provided that it was supported by the anti-circumvention measures envisaged in paragraphs 10.116 and 10.121).

10.112 Accordingly, we concluded that, subject to our assessment of proportionality (see paragraphs 10.123 to 10.141) and relevant customer benefits (see paragraphs 10.174 to 10.180), our preferred remedy is that GET (and any interconnected body corporate of GET) directly, or indirectly through arrangements with any associated person or other body over which it has control,²⁵³ should be prohibited from operating ferry services at the port of Dover after the date which is six months from the date of

²⁵³ Control within the meaning of section 26 of the Act.

an order to implement the remedy. We consider that in the meantime GET should be permitted to remedy the SLC by divesting the *Berlioz* and the *Rodin* to a purchaser (or purchasers) satisfactory to the CC.²⁵⁴

10.113 We considered that the date from which GET should be prohibited from operating MFL ferry services at the port of Dover (the prohibition date) should be six months from the date of an order to implement the remedy. It will allow GET a period of time to achieve the divestiture of the *Berlioz* and the *Rodin* as a means of remedying the SLC should it wish to do so and time to:

- (a) effect an orderly exit of the MFL ferry services from the port of Dover; and
- (b) make arrangements to operate on other routes, should it wish to do so.

10.114 We noted that six months is the maximum period of time normally allowed by the CC for a divestiture remedy. Although the timescale for applying to the Court to lift the inalienability clause is uncertain, we noted that the liquidation process took six months (January to June 2012). Prior to the issues concerning the inalienability clause being identified, DFDS told us that it thought the *Berlioz* and the *Rodin* could be divested in two months and Stena Line told us that three to six months would be a reasonable period for divestiture, although it noted that the sale process for a vessel can sometimes be as short as ten days. We also noted that, while we have concluded DFDS/LD would exit the Dover–Calais route in the short term in the absence of a remedy, DFDS told us that DFDS/LD would be likely to remain on the route beyond the short term if it had reason to believe that an effective remedy would be implemented.

10.115 If GET wished to pursue the divestiture of the *Berlioz* and the *Rodin*, in the event that by the prohibition date GET has made substantial progress towards the divestiture of the *Berlioz* and the *Rodin* to a purchaser satisfactory to the CC, which includes the securing of all necessary approvals and agreement of terms with the purchaser, the CC may revise its timetable should the circumstances make it appropriate.

10.116 We also considered that:

- (a) The appropriate elements of the interim undertakings given by GET to the CC should be incorporated in the order and remain in effect until the earlier of the prohibition date or the date that the *Berlioz* and the *Rodin* are divested.
- (b) GET (and any interconnected body corporate of GET) directly, or indirectly through arrangements with any associated person or other body over which it has control,²⁵⁵ should be prohibited from operating ferry services at the port of Dover with the *Berlioz* and the *Rodin* for a period of ten years from the prohibition date. This is to give the same effect to the prohibition on GET operating ferry services at the port of Dover as if GET had divested the *Berlioz* and the *Rodin*.²⁵⁶ If GET divests the *Berlioz* and the *Rodin* it should be prohibited from reacquiring or chartering them for a period of ten years from the date of divestiture.²⁵⁷

²⁵⁴ We concluded that the divestiture of the *Nord Pas-de-Calais* in addition to the *Berlioz* and the *Rodin* is not required to remedy the SLC (see paragraph 10.79).

²⁵⁵ Control within the meaning of section 26 of the Act.

²⁵⁶ See CC8, paragraph 3.8: 'The merger parties will generally be prohibited from subsequently purchasing assets or shareholdings sold as part of a divestiture package or acquiring material influence over them. The CC will normally limit this prohibition to a sunset clause period of 10 years.'

²⁵⁷ This is consistent with the approach described in paragraph 3.8 of CC8. We consider that acquiring any interest in the Vessels through a chartering arrangement would have equivalent effect to reacquisition in this case.

- (c) In the exceptional circumstances of this case, additional restrictions on the operation by GET of ferry services at the port of Dover using vessels other than the *Berlioz* and the *Rodin* for a limited period of time are required as an anti-avoidance measure to ensure that the effectiveness of the remedy in eliminating the SLC and its adverse effects is not put at risk. The justification for the anti-avoidance measure, and its scope, is explained in paragraphs 10.117 to 10.121.

10.117 The circumstances of this case are exceptional in two relevant respects:

- (a) our finding that there is excess capacity in the short-sea market means that the intended effect of the remedy is to prevent GET from operating ferry services at the port of Dover without necessarily resulting in a new operator entering the Dover–Calais route; and
- (b) the difficulty of designing a structural remedy that would, in the absence of anti-avoidance measures, not leave GET capable of re-establishing ferry services at the port of Dover in a relatively short period of time given its relationship with the SCOP and freight customers.

10.118 Our statutory duty is to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and the adverse effects flowing from it, and this we understand to extend to ensuring that risks of circumvention we have identified are minimized. Our guidelines say that we will seek remedies that have a high degree of certainty of achieving their intended effect; the corollary is that if we consider that the risk of circumvention is material, we do not have to satisfy ourselves that it is likely to eventuate before we take measures intended to avoid circumvention. In making this assessment, we will seek to ensure that there is no realistic prospect of the SLC remaining.²⁵⁸

10.119 We identified two considerations that we thought relevant in identifying a material risk of circumvention:

- (a) We have noted that GET’s rationale for the merger was largely based on removing DFDS from the short-sea market. For so long as overcapacity exists in the short-sea market, the risk of exit by DFDS/LD from the Dover–Calais route remains high, and the incentive for GET to bring about its exit remains unchanged. Were DFDS/LD to exit the Dover–Calais route, this would result in the market-weakening aspect of the SLC that we have identified.
- (b) GET indicated that it believed it should continue to be free to operate a ferry service out of Dover at below minimum efficient scale. In particular, it argued that if it divested the *Nord Pas-de-Calais* as a remedy, it should then be permitted to operate a service with the *Berlioz* and the *Rodin*, and that it would be willing to do so [redacted], to provide a broader service to its customers and to preserve jobs in the *Nord Pas-de-Calais* region. Whatever the reasons, a consequence of continued operations would be to risk the market-weakening outcome we have identified. We noted that such a service would be sub-scale and we expected that the service would continue to be loss making for several years. This is indicative of the strength of GET’s desire to continue operations from Dover.

10.120 We thus believe that, if we did not take measures to avoid circumvention, there is a material risk that GET might maintain its capacity on the Dover–Calais route, and that for it to do so would have the effect of undermining the effectiveness of the proposed

²⁵⁸ This approach was upheld by the Competition Appeal Tribunal in *British Sky Broadcasting Group plc v Competition Commission and others* [2008] CAT 25, paragraphs 293–294.

remedies. Were the prohibition remedy to take effect or GET to dispose of all three Vessels, circumvention could take the form of GET re-establishing ferry operations and rebuilding the MFL business using other vessels, capitalizing so far as possible on its existing goodwill and contractual relationships with the SCOP and otherwise. Were alternatively GET to divest only the *Berlioz* and the *Rodin*, circumvention might take the form of continuing to operate the *Nord Pas-de-Calais* as well as other business assets, and supplementing its operations by adding one or more new vessels.

10.121 Accordingly, as an anti-avoidance measure (and in addition to the ten-year prohibition on using the *Berlioz* and the *Rodin* on ferry operations at Dover), we consider it necessary to impose a two-year prohibition on any ferry operations at Dover involving use of the *Nord Pas-de-Calais* or any other vessel. The prohibition will apply whether GET disposes of all three Vessels, only the *Berlioz* and the *Rodin*, or none of the Vessels. The two-year period is considered appropriate for the following reasons. First, it will provide DFDS/LD with a limited window of opportunity to become fully established on the Dover–Calais route.²⁵⁹ However, after two years, GET should be permitted to re-enter the Dover–Calais route (in conformity with the competition rules²⁶⁰), should it choose to do so. Second, a two-year restriction creates the same effect as a divestiture where the sale and purchase agreement relating to the acquired business incorporates a non-compete covenant that complies with the terms of the European Commission Notice on restrictions directly related to and necessary to concentrations. Such provisions preserve the value of the business that has been transferred. We consider that in this case, a similar provision will preserve the effectiveness of our remedy by making circumvention less likely to occur.

10.122 In determining whether any proposed purchaser of the *Berlioz* and the *Rodin* is satisfactory to the CC, we would have regard to the criteria in the CC’s guidelines which state that the CC will normally wish to satisfy itself that a prospective purchaser is independent of the merger parties, has the necessary capability to compete and is committed to competing in the relevant market(s), and that divestiture to the purchaser will not create further competition concerns.²⁶¹ In this case, we will be concerned with the independence of the purchaser and that there are no further competition concerns. The purchaser’s capability to compete will not be a factor in our assessment given that it is not necessary for a purchaser to operate the Vessels on the short sea to address the SLC (see paragraph 10.37).

Our assessment of the proportionality of the preferred remedy

10.123 The CC’s guidelines state that in order to be reasonable and proportionate, the CC will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CC is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. The CC will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.²⁶²

10.124 Given our conclusion in paragraph 10.112 that our preferred remedy is for GET to be prohibited from operating ferry services at the port of Dover (the prohibition remedy),

²⁵⁹ This would help create a situation that more closely corresponded to the market structure that we would have expected to see in the absence of the merger.

²⁶⁰ We note in paragraph 10.173 that if there were competition concerns about GET’s subsequent re-entry into the market the OFT would have the ability to investigate this under its market study powers (assuming such re-entry was not the result of a relevant merger situation).

²⁶¹ CC8, paragraph 3.15.

²⁶² CC8, paragraph 1.9.

we consider in this section whether this remedy is proportionate in relation to the SLC.

10.125 We did not consider whether behavioural remedies would be proportionate as we did not identify any behavioural remedies that we considered would be effective (see paragraphs 10.147 to 10.171).

GET's views

10.126 GET told us that it considered that a divestiture remedy would be disproportionate because it would cause imminent detriment to consumers to alleviate the risk of an SLC which in GET's view was speculative.

10.127 GET told us that consumer detriment would result from a divestiture because it would:

- (a) remove the competitive constraint imposed by MFL on the other ferry operators; and
- (b) by reducing the number of ferry operators on the short sea from three to two would:
 - (i) reduce customer choice;
 - (ii) reduce spare capacity;
 - (iii) lead to higher prices; and
 - (iv) risk weakening competition between ferry operators in terms of service quality.

10.128 We do not accept GET's argument for two reasons:

- (a) 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 if DFDS/LD withdraws from the Dover–Calais route. As the merger has occurred, we consider that the conditions which give rise to the SLC already exist and will be exacerbated given that, as we have found, DFDS/LD is likely to exit the Dover–Calais route in the short term.
- (b) Our assessment of the competitive situation is that the Dover–Calais route cannot support three ferry operators and that DFDS/LD would be likely to withdraw in the short term in the absence of the CC's remedy. Therefore consumers would not benefit from competition between three operators for more than a short period in any event. We did not consider it necessary to quantify this short-term benefit as by contrast we expect that the SLC would have a long-term effect given the conclusions we came to in paragraph 9.4 on the likelihood of entry, and that Eurotunnel has the concession for the Fixed Link until 2086, and the costs of the SLC over the long term would significantly outweigh any short-term benefits.

10.129 We also noted that the entry of MFL on the Dover–Calais route in 2012 did not lead to a reduction in prices (based on the evidence we received for the period January to October 2012).

Remedy costs

10.130 The CC's guidelines note that the costs of a remedy may be incurred by a variety of parties, including the merger parties, third parties, the OFT and other monitoring agencies, and state that in relation to completed mergers, the CC will not normally take account of the costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.²⁶³ This is because it is usually open to the parties to make merger proposals conditional on the approval of the relevant competition authorities and so the cost of a divestiture remedy is avoidable. We consider that the same principle should apply to the prohibition remedy.

10.131 GET told us that bids for the SeaFrance assets had been required to be submitted without conditions relating to competition clearances. However, we considered that GET had adequate time to seek competition clearance from the OFT prior to submitting its bid on 4 May 2012 as the GET board had concluded at a meeting on 6 January 2012 that it was important for GET to submit a bid. Accordingly we considered that there was no reason to depart from our guidance and that it is not necessary for us to take account of any costs to GET as a result of the prohibition remedy.

10.132 In any event, the prohibition remedy allows for the possibility of divestiture and in that sense there is no reason to treat it any differently from any other divestiture remedy in a completed merger. Therefore, in principle the same considerations about the treatment of costs would apply. However, we are aware that if the Court refused permission to lift the inalienability clause, divestiture would not be possible until the five-year period expires which might in theory limit GET's ability to mitigate the costs of the remedy. Even if we were minded to have regard to the costs of the remedy to GET in this case, we note the following factors that could mitigate the costs:

- (a) MFL's operating loss is expected to be €25 million in the first 18 months of operation and it is not expected to break even until the end of 2014 or 2015, so the prohibition remedy will not result in GET forgoing any profit in that period;
- (b) the Vessels could be redeployed on other routes; and
- (c) the Vessels can be sold at the end of the five years, and in this context we note that GET acquired the Vessels at a substantially lower price than the brokers' estimates recorded in the Court minutes.²⁶⁴

10.133 The SCOP told us that the prohibition remedy would be 'catastrophic' for the SCOP and would result in severe job losses for the SCOP's members. The SCOP told us that it had 567 members, 515 of whom had permanent contracts and 52 had short-term contracts. We have considered whether this cost should be taken into account in our assessment of the proportionality of the prohibition remedy.

10.134 We note that the SCOP is not a subsidiary of GET and was not the party that was bidding for the SeaFrance assets, and as such, it was not in a position to seek competition clearance for the acquisition. However, as set out in paragraphs 4.35 to 4.38, we found significant evidence that the SCOP acted together with GET from January 2012 in preparing GET's bid and that GET and the Court both considered the SCOP relationship an important factor in making GET's bid the most attractive. As a result, we have concluded that GET and the SCOP are associated persons

²⁶³ CC8, [paragraph 1.10](#).

²⁶⁴ It was reported that at GET's annual results presentation on 22 March 2013 Jacques Gounon stated that the value of the Vessels was €150 million (source: Nord Littoral, 22 March 2013).

within the meaning of section 127 of the Act in relation to the acquisition of the SeaFrance assets. It was therefore possible for the SCOP to make its participation in the transaction conditional on the transaction obtaining the approval of the relevant competition authorities. We therefore considered that there was no reason to depart from our guidance and that it was not necessary for us to take account of any costs to the SCOP and its members as a result of the prohibition remedy.

10.135 Even if we were minded to regard the employment of the SCOP members as relevant for the purposes of assessing the proportionality of the prohibition remedy, we considered that it would be appropriate to consider the net potential impact on employment bearing in mind the job losses at DFDS/LD that would be likely to result if DFDS/LD exits the Dover–Calais route.²⁶⁵ Moreover, DFDS told us that if it acquired the *Berlioz* and the *Rodin* it is very possible that DFDS/LD would hire some of the SCOP employees as it would need to hire an additional crew because one of the vessels it currently operates on the Dover–Calais route would be redeployed to another route. Taking into account the potential loss of employment at DFDS/LD and the SCOP, we considered that it is not appropriate for the CC to place more weight on preserving the jobs of the SCOP members than those of the employees of DFDS/LD. We considered that the sustainable and efficient level of employment will be determined best through the process of competitive rivalry.

10.136 We also considered whether our assessment of the proportionality of the prohibition remedy should take account of [redacted] (see paragraph [8.62]) and the members' contributions to the SCOP of [redacted] per cent of their salaries. The [redacted] represented a payment of €25,000 per ex-SeaFrance employee who joined the SCOP made by the liquidator under a scheme that had been agreed with SeaFrance for preserving employment in the region. As we have concluded that GET and the SCOP are associated persons, we considered that we did not need to take into account that the SCOP and its members might not be able to recover these contributions. Even if we were minded to regard these contributions as relevant costs, we considered that they were significantly outweighed by the potential cost to consumers of the SLC discussed in paragraphs 10.138 and 10.139.

10.137 GET submitted that we should also take account of the impact on the port of Dover of the revenue it would lose as a result of the prohibition remedy. GET told us that the total amount it expected to pay to the port of Dover in 2013 was €[redacted]. We considered that this was not a material factor for the purposes of assessing the proportionality of the remedy given our conclusion that DFDS/LD would be likely to withdraw from the Dover–Calais route in the short term in the absence of the CC's remedy, so that the port of Dover would lose some revenue in any event.

Potential costs to consumers of the SLC

10.138 In paragraph 8.87 we noted that the GET board had an expectation that as a result of acquiring the SeaFrance assets it would be able to increase the Eurotunnel yield by €[redacted] to €[redacted], equivalent to €[redacted] a year, which we estimated to be equivalent to an NPV of €[redacted] million (£[redacted] million) over five years. These figures can be interpreted as a potential cost to customers of the SLC which we have identified as arising from the merger.²⁶⁶

²⁶⁵ DFDS told us that it employed approximately 400 people on the Dover–Calais route, of which approximately 280 were ex-SeaFrance employees.

²⁶⁶ We note that according to GET's internal documents [a large majority] of Eurotunnel passengers are from the UK.

10.139 To provide a check for the scale of the potential cost to customers implied by the GET board paper noted in paragraph 10.138, we calculated the impact of an assumed 5 per cent increase in the prices charged by Eurotunnel. GET's shuttle business was forecast to generate revenues of €480 million in 2012.²⁶⁷ Assuming a 5 per cent price increase across the business would imply an increased cost to customers of €24 million per year. The NPV of this increased cost over five years is approximately €90 million (£75 million),²⁶⁸ which is within the range calculated from the GET board paper noted in paragraph 10.138.

10.140 The figures noted in paragraphs 10.138 and 10.139 relate to only the potential impact of increase in prices by Eurotunnel. We consider that these figures are likely to understate the potential total cost to customers as they do not reflect either the likely increase in ferry prices following a price rise by Eurotunnel or the effect on prices of the competition-weakening effect.

Conclusion

10.141 We concluded that given the costs to customers of the SLC and that we have not identified any relevant third-party costs of the prohibition remedy, the prohibition remedy is a proportionate remedy. We do not consider any costs that would be incurred by GET or the SCOP to be relevant but note that even if we were minded to treat the claimed costs as relevant, they would be substantially outweighed by the benefits of eliminating the SLC and its consequential adverse effects on customers. We also considered that the benefits that GET claimed resulted from there being three ferry operators on the short sea would be short-lived and are outweighed by the long-term costs of the SLC.

Other remedy options

10.142 We also considered behavioural remedy options.

10.143 In this section we discuss:

- (a) the CC's framework for assessing behavioural remedies (see paragraphs 10.144 to 10.146);
- (b) GET's proposed remedy (see paragraphs 10.147 to 10.153);
- (c) the SCOP's proposed remedy (see paragraphs 10.154 to 10.158);
- (d) P&O's proposal on behavioural remedies (see paragraphs 10.159 and 10.160);
- (e) short-term price controls (see paragraphs 10.161 to 10.171); and
- (f) recommendation for a market investigation (see paragraphs 10.172 and 10.173).

²⁶⁷ Exane BNP Paribas analysis.

²⁶⁸ Assuming a discount rate of 10 per cent and a £/€ exchange rate of 1.2.

Framework in the CC's guidelines for assessing behavioural remedies

10.144 The CC's guidelines state that in general one or more of the following conditions will normally apply in the unusual circumstances where the CC selects behavioural remedies as the primary source of remedial action:²⁶⁹

- (a) divestiture is not feasible or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC;
- (b) the SLC is expected to have a relatively short duration; and
- (c) relevant customer benefits are likely to be substantial compared with the adverse effects of the merger and would largely be preserved by behavioural remedies but not by structural remedies.

10.145 Regarding these conditions:

- (a) we consider the effectiveness of structural remedies in paragraphs 10.45 to 10.112 and the proportionality of the remedy we consider to be effective in paragraphs 10.123 to 10.141;
- (b) we do not expect the SLC to be short-lived (see paragraph 9.4; and
- (c) relevant customer benefits are considered in paragraphs 10.174 to 10.180.

10.146 The CC's guidelines go on to state that the design of behavioural remedies should seek to avoid four particular forms of risk to enable the remedies to be as effective as possible:²⁷⁰

- (a) specification risks;
- (b) circumvention risks;
- (c) distortion risks; and
- (d) monitoring and enforcement risks.

Behavioural remedy proposed by GET

10.147 GET told us that it would be willing to offer to the CC the same undertakings that it made to the FCA.²⁷¹ The undertakings were as follows:

Eurotunnel Group undertakes not to grant, on its rail freight tariffs, any rebates conditional on the customers using its maritime freight transport service and in particular not to take into account the freight volumes transported by its maritime service when negotiating tariffs related to its rail freight transport service. Eurotunnel Group also undertakes not to discriminate in any way [against] customers who do not use its maritime transport service as opposed to those customers who do use them.

To ensure the effectiveness of this undertaking, Eurotunnel Group commits to conclude separate contracts for its rail and maritime freight

²⁶⁹ CC8, paragraph 2.16.

²⁷⁰ CC8, paragraph 4.2.

²⁷¹ GET's response to the Supplementary Remedies Notice, paragraph 6.2.

transport services and to assign the sales of its maritime transport service to a specific team, separate from the team in charge of the marketing of its rail transport service so that both teams are trading independently from each other.

- 10.148 These undertakings were specified to have a duration of five years from the date of the decision by the FCA authorizing the notified transaction, subject to a review clause.
- 10.149 GET also gave certain undertakings to the FCA that would come into effect if GET were successful in its tenders for the contracts to operate the ports in Boulogne-sur-Mer and Calais.
- 10.150 GET told us that it would also be willing to offer the following behavioural remedies, which are very similar to the interim undertakings given by GET to the CC:
- (a) strict separation of the commercial teams of Eurotunnel and the maritime activities, and the transfer of the commercial teams from MFL to the SCOP;
 - (b) separation of the Eurotunnel and MFL businesses, such that they are organized as separate business units reporting only to the Group holding company, with each team having separate assets, staff, sales teams and brands; and
 - (c) a ring fence preventing confidential information from being shared between the Eurotunnel and MFL businesses.²⁷²
- 10.151 GET told us that it considered that these behavioural undertakings were appropriate and sufficient to address any SLC identified by the CC.²⁷³ However, it also told us that it did not accept that any SLC arose and acknowledged that these behavioural remedies did not address the internalization effect. It told us that it had not identified any behavioural remedies that would address the SLC that we have identified.

Our assessment

- 10.152 We considered the risks associated with this remedy in accordance with the CC guidelines:
- (a) *Specification risks.* We consider that because GET would continue to receive the revenues from the MFL operation, it would still have an incentive to raise Eurotunnel prices as the internalization effect would still apply. The internalization effect is likely to become greater and the competition-weakening effect would materialize when, as we expect, DFDS/LD exits the Dover–Calais route.
 - (b) *Circumvention risks.* We consider that there is a risk that informal communication between GET and the SCOP could circumvent the requirement for commercially sensitive information, such as pricing for freight customers, not to be shared between Eurotunnel and the MFL business. In this regard, we note that in paragraphs 4.38 and 4.45 respectively we concluded that GET and the SCOP are associated persons and that GET has material influence over the SCOP. The closeness of the links between GET and the SCOP make it more likely that these risks could materialize.

²⁷² GET's response to the Supplementary Remedies Notice, paragraph 6.2.

²⁷³ GET's response to the Supplementary Remedies Notice, paragraph 6.1.

(c) *Distortion risks.* We have not identified any distortion risks.

(d) *Monitoring risks.* We consider that compliance with the formal arrangements envisaged by this remedy could be monitored by the monitoring trustee already appointed to monitor the undertakings given by GET to the FCA and the interim undertakings given to the CC although this will entail ongoing costs.

10.153 We concluded that because of the risks we have identified with the GET remedy proposal, particularly that it does not address the internalization and competition-weakening effects, this would not be an effective remedy.

Behavioural remedy proposed by the SCOP

10.154 The remedy proposed by the SCOP has the following elements:

- (a) complete separation of the management of the MFL business from GET by transferring all MFL employees to the SCOP;
- (b) extension of the existing services contract between MFL SAS and the SCOP so that GET retains the commercial risk of the MFL operation until the revenues from MFL are sufficient to cover its operating and capital costs and the SCOP achieves financial viability on a stand-alone basis; and
- (c) the SCOP to be given an option to acquire the Vessels by outright purchase or long-term charter when it has sufficient financial strength to do so.

10.155 In relation to the SCOP proposal, GET told us that there would need to be limits on the extent of the financial support provided by it to MFL.

Our assessment

10.156 We have considered the risks associated with this remedy in accordance with the CC guidelines:

- (a) *Specification risks.* This remedy would prevent GET from having any influence over MFL's pricing. The SCOP submitted that it would address the CC's concern about horizontal unilateral effects.²⁷⁴ However, as with the GET remedy proposal, we consider that because GET would continue to receive the revenues from the MFL operation it would still have an incentive to raise Eurotunnel prices as the internalization effect would still apply. Although the SCOP proposed that it should be given an option to acquire the Vessels, it would not be able to exercise the option until it could raise the necessary funding which the SCOP told us would not be for [X]. We considered that this means the incentives from the internalization effect would continue for an unspecified period until such time as, if ever, the option is exercised and that the competition-weakening effect would materialize when, as we expect, DFDS/LD exits the Dover–Calais route.
- (b) *Circumvention risks.* We consider that, as with the GET proposal, there is a risk that informal communication between GET and the SCOP could circumvent the requirement for commercially sensitive information not to be shared between Eurotunnel and the MFL business and note our concerns in this regard described in paragraph 10.152(b) resulting from our finding that GET and the SCOP are associated persons and that GET has material influence over the SCOP.

²⁷⁴ SCOP's initial response to the remedies notice, paragraph 5.12.

(c) *Distortion risks.* The effect of the payments made under the commercialization contract between MFL SAS and the SCOP is that GET bears the commercial risk of the MFL operation. As the SCOP's profitability is not dependent on the revenues from the MFL operation (except for share of revenue from the onboard catering sales it receives under the commercialization contract), we consider that there is a risk that the SCOP will not have the same incentives to compete (or exit) as a ferry operator which bears its own financial risks.

(d) *Monitoring risks.* The SCOP proposes that compliance with the arrangements envisaged by this remedy should be monitored by the monitoring trustee already appointed to monitor the undertakings given by GET to the FCA. We do not envisage any particular difficulties with monitoring the formal aspects of the proposed arrangements.

10.157 Our principal concern with the remedy proposed by the SCOP is that because GET would continue to receive the revenues from the MFL operation for an unspecified period of time and the SCOP will not be able to raise funding independently for several years, the remedy would not take effect in a timely fashion and the internalization and competition-weakening effects would still be expected to arise. GET and the SCOP have not responded to our concerns about this proposal.

10.158 We therefore concluded that this is not an effective remedy.

Behavioural remedy proposed by P&O

10.159 P&O suggested that if a divestiture remedy could not be achieved until the expiry of the inalienability clause, a package of restrictions might help to address the SLC, although P&O also noted that it was concerned whether behavioural remedies could be monitored effectively. The package of measures proposed by P&O is:

(a) a cap on the combined market share of the MFL ferry services and Eurotunnel;

(b) a prohibition on Eurotunnel buying space on MFL ferries;

(c) a requirement that the MFL ferry services should be available only to freight customers and not to passenger traffic;

(d) a prohibition on Eurotunnel providing financial support to the MFL business;

(e) a prohibition on joint negotiations by Eurotunnel and the MFL business with customers or suppliers; and

(f) a requirement for the charter terms for the ferries used in the MFL business to be transparent and at commercial rates.

10.160 Taking into account the CC Guidelines, we considered that this proposal would not address the internalization effect because GET would continue to receive the revenues from the MFL operation and therefore would still have an incentive to raise Eurotunnel prices. In addition, we considered that measures such as a cap on market share and limiting the MFL ferry services only to freight customers would have the potential to distort the market. We therefore concluded that this would not be an effective remedy.

Short-term price controls

10.161 In view of our finding that the acquisition is likely to result in an increase in prices charged to passengers and freight customers by Eurotunnel (see paragraph 9.3), we have considered whether price controls could be an effective and practicable measure to prevent GET from exercising market power in the period prior to a delayed divestiture remedy. A price control mechanism, if employed, would be applied to the prices of Eurotunnel to prevent increases in the prices of shuttle services to customers due to the strength of the internalization incentive that results from GET's ownership and operation of the MFL business.

10.162 In the Supplementary Remedies Notice we proposed that price controls might be implemented by applying a cap to the average yield on Eurotunnel's passenger and freight shuttle services either by limiting increases in the average yield to an inflation factor or by requiring that ratio of the average yield on the shuttle services to the average yield on ferry services should not exceed a specified level.

10.163 As our main concern is that the acquisition might lead to an increase in prices by Eurotunnel, we have focused on price controls rather than remedies to address non-price factors such as frequency²⁷⁵ and timing of services and other aspects of service quality.

10.164 GET told us it considered that price controls would:

(a) represent a material change to the economic basis on which the concession to operate the tunnel was granted to GET's subsidiaries under the Treaty of Canterbury;

(b) be impossible to implement given Eurotunnel and ferry operators use yield management systems for passenger services and negotiate individually with freight customers;

(c) be very costly to implement and monitor; and

(d) distort the market, and therefore make any market investigation very difficult.²⁷⁶

10.165 DFDS told us that it did not believe that price controls would be an appropriate or effective remedy. It said that the effect of price controls would be that prices would remain so low that it would continue to sustain losses on the Dover–Calais route and therefore it would exit from the route in the short term. It also told us that price controls would be too complex to implement.

10.166 P&O told us that it considered that price controls were not workable and would be hard to monitor, particularly because all the operators used dynamic pricing systems.

10.167 [✂]

10.168 The Rail Freight Group told us that while a short-term price control might be an attractive remedy, the control mechanism should be reviewed when the outcome of the Intergovernmental Commission's current review of the allocation of costs between the services using the Fixed Link (ie the shuttle services, Eurostar and freight services) is known, as this could affect the appropriate charges of the shuttle

²⁷⁵ We note that Eurotunnel prices might rise if it reduced the available capacity by operating fewer shuttle services.

²⁷⁶ GET's initial response to the Supplementary Remedies Notice, section 3.

services. We consider that in practice this review would be unlikely to affect the proposed price controls mechanisms as they are not based on costs.

10.169 In the light of GET's comments in paragraph 10.164(a), we have reviewed the Concession Agreement. Clause 2.1 provides that the Concessionaires are free to determine and carry out their commercial policy, within the framework of national and EU law. Clause 12 protects the Concessionaires' freedom to determine their tariffs and commercial policy. In particular, under it, laws relating to control of prices and tariffs do not apply to the prices and tariffs of the tunnel. However, the provisions of that clause are expressly made subject to national and EU laws concerning competition or the abuse of a dominant position. Clause 41.2 of the Concession requires the Concessionaires to comply with national laws and EU law in general. Those freedoms, and their limits, derive from Article 12 of the Treaty of Canterbury. The Channel Tunnel Intergovernmental Commission (the IGC) told us that the interpretation of those provisions has never been tested.

Our assessment

10.170 We consider that there are a number of difficulties in designing practical price controls in this case, including:

- (a) prices charged to customers are determined by a yield management system;
- (b) prices charged to freight customers are individually negotiated with a significant number of customers;
- (c) determining the appropriate benchmark for a price cap given that the market has been characterized by overcapacity; and
- (d) a price control on Eurotunnel would distort the market by constraining the prices that ferry operators are able to charge on the Dover–Calais and Dover–Dunkirk routes.

10.171 In view of these factors and the comments we have received, we considered that price control is not an effective remedy.

Recommendation for a market investigation

10.172 In the Supplementary Remedies Notice, we identified that a possible remedy would be for the CC to recommend to the OFT that it open a market study into the supply of transport services for passengers and freight on the short sea.

10.173 We do not assess this further in this report given that other remedies are more timely remedies and, in any event, the OFT may undertake a market study at its own discretion without a recommendation from the CC, for example if it had concerns about a subsequent re-entry of GET into the operation of ferry crossings on the Dover–Calais route.

Relevant customer benefits

10.174 In accordance with the CC's guidelines, having identified that the prohibition remedy is proportionate, we considered whether we needed to take into account 'the effects

of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned'.²⁷⁷

10.175 RCBs are limited by the Act to relevant customers in the form of:

- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
- (b) greater innovation in relation to such goods or services'.

10.176 The Act provides that a benefit is only a relevant customer benefit if it accrues from or is expected to accrue to relevant customers within the UK within a reasonable period from the merger and would be unlikely to accrue 'without the creation of that situation or a similar lessening of competition'.²⁷⁸

10.177 The CC will normally take RCBs into account, as permitted by the Act, once it has decided on the existence of an SLC by considering the extent to which alternative remedies may preserve such benefits. In essence, RCBs that will be forgone due to the implementation of the remedy may be considered as costs of that remedy by the CC. The CC may modify a remedy to ensure retention of an RCB or it may change its remedy selection, for instance to implement a remedy other than prohibition or, in rare cases, it may decide that no remedy is appropriate.²⁷⁹

10.178 GET submitted that its acquisition of the SeaFrance assets benefited customers, because the existence of the MFL business meant that there was more capacity on the short sea and prices were lower than would otherwise be the case, and gave customers more choice as MFL provided a viable ferry alternative to P&O and DFDS/LD.²⁸⁰

10.179 The SCOP submitted that the existence of MFL had given rise to more competition, more frequent sailings, more choice for customers and lower prices than would otherwise be the case, all of which were beneficial for customers.

10.180 We considered the comments made by GET and the SCOP and concluded that these factors are not RCBs as defined in the CC's guidelines as they are not merger-specific and could have arisen had another operator acquired the SeaFrance assets without giving rise to a similar lessening of competition. We have considered the points made by GET and the SCOP that there is more capacity on the short sea, more choice for customers and lower prices in our proportionality assessment. We have not identified any other factors that could be considered to be RCBs in this case.

Decision on remedies

10.181 We have decided that GET (and any interconnected body corporate of GET) directly, or indirectly through arrangements with any associated person or other body over which it has control,²⁸¹ should be prohibited from operating ferry services at the port of Dover, commencing on the date six months from the date of the CC order to implement the remedy. In the meantime, GET would be permitted to divest the *Berlioz* and the *Rodin* as a means of remedying the SLC to a purchaser (or

²⁷⁷ CC8, paragraph 1.14.

²⁷⁸ Section 30(2) & 30(3).

²⁷⁹ CC8, paragraph 1.15.

²⁸⁰ GET initial submission, paragraph 2.6.

²⁸¹ Control within the meaning of section 26 of the Act.

purchasers) satisfactory to the CC (provided that the anti-avoidance provisions described in paragraphs 10.116 and 10.121 would also apply).

10.182 In the event that by the prohibition date GET has made substantial progress towards the divestiture of the *Berlioz* and the *Rodin* to a purchaser or purchasers satisfactory to the CC, which includes the securing of all necessary approvals and agreement of terms with the purchaser, the CC may revise its timetable should the circumstances make it appropriate.

10.183 We have also decided that, as set out in paragraphs 10.116 and 10.121:

- (a) The appropriate elements of the interim undertakings given by GET to the CC should be incorporated in the order and remain in effect until the earlier of the prohibition date and the date that the *Berlioz* and the *Rodin* are divested.
- (b) GET (and any interconnected body corporate of GET) directly, or indirectly through arrangements with any associated person or other body over which it has control,²⁸² should be prohibited from operating ferry services at the port of Dover with the *Berlioz* and the *Rodin* for a period of ten years from the date the prohibition comes into effect. If GET divests the *Berlioz* and the *Rodin*, it should be prohibited from reacquiring or chartering them for a period of ten years from the date of divestiture.²⁸³
- (c) Whether GET divests the *Berlioz* and the *Rodin* or the prohibition in subparagraph (b) above applies, GET should be prohibited from operating ferry services at the port of Dover with any vessel for a period of two years from the date the prohibition comes into effect.

10.184 We concluded in paragraph 10.110 that a prohibition on GET operating ferry services at the port of Dover would be an effective remedy and is less restrictive than prohibiting GET from operating on the short sea. We did not identify any other less intrusive remedies that we considered would be effective.

10.185 We concluded in paragraph 10.141 that a prohibition on GET operating ferry services at the port of Dover would also be a proportionate remedy given our assessment of the benefits of achieving a solution to the SLC. We have not identified any relevant third party costs.²⁸⁴ To the extent that customers benefit from the current competitive situation, we expect that any benefits would only apply in the short term and are outweighed by the long-term cost of the SLC.

10.186 We also considered in paragraph 10.180 whether any potential RCBs arise from the merger and concluded that the potential benefits noted by the parties are not RCBs as defined in the Act. As such, we concluded that the consideration of RCBs did not have an effect on our assessment of our preferred remedy option.

10.187 We have concluded that our chosen remedy represents as comprehensive a solution to the SLC and its adverse effects as is reasonable and practicable. We would also consider it acceptable for GET to divest the *Berlioz* and the *Rodin* to a purchaser approved by us as an alternative to the ten-year prohibition on operations with these vessels at Dover, provided that such divestiture took place within the six-month period referred to above. This divestiture would be subject to a ten-year prohibition

²⁸² Control within the meaning of section 26 of the Act.

²⁸³ This is consistent with the approach described in CC8, [paragraph 3.8](#). We consider that acquiring any interest in the vessels through a chartering arrangement would have equivalent effect to reacquisition in this case.

²⁸⁴ We note that even if we were minded to treat the claimed costs of GET and the SCOP as relevant, they would be substantially outweighed by the benefits of eliminating the SLC and its consequential adverse effects on customers.

on reacquiring the *Berlioz* and the *Rodin*²⁸⁵ (reacquisition for these purposes would include acquiring an interest in these vessels through chartering) and a two-year prohibition on operating ferry services at the port of Dover with any vessel.

²⁸⁵ In accordance with CC8, [paragraph 3.8](#).