COMPLETED ACQUISITION BY GROUPE EUROTUNNEL SA

OF

CERTAIN ASSETS OF SEAFRANCE SA (IN LIQUIDATION)

INITIAL SUBMISSION

19 November 2012

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1. INTRODUCTION

1.1 This submission to the Competition Commission ("**CC**") sets out the background to the completed acquisition by Groupe Eurotunnel SA ("**GET**") of three ferries ("**the Vessels**") and a collection of other assets from the liquidator of SeaFrance SA ("**SeaFrance**") ("**the Asset Acquisition**")[1].

1.2 The Asset Acquisition was referred to the CC by the Office of Fair Trading ("**OFT**") in a decision dated 29 October 2012 ("**the Decision**"). This submission explains why there are no grounds to believe that the Asset Acquisition will result in a substantial lessening of competition in the UK ("**SLC**") on the balance of probabilities threshold.

1.3 To avoid undue repetition, this initial submission has not repeated all of the arguments and re-submitted the data previously provided to the OFT and the French Competition Authority ("**FCA**") pursuant to GET's notification of the Asset Acquisition to the FCA under French national merger control laws. To assist the CC, a further copy of submissions (including convenience translations) to the FCA is provided at Appendix 7.

1.4 **The FCA approved the Asset Acquisition subject to certain limited behavioural undertakings on 8 November 2012. A convenience translation of the confidential version of the FCA's clearance decision was provided to the CC on 16 November.** A brief summary of certain of the points made in the FCA's decision is included at Appendix 7.

1.5 Information in this submission that is confidential to GET is marked [REDACTED].

[1] In this submission, "Eurotunnel" refers to the business within GET responsible for operating and maintaining the Channel Tunnel, and for running freight and passenger shuttle services through the Channel Tunnel.

2. EXECUTIVE SUMMARY

2.1 GET considers that the Assets Acquisition will not give rise to an SLC for the following reasons:

2.2 <u>The Vessels do not amount to an "***enterprise***"</u>

2.2.1 The statutory definition of an "***enterprise***" focuses on activities. However, GET acquired bare assets, including the Vessels, which had not been used in the operation of a business for a period of nine consecutive months before MyFerryLink ("**MFL**") began operations.

2.2.2 The assets acquired by GET were not sufficient to conduct a business on their own; additional business critical services, resources and inputs were needed by MFL from other parties before the Vessels could be used to create and start the activities of a business. The other assets which were acquired by GET were of limited value due to the previous commercial difficulties of SeaFrance and the delay since it had been operational.

2.2.3 In the period of nine months whilst the Vessels were not operational, all of SeaFrance's freight and passenger customers were forced to move their business to alternate service providers. The timing and circumstances of SeaFrance's cessation of activities, and the duration of its absence from the market, in conjunction with the absence of ongoing customer contracts, mean that no customers or business (i.e. no goodwill) transferred to GET with the Vessels and other assets it acquired from the liquidator. This is self-evident from the very low freight and passenger volumes that have been achieved to date by MFL (see section 11 below).

2.3 <u>The increase in GET's share of supply is minimal (below 1%[2])</u>

2.3.1 SeaFrance ceased operating on 16 November 2011, at which point its turnover and share of supply was redistributed in its entirety amongst its remaining competitors, principally P&O and DFDS.

2.3.2 MFL is not continuing the previous operations of SeaFrance using the Vessels: it has instead commenced a new ferry operation from scratch, using fewer ferries and different branding[3]. SeaFrance's pre-liquidation market share was about 16% and 11% for freight and passenger transport, respectively, whereas three months after launch MFL has achieved a share of less than 1%.

2.3.3 The number of ferries in active operational use by SeaFrance has declined over time:

(a) Until 2009 SeaFrance had operated seven ferries; the *Renoir, Manet, Cézanne, Molière, Berlioz*, *Rodin* and *Nord-Pas-de-Calais*.[4]

[2] The freight transport sales achieved by MFL since it started business on 20 August 2012 have, on an average ongoing basis and per month, been equivalent to a market share of less than 1%. If measured consistently on an average basis since 20 August, MFL's freight sales have also been equivalent to a market share below 1%. During the Half Term week of 29 October 2012 to 2 November 2012 MFL ran a promotion, advertising passenger tickets on its ferries for 1p (which was then refunded to passengers) per crossing. This led to a temporary increase in MFL's sales, increasing its share of passenger traffic if measured on a snapshot basis for October to about [REDACTED]%. However, offering passenger tickets for free is obviously not a sustainable business model for a ferry operator. GET therefore considers it accurate, and it has done so in this submission, to refer to MFL's true average market share, which is below 1%.

[3] The Vessels are operating under the brand of MFL and will not operationally use the SeaFrance brand or trademark, not least because the SeaFrance brand is considered to have negative connotations for customers.

[4] The Cézanne was withdrawn from service in February 2009 and sold in 2011. The Rénoir was withdrawn from service in March 2009 and also sold in 2011. The Manet was withdrawn from active service in April 2008 and was sold in 2009.

(b) Immediately before going into liquidation in January 2012 SeaFrance had just four operational ferries – the *Molière, Berlioz*, *Rodin* and *Nord-Pas-de-Calais.*

(c) Upon entering liquidation the *Molière* (which had been hired by SeaFrance) was returned to its owners. **The *Molière* had on its own accounted for 22% and 29% of SeaFrance's total revenues for freight and passenger transport, respectively, prior to it ceasing business. In October 2012 it was chartered by DFDS for use by them on the Dover-Calais route, A competitor of MFL is therefore operating another of SeaFrance's previous ferries and is achieving circa. 3% market share from that vessel alone.,**

(d) The three remaining ferries operated by SeaFrance immediately prior to entering liquidation – the *Berlioz*, *Rodin* and *Nord-Pas-de-Calais* – were sold to GET as part of the Asset Acquisition.

2.3.4 The *Berlioz* and *Rodin* are the only two Vessels acquired by GET that are currently used on a day-to-day basis by MFL. The third acquired Vessel, *Nord-Pas-de-Calais,* may well cease operations by the end of 2015 because it is currently 28 years old, is expensive to operate on a daily basis and will require considerable investment to comply with new environmental legislation if it was to operate beyond 2015.

2.3.5 SeaFrance ceased trading 7.5 months before the Assets Acquisition. The correct analytical approach if the CC evaluates the impact of the Asset Acquisition is by reference to the turnover achieved by MFL since it acquired the Vessels. This represents an increase in Eurotunnel's prior share of supply of **below 1%**.

2.4 **<u>The demise of SeaFrance is a paradigm example of the Exiting Firm Scenario</u>** (see section 6 below), which on its own indicates that no SLC will result from the Asset Acquisition.

2.5 **<u>GET faces strong competition and the difficulty of its own capacity constraints</u>**

2.5.1 Following the Assets Acquisition MFL and Eurotunnel continue to face **strong competition from ferry companies operating much wider route networks** connecting the UK with Continental Europe and Ireland. Eurotunnel and MFL operate only between Dover-Calais. This gives larger ferry companies a material benefit in winning and retaining business, as they can offer pricing and transport packages across different routes;

2.5.2 **Ferry operators have considerable spare capacity** and low barriers to market entry and expansion, which give them the incentive and scope to compete very aggressively for sales with GET (as recognised by the FCA after their detailed investigation;

2.5.3 The ferry companies have a further significant advantage in trying to expand their business, because [REDACTED]: it also relies on a single route to market (i.e. the Tunnel). Ferry companies however have greater flexibility and resilience of service because they operate across several ferries and routes;

(a) [REDACTED] Faced with this need for capacity GET purchased the Vessels, diversifying from the capacity-constrained Eurotunnel business because it felt that a complementary ferry business could be profitable and offer greater choice for customers if run properly.

(b) As a new start-up MFL, which has to date been run on an arm's-length basis from Eurotunnel, has so far failed to make material commercial inroads into the freight and passenger markets. Following the complete break from SeaFrance's previous activity, MFL has been building its operations and goodwill from scratch and since it started operating the Vessels on 20 August, has achieved an extremely small turnover, equivalent to an annualised **share of supply of below 1%:** such a small increase to the turnover achieved by Eurotunnel cannot give rise to an SLC. The size of market achieved to date by MFL also indicates the intensity of competition share.

2.6 **The Asset Acquisition is pro-competitive**

2.6.1 MFL is currently a weak competitor and Eurotunnel is becoming capacity constrained, and both are operating in only one segment of the wider market. Some flexibility for Eurotunnel and MFL to work together as a **more effective competitor** to the ferries would be to consumers' direct benefit.

2.6.2 GET believes that **the Asset Acquisition is pro-competitive** by enabling it to develop opportunities for future expansion because [REDACTED]. Acquiring MFL will also enable GET to restore a viable ferry alternative to P&O[5] and DFDS who:

(a) are not capacity constrained (unlike Eurotunnel),

(b) are doing well commercially on the Short Sea route. For example, on 15 November 2012 DFDS announced its interim financial results for the third quarter of the 2012 financial year. DFDS reported that, "*freight volumes increased by 56.2% and passenger numbers by 29.6% due to the new route between Dover and Calais, which opened in February. Freight rates rose slightly, while revenue per passenger was higher than expected. As a whole, freight volumes were in line with expectations. The opening of a competing route between Dover and Calais in August had a limited impact in Q3*"[6],. and

(c) operate across a range of routes between the UK and Continental Europe which allows them to offer packages of routes and cross-route discounts to their customers which cannot be matched by Eurotunnel/MFL which only operate on the Dover-Calais route[7].

[5] In this respect, contrary to the statement in paragraph 95 of the Decision, GET does not accept that P&O (or any other ferry operator on the Short Sea route) is capacity-constrained.

[6] http://www.dfdsgroup.com/Investors/Reports/Documents/2012/Q3_UK_OMX_27_15.11.2012.pdf

[7] The diagrams are taken from the websites of DFDS and P&O, which indicate clearly that they operate across a range of routes, and not just on the Short Sea route, which encourages customers to book multiple routes with them, to the detriment of Eurotunnel and MFL which operate just on Dover-Calais.
http://www.poferries.com/
http://www.dfdsseaways.com/

P&O route map **DFDS route map**

LD Lines route map

2.7 **<u>Customers can and do readily switch to alternative operators:</u>** All of the ferry operations between the UK are believed to have significant spare capacity. There are no or insignificant switching costs or delays. As a result, passengers and freight transport **customers can readily switch to alternative operators** if Eurotunnel/MFL were to attempt to increase prices or otherwise act anti-competitively post "***merger***".

2.8 Customers do not even need to switch to exercise buyer power; just the act of one or some larger freight customers threatening to switch business from Eurotunnel to ferry providers is sufficient to exercise a significant competitive constraint on Eurotunnel. This competitive constraint is unaffected by the Asset Acquisition and even if MFL may win a small number of additional business from customers as a result of Eurotunnel customers diverting to ferry operators, the small amount of resulting incremental MFL business would be at materially lower margins and would therefore help undermine the financial attractiveness of an attempted price increase by Eurotunnel. This is discussed further in Appendix 13 and Section 10 below.

2.9 **<u>No Scope for predation or bundling</u>**

2.9.1 There is **no scope for Eurotunnel/MFL to engage in predation or anti-competitive bundling** through a combination of Eurotunnel and MFL, to the detriment of competitors or customers because of: (a) the existence of material spare capacity amongst ferries and airlines, (b) low switching costs and barriers for customers and (c) the costs and pricing structure of the Channel Tunnel.

2.10 Inter-availability is used rarely and is not a means of excluding rivals

2.10.1 Because MFL is a small operator with comparatively few sailings, there is **no incentive or scope for Eurotunnel to terminate the inter-availability arrangements** that already exist between it and the other ferry operators.

2.10.2 The extremely small value and volume of traffic conducted under the inter-availability arrangements means that they cannot be used by GET as a way of foreclosing rivals or raising rivals' marginal costs.

2.10.3 GET offered an undertaking in lieu to the OFT to maintain in force and apply the current inter-availability arrangements (entered into by each of Eurotunnel and MFL) on a non-discriminatory basis. GET also offered to undertake to enter into similar arrangements with new entrants upon their request. GET remains willing to enter into such undertakings.

2.11 No Risk of coordinated effects

2.11.1 Finally, the significant differences in cost structures and operations between Eurotunnel, MFL and other ferry companies mean that there is **no risk of coordinated effects** arising from the Asset Acquisition.

3. THE PARTIES

3.1 **GET**: is a public limited company listed on the Paris and London Stock Exchanges. Companies within the GET corporate group hold, until 2086, the concession to the Channel Tunnel, connecting Coquelles (Pas-de-Calais, France) with Folkestone (Kent, United Kingdom). The Channel Tunnel is open to all rail companies transporting passengers or goods. GET's passenger vehicle and freight shuttle transport business through the Channel Tunnel is conducted by GET's Eurotunnel business.

3.2 **The Vessels**: GET purchased the Vessels from the liquidator of SeaFrance, which was previously a 100% owned subsidiary of the SNCF. The Vessels had been used to provide passenger and freight transport services on the Dover-Calais route. Immediately before its operations ceased in mid November 2011, SeaFrance had:

3.2.1 operated three ferries (i.e. the *Nord-Pas-de-Calais*, the *Rodin*, the *Berlioz*) which were acquired by GET, and

3.2.2 also operated a fourth ferry (the *Molière*, which is now operated by DFDS) which it had leased but which was not included in the company's liquidation and was not sold to GET (see below).

3.3 For details of background on GET and the acquired assets, including significant events in the last five years and previous mergers during this timescale involving GET or ferries of SeaFrance, please see Appendix 1.

4. JURISDICTION

- *SeaFrance ceased trading on 16 November 2011, just over nine months before the date when GET began operating the acquired vessels (on 20 August 2012).*
- *The assets acquired by GET from the liquidator of SeaFrance were not sufficient to represent a business and had not been used in the activities of carrying on a business for the period of nine consecutive months preceding the Asset Acquisition.*
- *If considered as the acquisition of an "enterprise", it would not meet the UK turnover test but would satisfy the share of supply test (with an increment of below 1%).*

4.1 SeaFrance was put into official receivership by the Commercial Court of Paris ("**the Paris Court**") on 16 November 2011. From that date SeaFrance immediately, overnight and abruptly ceased all commercial activity and the Paris Court sought to find a purchaser for the ex-SeaFrance business as a going concern.

4.2 Before it ceased operating, the turnover achieved by SeaFrance attributable to the three Vessels acquired by GET was, on any conceivable basis of calculation, materially below £70 million. The methodology underlying that calculation was explained in section 5 of the informal submission dated 3 October 2012 from GET to the OFT ("**the OFT Submission**"). Equally, the turnover achieved by MFL since it began operating the Vessels is materially below £70 million. In paragraph 31 of the Decision, **the OFT accepted that the turnover test was not met in relation to the Asset Acquisition**.

4.3 The Asset Acquisition could therefore only be a relevant merger situation on the basis of the share of supply test. However, GET considers that **there is no relevant merger situation within the meaning of section 23 of the Enterprise Act 2002 ("EA02") in this case because the Vessels and other assets it acquired do not constitute an "*enterprise*" for the purposes of section 129(1) of the EA02**.

4.4 In a letter dated 31 October 2012, GET formally requested the CC to address as a preliminary issue, before undertaking an in-depth inquiry in relation to the Asset Acquisition, whether GET had acquired an "*enterprise*" in this case[8]. In a letter dated 8 November 2012, the CC replied to the effect that it would not address this as a preliminary issue.

4.5 GET will not contest further at this stage the CC's procedural decision on this issue, but GET continues to believe that there is a discrete preliminary issue of whether an "*enterprise*" has been acquired in this case.

4.6 Even if the CC is unwilling to postpone its full fact-finding investigation pending determination of the "*enterprise*" issue, GET requests that the CC, within its normal procedures, give early consideration to the "*enterprise*" issue on the basis that it is, logically, the first question to be considered by the CC. If the CC were, having done so, to be in favour of GET's arguments that no "*enterprise*" has been acquired, GET suggests that this would allow the CC to produce a shorter set of Provisional Findings and a briefer final decision, which would be likely to cut down the amount of work required for the CC and GET in this case.

4.7 This issue is further discussed in section 7 below, in the context of GET's commentary on the Decision.

[8] The issue was also covered in detail in GET's response dated 10 October 2012 to the OFT Issues Paper dated 5 October 2012 ("the Issues Paper Response") and in previous submissions by GET to the OFT.

5. THE ASSET ACQUISITION AND ITS RATIONALE

- *Under court liquidation GET acquired only 3 ex SeaFrance vessels and limited other assets.*
- *Vessels are owned by a GET subsidiary, but chartered to a co-operative to run services on MFL's behalf.*
- *MFL sells freight tickets and a subsidiary of the co-operative sells passenger tickets as agent to MFL.*
- *MFL started services on 20 August 2012.*

5.1 **Background to the Asset Acquisition**: the liquidation of SeaFrance and GET's acquisition of the Vessels and other assets from the liquidator, following a transparent public sale process, was discussed in section 6 of the OFT Submission. A detailed chronology of the events leading up to the Asset Acquisition is provided at Appendix 1 to this submission. The key events are outlined below:

5.1.1	October 2011	the Paris Court received offers from a group comprising the ex-SeaFrance employees and a joint bid from DFDS and Louis Dreyfus Armateurs ("**LDA**"). Both offers were rejected by the Paris Court as the three non-leased SeaFrance vessels were estimated to be worth €50 to €60 million – whereas DFDS/LDA offered €5 million with the SCOP wishing to acquire the vessels for a symbolic €1 payment.
5.1.2	16 November 2011	SeaFrance ceased operating.
5.1.3	January 2012	the Paris Court launched liquidation proceedings and invited offers to acquire the liquidated assets. Initial expressions of interest were received from a number of parties. Interested parties were met by the Court liquidator and summons to meetings with the Court were issued to the three interested parties at the time (Eurotunnel, P&O and DFDS/LDA), but both DFDS/LDA and P&O declined to meet the liquidator (in March 2012 and April 2012, respectively) to discuss the possibility of their acquiring the assets for sale.
5.1.4	4 May 2012	deadline set by the Paris Court for submission of bids: GET submits an offer to acquire the assets advertised for sale.
5.1.5	10 May 2012	formal bids received by the Paris Court from Eurotunnel, New Channel Company (owned by DFDS/LDA) and Stena Line are opened in open court[9].
5.1.6	11 June 2012	the Paris Court handed down a judgment which declared GET the transferee of the assets being sold[10].

[9] New Channel Company offered €50 million for MV SeaFrance Rodin and MV SeaFrance Berlioz (or €30/€25 million respectively for each vessel on its own) only. Stena Line offered €30 million for MV SeaFrance Rodin only. GET offered €65 million in total for the three vessels (valued at €61.4 million) as well as taking on the tangible and intangible assets.
[10] A copy of a convenience translation of the Paris Court's judgment of 11 June 2012, selling the ex-SeaFrance assets to GET was provided at Appendix 2 to the OFT Submission.

5.1.7 2 July 2012 completion of the sale of the Vessels to GET.

5.1.8 2 July – 20 August 2012 GET undertakes start-up activities, acquiring the other assets, services and elements needed to operate the vessels and negotiates with the SCOP for the provision of services, and the "*flash docking*" of the Vessels (to make them operational) is undertaken.

5.1.9 20 August 2012 MFL begins operations, using the *Rodin* and the *Berlioz;* the third Vessel acquired by GET from the liquidator (the *Nord-Pas-de-Calais)* is still not used operationally.

5.2 The fourth ferry which SeaFrance had previously operated immediately prior to entering liquidation[11], the *SeaFrance Molière* (now operated by DFDS) was excluded from the scope of the liquidation of the SeaFrance business.

5.3 **Structure of the Asset Acquisition:** The GET group, which owns the Vessels, has entered into a bareboat charter party with a workers' cooperative ("**SCOP**") comprising some of the previous operational employees of SeaFrance. Under a separate commercial agreement, the SCOP crews and operates the Vessels for MFL SAS, under the MFL brand, in return for a fee. In terms of the division of responsibilities between the SCOP and MFL:

5.3.1 the SCOP is responsible for providing crews for the Vessels, which it operates for GET in return for a fee,

5.3.2 MFL has agreed to purchase from the SCOP in the first year of the Vessels' operation [REDACTED] crossings[12],

5.3.3 scheduling for the Vessels is determined by the SCOP in conjunction with MFL,

5.3.4 MFL is responsible for determining the pricing and sales strategy in respect of the [REDACTED] crossings (using the Vessels) which it has purchased from the SCOP,

5.3.5 In relation to the sale of the tickets for the [REDACTED] crossings

(a) freight tickets will be sold by MFL using its own commercial team, and

(b) passenger vehicle tickets will be sold through Dover Calais Ferries Ltd ("**DCF**"), a company held by the SCOP, as agent for MFL, with DCF having the right to appoint sales sub-agents.

5.4 In practice, therefore, the SCOP acts as a subcontractor providing essential operational and other services to MFL, which in turns bears the commercial and financial risk of its new ferry venture.

5.5 **Since MFL started operating commercially on 20 August 2012 it has carried [**REDACTED**] cars and [**REDACTED**] lorries which, if annualised, would be**

[11] It should be noted that in previous years SeaFrance had operated more than four ferries on the Short Seas route

[12] For this purpose, a "crossing" means an entire ship for one crossing in one direction.

equivalent to a share of supply of under 1% on the Short Sea route[13] for either freight or passenger transport.

5.6 **Rationale for the Asset Acquisition:** MFL enables the GET group to offer a complementary transport option to freight and passenger customers who could not travel through the Channel Tunnel[14] and/or who would be willing to travel by a cheaper but slower travel option (i.e. by ferry).

5.7 From a GET perspective, its acquisition of the Vessels will allow it to diversify its commercial offering, by offering ferry services to passengers and commercial customers on the Short Sea route. This is attractive to GET because, in contrast to the ferry operators, GET currently faces material capacity constraints in its Tunnel operations and [REDACTED]. The capacity constraints currently experienced by Eurotunnel are discussed in more detail in section 10 below.[15]

5.8 Increasing capacity of its Eurotunnel shuttle operations would require an investment of about €[REDACTED] million to increase its freight capacity from about [REDACTED] million lorries p.a. to about [REDACTED] million lorries p.a. The lead time on purchasing the additional freight shuttles to do so is about [REDACTED]. In contrast, by acquiring the Vessels, GET has increased its potential maximum capacity by 200,000 lorries p.a. in a matter of months for an investment of about €[REDACTED] million (comprising the €65 million purchase price of the ferries and other investments of about €[REDACTED] million to start up the MFL operation).

5.9 It is however important to note that the MFL ferry business is being conducted under the new MFL brand and represents a new-start ferry operation, rather than being (or being presented as) a continuation of the previous SeaFrance business. The MFL business does not use and is not operated under the SeaFrance brand and there is no likelihood that it will do so given that the SeaFrance brand is considered to have negative connotations for customers. This is because SeaFrance ceased operating immediately, abruptly and overnight at the busiest time of the year for freight customers and because, due to previous poor management, the company's reputation for service quality and reliability had been poor.

5.10 MFL is currently only operating on a day-to-day basis the *Rodin* and *Berlioz* ferries, with the *Nord-Pas-de-Calais* currently being held in reserve and used to cover periods when one of the other ferries is withdrawn from operational service for routine maintenance. The *Nord-Pas-de-Calais* will not begin operating as a permanent part of the MFL fleet until the first quarter of 2013 and may well cease operating in 2015.

5.10.1 The *Nord-Pas-de-Calais* is 28 years "*old*" and a ferry's operational life is generally about 30 years, because the ferry's maintenance costs beyond this point make its operation unprofitable.

5.10.2 The material investment needed to bring the *Nord-Pas-de-Calais* into compliance with EU environmental legislation[16] on maritime emissions would also likely substantially exceed the price paid by GET to purchase the vessel.

5.10.3 The limited remaining working life of the *Nord-Pas-de-Calais* was reflected in its low purchase price (€3 million, compared to the *Berlioz* and the *Rodin* which cost €30 million and €28.4 million, respectively).

[13] The "Short Sea" route comprises the short-distance routes between England and France or Belgium, in other words the Pas-de-Calais routes (between Dover, Folkestone, Ramsgate and Newhaven and Calais, Dieppe, Boulogne and Dunkirk) and the services crossing the "Belgian Strait" (Ramsgate-Ostend).

[14] Certain types of loads cannot be transported through the Channel Tunnel, such as dangerous materials and over-sized heavy loads (i.e. loads more than 18 metres in length and more than 44 tonnes).

[15] Please also see the detailed consideration of these issues in GET's response to the OFT's questions of 29 August 2012.

[16] EU Directives EC/1999/32 and 2005/33 as currently being revised in a proposed new directive.

5.10.4 In any event, the *Nord-Pas-de-Calais* was only designed to carry freight vehicles and their drivers, and so cannot be used for the transport of passenger vehicles.

5.11 GET's commercial aspiration is for MFL ultimately to develop a share of [REDACTED]% of passenger transportation services, and [REDACTED]% of freight transportation services, on the Short Sea route within two to three years. However, due to delay in the start-up of MFL and it having a slower build-up in traffic than anticipated, these objectives will probably be revised downwards. These growth projections were based on MFL achieving [REDACTED] round trips (or "*rotations*") per day in total on the Short Sea route, being [REDACTED] rotations per day by each of the *Berlioz* and *Rodin*. By way of comparison, the four ferries operated by SeaFrance pre-liquidation would on average have achieved 14-15 rotations per day – being 4 rotations by *Molière*, 4 by *Rodin*, 4 by *Berlioz* and 2-3 by *Nord-Pas-de-Calais*.

6. **COUNTERFACTUAL AND EXITING FIRM DEFENCE**

- *SeaFrance ceased trading in November 2011 and court liquidation occurred in January 2012.*
- *Only GET put forward a complete offer to the court liquidator – no other suitable purchaser.*
- *SeaFrance ceased trading prior to GET's acquisition – it was inevitable.*
- *All of SeaFrance's turnover and share of supply was re-distributed immediately amongst other Channel operators.*

6.1 The Vessels were not used as part of an operational business providing ferry services to third parties in the nine month period from 16 November 2011 (when SeaFrance ceased trading overnight) until 20 August 2012 (when MFL began operations). In addition, whilst the Vessels and other assets were held by the liquidator, advance orders were not being taken for providing ferry services using the Vessels.

6.2 GET has discussed briefly below the application to the Asset Acquisition of the counterfactual and the exiting firm scenario and the counterfactual in this case; these issues are both discussed in section 7 below, in the context of GET's commentary on the Decision.

6.3 **Counterfactual:**

6.4 Until 2009 SeaFrance had operated seven ferries (with the Rénoir, Manet and Cézanne all being in SeaFrance's active fleet until 2009). Immediately before ceasing business, SeaFrance had operated four ferries (of which GET purchased three Vessels). As explained above, a period of 7.5 months then lapsed between SeaFrance ceasing operations and the Asset Acquisition, during which period customers were forced to move to alternate service providers. **GET considers therefore that the counterfactual cannot be the pre-liquidation operations of SeaFrance, given the difference in scale between it and the assets purchased bought by GET, and because those assets were not operational for many months prior to the Asset Acquisition.**

6.5 **Equally, GET considers that 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 (whether DFDS or otherwise).** The Paris Court followed a transparent and open tender process for the sale of the Vessels, but it deemed GET's bid to be the only acceptable and compliant tender for the Vessels at a price above the Vessels' liquidation value. Consequently, GET considers that there is no reason to believe that the Paris Court would, instead of accepting GET's tender, have commenced a fresh attempt to sell the Vessels, further delaying payments to creditors and increasing the costs (and risks) of the liquidation.

6.6 If GET had never been involved in the tender process, the Vessels could have been sold to third parties individually or as a group. In either case, GET considers it is mere speculation as to where the Vessels might have been used and by whom the Vessels might have been bought. In GET's opinion, it is far from certain that some or all of the vessels would have been used on the Short Sea or on other routes between the UK and Continental Europe[17]. For example, P&O and DFDS both operate ferries across a number of routes between several countries. Alternatively, the Vessels could have been used in other locations (e.g. the Greek Islands[18]) for short crossings, or have been adapted for use on longer crossings in other geographical areas, such as Stena's plans to use the *Rodin* on routes other than the Short Sea, potentially in Scandinavia.

[17] In the Decision the OFT accepted that if it had been successful in bidding for the *Rodin*, Stena would likely have used the vessel on routes other than the Short Sea route. GET submits that, in the same way, it cannot be assumed that other bidders for the Vessels would have operated them on the Short Sea.

[18] This is not as far-fetched as may initially be thought given that a Seacat, originally operated from Folkestone, has been used as part of a ferry business in the Greek Islands.

6.7 **In its decision, the FCA rightly noted that the situation that would have resulted from another decision by the Paris Court could not be a relevant counterfactual since this situation is hypothetical**.[19]

6.8 **The exiting firm scenario**: GET considers that the situation in this case is the paradigm example of the exiting firm scenario.

6.9 Paragraphs 4.3.8 – 4.3.18 of the joint OFT/Competition Commission merger assessment guidelines, OFT 1254/CC2 ("**the Joint Guidelines**"), deal with "*the exiting firm scenario*". Paragraph 4.3.8 of that guidance identifies three questions to consider as to whether the "*exiting firm scenario*" may apply.[20]

6.9.1 **Would the firm have exited?** The OFT states in paragraph 38 of the Decision that absent the "*merger*" SeaFrance would have exited the market. GET's view is that by the time of the Asset Acquisition SeaFrance had already exited the market given it ceased operating ferry services on 16 November 2011, was liquidated in January 2012 and the Asset Acquisition did not complete until 2 July 2012.

6.9.2 **Would there have been an alternative purchaser for the firm or its assets?** By reference to the 11 June 2012 Paris Court judgment, and especially section 2(c)(ii), GET considers that there were no alternative purchasers for the Vessels and other assets above their liquidation value (that being the amount which GET paid for the Vessels and other assets).

6.9.3 **What would have happened to the sales of the exiting firm?** From the date when SeaFrance ceased operating (16 November 2011), its freight and passenger customers had no choice but to immediately transfer their sales in their entirety to other operators (see Table 6 below). Consequently, when the Asset Acquisition completed in July 2012 there were no active sales or customers transferring with the Vessels to GET from which MFL benefitted when it began operations using the Vessels.

6.10 Given the above, even if GET's acquisition of the assets from the liquidator of SeaFrance is considered to represent an enterprise and a relevant merger situation – neither of which GET considers to be the case, in line with its representations above – it is considered that the acquisition clearly satisfies the conditions of the "*exiting firm scenario*" outlined in the Joint Guidelines.

[19] FCA decision, page 8, paragraph 41.
[20] Which would only be relevant if, contrary to the above submissions, the Asset Acquisition is considered by the CC to represent an enterprise and a relevant merger situation.

7. COMMENTS ON THE DECISION

7.1 In response to a request from the CC, this section sets out GET's views on certain aspects of the Decision, before considering in sections 8 to 12 below the questions that the CC will address as part of its investigation.

7.2 GET recognises that the CC will undertake its own detailed investigation in this case, including considering afresh the evidence and arguments put to the OFT as well as gathering and reviewing additional evidence. However, before considering the substantive issues in this case GET welcomes the opportunity to comment on a number of important aspects of the Decision and the background to it.

7.3 **No "*enterprise*" was acquired by GET**

7.4 A relevant merger situation within the meaning of section 23(1) EA02 arises where "*two or more enterprises have ceased to be distinct enterprises*". An "*enterprise*" is defined in section 129(1) of EA02 as "*the activities, or part of the activities, of a business*". The term "*business*" is itself defined in Section 129(1) as including "*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*".

7.5 In addressing the statutory question under section 35(1) EA02 of whether "*a relevant merger situation has been created*" the CC must therefore decide if an "*enterprise*" has been acquired, which in turn depends on whether there has been the transfer of a "*business*".

7.6 As noted above, the statutory definition of a "*business*" focuses on *activities*. Paragraphs 3.2.2 – 3.2.4 of the Joint Guidelines indicate that the CC will have regard to the substance of an arrangement, rather than merely its legal form. In determining the issue, these guidelines indicate that the CC will take account of the following components when considering whether a purchaser has acquired an "*enterprise*":

7.6.1 Assets and records needed to carry on the business.

7.6.2 Benefit of existing contracts and goodwill.

7.6.3 Transfer of physical assets, and in particular whether they "*enable a particular business activity to be continued*".

7.6.4 The fact that the business acquired may no longer be trading does not in itself prevent the business from being an enterprise for the purposes of the EA02.

7.7 These aspects are each considered below in detail in the specific context of the Asset Acquisition.

7.8 **Nature of the assets acquired by GET**

7.9 Under the legal documentation to give effect to the Asset Acquisition, GET did not receive from the liquidator any warranties as to the state of the assets acquired or even as to existence of certain assets and GET had no recourse if those assets were missing. In the Asset Acquisition, GET acquired from the liquidator of SeaFrance the collection of bare assets listed below:

7.9.1 the three Vessels,

7.9.2 the SeaFrance logos, brand and the trade name,

7.9.3 certain computer software, websites and domain names, IT systems, hardware and office equipment, and

7.9.4 an inventory of technical and spare parts.

7.10 **<u>Whether GET acquired assets that enabled a business activity to be continued</u>**

7.11 The assets acquired from the liquidator were not enough on their own to run a business. As a result, MFL needed to procure additional business-critical resources, services and facilities from third parties in order to commence business using the Vessels, as described below.

7.11.1 **The Vessels could not simply be operated in the state that they were acquired by GET.** Because the Vessels had not been operational since November 2011 before they could begin operating they had to undergo a process of so-called "*flash docking*", to be checked for seaworthiness and to allow other checks to be performed on them. [REDACTED].

7.11.2 Although GET had acquired the Vessels it had not acquired the essential inputs needed to operate them. Before the Vessels could begin operating, GET needed to arrange fuel supply contracts and acquire maps, charts and stock for them.

7.11.3 GET did not acquire with the Vessels, and it had 72 hours in which separately to arrange, suitable insurance cover.

7.11.4 **GET did not acquire with the Vessels the harbour slots (and related access rights)** in the ports at Dover and Calais which are needed for the Vessels and customers to berth, load and unload. These harbour slots had to be arranged directly by GET with the relevant harbour authorities.

7.11.5 As part of the Asset Acquisition, GET did not acquire office space or property from which MFL could carry on business.

7.11.6 **GET did not acquire from the liquidator the people or capability to staff, operate and maintain the Vessels. These are instead separately contracted** from and provided by the SCOP to MFL (see below).

7.11.7 **GET did not acquire with the Vessels the benefit of existing contracts and it did not acquire, in any meaningful sense, goodwill**.

7.11.8 **MFL does not itself have (and did not acquire from the liquidator) the ability, resources or capability to price, market and sell passenger tickets for transport** on the Vessels. These services are provided on MFL's behalf by the SCOP (and its subsidiary, DCF).

7.11.9 **MFL does not itself have (and did not acquire from the liquidator) the corporate support services** needed for it to function, including legal, invoicing, credit control, IT and HR services, all of which are provided by GET's central corporate function.

7.12 The Decision states that "*the vessels acquired enable the activity of operating a ferry business*"[21]. The Vessels however are just one element of a much broader collection of assets, services and support (see above) all of which are essential to operate a ferry business that were not acquired by GET as part of the Asset Acquisition.

7.13 **In brief, the Vessels and other assets purchased as part of the Asset Acquisition on their own were not sufficient to enable the activity of operating a ferry business. Without these additional elements the Vessels could not be used to operate a ferry business.** The reference in the Decision to these as "*normal commercial matters of an ongoing nature, not one-off activities to get a business up*

[21] Decision paragraph 13

and running"[22] ignores the reality that the Vessels could not set up or operate without these essential inputs and also does not acknowledge the extent to which the Vessels needed additional one-off works before they could be used operationally.

7.14 Customer records needed to carry on the business

7.15 The assets acquired by GET include various databases and files, including details of what may be SeaFrance's old clients, but what would more likely have been potential sales prospects. GET considers that the database of ex-SeaFrance customer details is of limited commercial value for the following reasons.

7.15.1 **The records and databases had not been used or maintained for nine months prior to MFL commencing operations, during which period the data had ceased to be up to date and relevant** (see paragraph 7.22 below, re continuity of service).

7.15.2 All ex-SeaFrance freight customers, who had already moved to using alternative suppliers, would be readily identifiable by monitoring freight movements harbour-side and would in any event need to be won-over by MFL through individual negotiations. MFL has not used the details of freight customers acquired via the liquidator in order to try and market and sell the operations of MFL. It has instead identified from scratch, using public sources, potential freight customers which it has contacted on an individual basis.

7.15.3 In respect of ex-SeaFrance passengers, GET considers that **the database is of limited value because they had already moved to alternative suppliers** and for MFL to contact them as a new operator with a new brand has proven to be as successful as cold-calling any potential ferry passenger. [REDACTED]. This in itself illustrates the very limited value attributable to the database included in the acquired assets,

7.15.4 In a separate and subsequent transaction, on 1 August 2012 the liquidator sold to GET the customer records and other harbour side assets in Dover of SeaFrance UK Limited for €[REDACTED]. These assets included a portakabin which was subsequently sold for about €[REDACTED]. Before selling these assets to GET, the liquidator of SeaFrance had publicly advertised them for sale to third parties to try and maximise the proceeds received. The total value of the consideration payable by GET, of which most was attributable to the portakabin, following the liquidator's public tender process self-evidently negates the comment in the Decision[23] that the customer records "*have substantive value in them*".

7.15.5 In GET's opinion, the commercial value in the customer records is at best trivial, and certainly not enough for them to represent a meaningful part of a business. The customer records are of no material assistance to MFL in starting its operations from scratch.

7.16 Benefit of existing contracts

7.17 As part of the Asset Acquisition, GET has not acquired the benefit of any ongoing contracts with customers or suppliers. All such contracts terminated when SeaFrance entered liquidation and had to be negotiated from scratch.

7.18 Benefit of Goodwill

[22] Decision paragraph 19
[23] Decision paragraph 27

7.19 Goodwill was one of the collection of assets purchased by GET as part of the Asset Acquisition. The liquidation process however means that assets are simply bundled-up to be advertised for sale, as part of the liquidator's attempt to maximise the sale proceeds. It does not mean that there was any, or a material value, associated to goodwill, and no separate value for goodwill was identified in the Paris Court's June 2012 judgment.

7.20 In GET's opinion, there is no goodwill in the SeaFrance brand, which is why the new MFL brand is being used. The SeaFrance brand is not being used by MFL because, in GET's opinion for reasons attributable to its previous poor management, the brand is considered to have negative connotations (in terms of unreliability and service delivery) for consumers. The Decision refers to the fact that the www.SeaFrance.co.uk website redirects visitors to MFL's website. The website merely informs visitors that SeaFrance has ceased operating and that the ferries have been acquired by a new operator, MFL; this does not however indicate that there was material goodwill in the SeaFrance brand. In fact, it is little different to the common commercial practice of companies bidding on website searches to ensure that a customer conducting a website search is directed to their, rather than to a competitor's website.

7.21 Staff

7.22 MFL has sub-contracted the maritime operations to an independent company, the SCOP, which started as a cooperative of some of the ex-Seafrance employees. The SCOP has sourced its employees from the local recruitment pool through an open and rigorous recruitment exercise aimed at finding best local staff ideally with experience but most particularly willing to work on a new maritime operation with a totally different ethos to SeaFrance. This resulted in quite a few applicants who were ex-SeaFrance employees being declined positions. Currently, MFL and the SCOP together employ [REDACTED] staff[24], broken down as follows:

[24] To provide context, immediately before its liquidation SeaFrance had employed 865 staff.

7.22.1 [REDACTED] staff are employed by MFL, of whom [REDACTED] were previously SeaFrance employees ([REDACTED] working in each of the sales and accounts teams of MFL), and

7.22.2 [REDACTED] staff are employed by the SCOP, of whom [REDACTED] were previously SeaFrance employees.

7.23 Neither the SCOP nor MFL have employed any of the staff previously employed by SeaFrance (being approx. 70 in number) in its corporate support services, providing central support in relation to IT, HR, sales, credit control and finance etc. teams.

7.24 In GET's opinion, **it is simply wrong for the OFT therefore to conclude in the Decision[25] that "*the [ex-SeaFrance] staff have, in effect, transferred to Eurotunnel*"**. The substance of the arrangement[26] is 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, rather than the ex-SeaFrance employees being transferred across to GET. Given that the SCOP needed to find individuals trained to operate the Vessels in an area of France where SeaFrance had been based and where unemployment is high, it is unsurprising that a number of ex-SeaFrance employees were in fact hired by the SCOP.

7.25 The May 1992 decision of the Monopolies and Mergers Commission ("**MMC**") in *AAH/Medicopharma,* cited by the OFT in the Decision[27], in fact merely supports GET's argument on the susbstance of the case.

7.25.1 In *AAH/Medicopharma* on 3 November 1991 two companies, jointly referred to as Medicopharma UK, resolved to cease trading and on the same day the companies' stock and other assets (including leases) were transferred to AAH Holdings plc pursuant to arrangements entered into between them. The ex-Medicopharma staff were asked to report to their previous places of work (since acquired by AAH) on 4 November (i.e. the next day) and AAH staff began operating fully the depots it had acquired on 7 and 8 November (i.e. 4 or 5 days later)[28]. Further, under the contractual arrangements, part of the consideration provided by AAH to Medicopharma UK's parent company took account of the costs arising from the termination of employment of Medicopharma's employees[29].

7.25.2 By contrast, in this case;

(a) SeaFrance entered into liquidation in January 2012 and completion of the sale to GET occurred in June 2012 – i.e. a much greater delay than in AAH/Medicopharma where the arrangements occurred within a week.

(b) There was no arrangement under which SeaFrance agreed to transfer its assets, staff or business to GET. There was instead an arm's-length sale process subsequently conducted by an entirely independent entity, the liquidator, who owed his duty to maximise value on the sale to the Paris Court.

(c) In AAH/Medicopharma the MMC noted that "*overwhelmingly*" the ex-Medicopharma UK staff would turn up for work the following day

[25] Decision paragraph 22
[26] In contrast to that described in paragraph 24 of the Decision
[27] AAH Holdings plc/Medicopharma NV cited in Decision paragraph 25
[28] See AAH/Medicopharma Decision paragraph 6.88
[29] See AAH/Medicopharma Decision paragraphs 6.54-6.55

at their previous place of employment, and in fact they did so[30]. By contrast, in the current case, the SCOP initiated a fresh recruitment exercise that led to less than half of the staff employed by SeaFrance immediately prior to its liquidation (in January 2012) being subsequently hired following completion of the Asset Acquisition (in June 2012) by the SCOP on behalf of MFL.

7.26 Continuity of service

7.27 **GET bought assets from a liquidator that had not been used for the provision of ferry services for 7.5 months at the time of the Asset Acquisition**. None of the acquired Vessels were ready for use commercially for a further 1.5 months after the Asset Acquisition. Consequently, there was a total of 9 months for which the Vessels were not operational prior to their being used by MFL (rather than the period of 6 months focused on in the Decision[31]). In this context, GET considers that **compelling evidence was required to demonstrate that it may be the case that the activities of a *business* have been transferred to GET. In GET's opinion, there was no such compelling evidence provided in the Decision and there is none available.**

[30] See AAH/Medicopharma Decision paragraph 6.88
[31] Decision paragraph 18

7.28 The Decision admitted that "*regularity of custom is relevant for assessing whether the period of closure has meant that goodwill has wholly or in part been dissipated*"; but it then concluded that "*the goodwill has not dissipated as a result of the cessation of trading*"[32]. However, about [REDACTED]% of the turnover generated by SeaFrance from the Vessels had been attributable to freight customers who would purchase transport services regularly (often daily, or at least several times per week) from a transport provider. Further, as noted by GET in paragraph 21 of its Issues Paper Response, SeaFrance's cessation of business without prior notice in November 2011:

7.28.1 occurred at the busiest time of the year for freight companies (i.e. in the immediate run-up to Christmas, which is also the period when freight companies negotiate prices for the following calendar year with providers of transport services on the cross-Channel route), and

7.28.2 lasted for such a period of time that passenger customers missed the chance to use the Vessels at the peak passenger transport periods (i.e. Christmas, Easter and the Summer holiday period until 20 August 2012 when MFL began operating).

7.29 It is therefore inconceivable for the OFT to conclude that the circumstances and duration of SeaFrance's cessation of operations meant that "*the goodwill has not dissipated as a result of the cessation of trading*". **The circumstances and duration meant that all SeaFrance goodwill had evaporated long before the Asset Acquisition**.

7.30 GET also rejects completely the suggestion in the Decision[33] that there was continuing goodwill "*dependant on the routes travelled on, familiarity with the crew and/or vessels and so on*". In GET's opinion, freight customers and passengers do not determine which transport operator to use because of the identity of the ferries or in the anticipation that they will meet individual ferry crew members on their journey. Equally, any customer preference for travelling on an individual route is entirely separate from the Vessels themselves. **In GET's opinion, these suggestions in the Decision arise from a lack of understanding about the nature of ferry operations on the Short Sea.**

7.31 **OFT changed its central theory of harm from the Issues Paper**

7.31.1 The horizontal theory of harm that was put to GET in the Issues Paper was that the "*merger*" created a high combined market share and involved SeaFrance's closest competitor in circumstances where the *low levels of capacity utilisation by ferry operators* created a realistic prospect that a ferry operator would leave the Dover/Calais route, which would leave only two operators on that route and would enable the remaining competitors to raise their prices: see the Issues Paper at paragraphs 94-97.

7.31.2 This was the case that GET believed it had to meet and sought to meet.

7.31.3 **In the Decision the OFT completely reversed itself on this point: instead of focusing on the *low* levels of capacity utilisation (i.e. the high level of spare capacity) the OFT referred the case to the CC because it was *unlikely that there was sufficient spare capacity*** to defeat a price rise by GET: see the Decision at paragraphs 108 and 166.

7.31.4 The OFT did not put this analysis to GET. Had it done so, GET would have proposed following the normal course of using critical loss analysis to analyse the argument and would have argued that "*the likely level of spare capacity relative to Eurotunnel's sales volumes*" makes no economic sense.

[32] Decision paragraph 18
[33] Decision paragraph 18

If the OFT believed that spare capacity is "*not sufficient to defeat a price rise by Eurotunnel*" it should have compared the level of spare capacity with a critical loss threshold. Comparing spare capacity with GET's sales volumes provides no information about whether that capacity is sufficient to defeat a price increase.

7.32 **<u>Misdirection on expansion by existing competitors using existing capacity</u>**

7.32.1 The OFT dealt with the question of whether expansion by **existing competitors** using **existing capacity** would be sufficient to prevent an SLC at paragraphs 108 and 166 of the Decision.

7.32.2 The OFT has erred in considering separately two related issues. It found at paragraph 108 of the Decision that new entry was unlikely to prevent the post-Asset Acquisition GET from profitably raising its prices in part because of the existence of spare capacity. And it also found at paragraphs 108 and 166 that expansion by existing competitors using their spare capacity was unlikely to be sufficient to prevent the merged group from profitably raising its prices. The OFT wrongly failed to consider whether, **if the merged group sought to raise its prices, this would be defeated by a *combination* of expansion by existing competitors *and* new entry** (since new entrants would no longer be deterred from entering by the existence of spare capacity, because the higher prices would make new entry more attractive in that scenario).

7.33 **<u>Misdirection on expansion by existing competitors using new capacity</u>**

7.33.1 The OFT considered whether the existing competitors would invest in *new capacity*. In relation to this issue, the OFT did not refer at all to P&O in paragraphs 113-123.

7.33.2 The OFT dealt with DFDS by referring to its announcement of 24 October 2012 headed "*More competitive Channel set up*" and concluding, in respect of the developments: "*Neither do they indicate, on the basis of the evidence available, that DFDS is about to profitably increase or expand its capacity on the Short Sea imminently*."

7.33.3 The Joint Guidelines (at paragraph 5.8.3) make clear that the issue is whether "*expansion might prevent an SLC*". It follows that **the question the OFT needed to ask itself, but did not, was whether P&O and/or DFDS would be likely to invest in new capacity *in response to an attempt by the merged group to raise its prices* and, if so, whether that expansion would be timely and sufficient to defeat the price increase.**

7.33.4 In paragraphs 119-120 of the Decision, the OFT failed to give proper consideration to the announcement by Euroferries of its intention to commence a new ferry service. The OFT rejected the potential for new entry on the basis that a previous Euroferries attempt at entry had failed. However, in doing so the OFT ignored comment from Euroferries explaining why its previous effort failed and this latest attempt would succeed (see Appendix 2). The Decision also appeared to discount Euroferries' new entry on the basis that it was not on the Dover-Calais route, although the route on which Euroferries will operate is within the definition of Short Sea route (see footnote 13 above).

7.33.5 In practice, the market is very simple: it is very easy for customers to compare the service and prices being offered by operators; customers are highly price-sensitive and will readily move to other operators if Eurotunnel attempted uncompetitively to raise its prices; and other operators already have sufficient spare capacity to be able readily to accommodate any additional demand from customers.

7.34 **Lack of evidence/illogicality on transfer of SeaFrance's share to GET**

7.34.1 When analysing the effects of the "*merger*", the OFT explained at paragraph 85 that it had assumed on a "*cautious basis*" that *all* of the customers serviced by SeaFrance in 2011 would transfer to GET (other than those serviced by the vessel that GET had not purchased), even though for a period of nine months none of the Vessels had been active and one of the three Vessels (the *Nord-Pas-de-Calais)* remains out of operational service.

7.34.2 The OFT's assumption led the OFT to find that the "*merger*" increased GET's share of any Short Sea market by a non-trivial amount (paragraphs 3 and 164 of the Decision) and that the Asset Acquisition combined GET with a close competitor (paragraphs 89-100 and 164 of the Decision).

7.34.3 When considering whether it may be the case that the Asset Acquisition involved the transfer of an enterprise, the OFT found that the Asset Acquisition may have involved the transfer of "*some*" goodwill (paragraphs 14-16 of the Decision).

7.34.4 There is a **mis-match between the OFT's assumption that *all* of the sales enjoyed by SeaFrance in 2011 would transfer to GET and its findings on the "*enterprise*" issue that "*some*" goodwill would transfer**. The OFT erred because:

(a) the OFT's conclusion that *all* of the sales enjoyed by SeaFrance in 2011 would transfer to GET was not supported by any evidence (GET has provided its estimate of the actual diversion figures from SeaFrance to other operators at Table 6); and

(b) it is illogical to assume that *all* of the goodwill would transfer on the basis of a finding that only *some* of it would.

7.34.5 The **Decision also failed to take account of the current low level of sales being achieved by MFL, consistent with it being a new entrant starting from scratch**; even though the Decision itself acknowledged (see paragraph 85) that the level of sales achieved by MFL is equivalent to a market share of below 1%.

7.35 **Counterfactual and exiting firm scenario**

7.36 As mentioned above, there are three questions that must be considered at this point.

7.36.1 **Would the firm have exited?** As noted above, the OFT accepts (paragraph 38 of the Decision) that absent the "*merger*" SeaFrance would have exited the market. In fact, however, SeaFrance had <u>already</u> exited the market by ceasing business on 16 November 2011.

7.36.2 **Would there have been an alternative purchaser for the firm or its assets?** By reference to the 11 June 2012 Paris Court judgment, and especially section 2(c)(ii), GET considers that there were no alternative purchasers for the Vessels and other assets above their liquidation value (that being the amount which GET paid for the Vessels and other assets). This is consistent with the FCA's decision which states that the situation that would have resulted from another decision by the Paris Court could not be a relevant counterfactual since this situation is hypothetical.[34]

7.36.3 The OFT rejected the "*exiting firm*" defence in the Decision at paragraphs 39-60 on the grounds that there were alternative purchaser scenarios which might have led to a better outcome for competition. However, in reaching this conclusion the OFT erred in misapplying the Joint Guidelines. The Joint Guidelines state that: "*The Authorities will take into account the prospects of alternative purchasers for the business above the liquidation value.*" (paragraph 4.3.17.)

7.36.4 It follows that alternative purchasers *below* the liquidation value will be disregarded because the administrator or liquidator, as the case may be, would reasonably prefer to sell the assets in a liquidation.

7.36.5 In some cases, the identification of the liquidation value is difficult, for example if there are competing bids for a going concern. There is no such difficulty in this case. The liquidation value is the net price that is paid by the highest bidder in the liquidation. In this case, SeaFrance's assets were placed into liquidation and an open, transparent, Court-approved process resulted in the sale of the assets for €65 million, free of any debts (which were cancelled as part of the liquidation process). In other words, this amount represented the liquidation value of the ex-SeaFrance assets. Bids at lower levels, including that from DFDS, ought therefore to have been excluded from the OFT's analysis as a matter of the straightforward and appropriate application of the Joint Guidelines, on the basis that they were bids below the liquidation value of the assets.

7.36.6 In paragraphs 50 and 51 of the Decision, the OFT relies on (presumably standard form) wording in the Paris Court's judgment that the receiver judge was not obliged to accept bids for the assets to speculate that "*there was a reasonable prospect that, absent the Eurotunnel purchase, new disposal terms would have been offered by the Court and a less anti-competitive purchaser would feasibly have made a bid for the SeaFrance assets*". The OFT has made an error of law. There is no evidence that, having spent 7.5 months trying to find a buyer, and it being inconceivable that a potentially interested buyer was not aware of the opportunity, the French court would have chosen to commence a fresh attempt to sell, further delaying payments to creditors and increasing the costs of the liquidation.

7.36.7 **What would have happened to the sales of the exiting firm?** The OFT did not in the Decision consider this issue because it concluded that there would have been alternate purchasers which may have resulted in a better outcome for competition.

7.36.8 It is clear that from the date when SeaFrance ceased operating (16 November 2011), its freight and passenger customers transferred their sales in their entirety to other operators (see Table 6 and Appendix 8 below). Consequently, when the Asset Acquisition completed in July 2012 there were no active sales or customers transferring with the Vessels to GET from which MFL benefitted when it began operations using the Vessels.

7.36.9 In Table 3 of the Decision, the OFT claimed that the majority of SeaFrance's passenger sales and much of its freight sales had transferred to Eurotunnel. GET's own analysis (see, for example, Annex 5 to the Issues Paper Response) indicates that the majority of SeaFrance's sales transferred to P&O and DFDS rather than to Eurotunnel.

[34] FCA decision, page 8, paragraph 41.

7.36.10 The key consideration however in GET's opinion is the fact that it **acquired no additional turnover or share of supply as part of the Asset Acquisition**, because the Vessels had not been used operationally for the consecutive period of nine months prior to their beginning operations with MFL. It is only since MFL itself has begun operations that GET has achieved (limited) incremental sales and turnover, but that is as a result of GET's own sales efforts, rather than simply being sales and market share that transferred to GET as part of and under the Asset Acquisition.

7.36.11 Even if, notwithstanding the arguments made in this submission, the CC considers that it has jurisdiction to review the Asset Acquisition then GET considers that the only turnover (and share of supply) that can legitimately be taken into account on the part of MFL is that which **MFL itself has generated since it started operating on 20 August 2012 - i.e. sales equivalent to a share of supply of below 1%**. Given that SeaFrance was not operating for the nine months prior to MFL beginning operations, and that MFL is operating under new branding, there is no basis for the OFT[35] to accredit to MFL the turnover and share of supply previously enjoyed by SeaFrance in 2011.

7.37 **Third party comments**

7.38 GET notes the comment in the Decision (paragraph 151) that all competitors responding to the OFT's inquiries "*raised concerns relating to the Transaction*". This is not of course surprising, given the small number of ferry companies currently operating on the Short Sea route and competitors' natural propensity to try and use processes such as the OFT's review of the Asset Acquisition to their competitive advantage.

7.39 In this context, the CC may have had brought to its attention the press coverage of the reference of the Asset Acquisition to the CC and of the FCA's decision conditionally to clear the acquisition. GET would make the following observations on an article in the Financial Times dated 8 November 2012 (see Appendix 5) which widely quotes P&O:

7.39.1 P&O claims the Asset Acquisition was politically expedient – GET was however provided with an opportunity to bid to begin operating ferries on the Short Sea by the liquidation of SeaFrance and as GET is not an established ferry operator like P&O it made an opportunistic offer to acquire certain of the ex-SeaFrance assets as the basis from which GET could build from scratch a new ferry service. In particular:

(a) The price paid and the bid by GET were not politically, but business motivated, reflecting the market value of the assets and the opportunities GET observes to develop a profitable ferry business on the Short Sea route.

(b) GET entered into a separate arrangement with the SCOP because, as employees did not transfer to it along with the Vessels, MFL needed to procure experienced maritime staff to operate the Vessels before MFL could begin running an operational ferry business.

(c) Had P&O or DFDS acquired the Vessels, they would have been able to use their existing maritime resources to crew and operate the Vessels. This was not something available to GET, which had to start creating the MFL ferry business from scratch.

[35] See Decision paragraph 85

(d) The court liquidation process followed a public competitive tender exercise, which was designed to secure the maximum market value for the assets sold – something that P&O, DFDS and others chose not to offer.

7.39.2 P&O states that it welcomes the reference to the CC. This is to be expected as along with DFDS, P&O has been vocal in public and in submissions to competition authorities in protecting their previous position as the only ferry operators between Dover and Calais/Dunkirk. It could also be expected that P&O will not welcome more competition on the Short Sea route.

7.39.3 GET is unable to comment on the reported comments from freight customers[36] since it has not seen them. GET would however note that in practice freight customers shop around and multi-source transport services from several operators, playing them off against each other to win advantageous prices and terms of supply.

7.40 GET is also unaware of what take-up there was in practice of the OFT's consultation pilot project. GET notes that the OFT indicated[37] it received comments from "*several*" passengers. By contrast, GET's own IT department had identified [REDACTED] customers who clicked onto the initial page on GET's website each for an average of [REDACTED] seconds, but that there [REDACTED] who had gone on to use the weblink which GET had placed on its website to contact the OFT and provide anonymous comments on the OFT's inquiry page (see Appendix 10).

[36] Decision paragraphs 148 - 152
[37] Decision paragraphs 148 and 152

8. **PRODUCT MARKET**

- *Distinct markets for freight and passenger transport.*
- *Freight consists of lo-lo and ro-ro ferries and freight trains via channel tunnel.*
- *Passenger also includes low cost airlines and Eurostar as well as Channel Tunnel and ferries.*

8.1 In line with the OFT's recent merger decision in DFDS/Louis Dreyfus[38] ("*the DFDS Decision*"), GET considers that a distinction can be drawn between the provision of maritime transport services for (a) freight and (b) passengers between the UK and Continental Europe[39].

8.2 **Freight transport services:** GET considers that – consistent with the OFT's approach in the DFDS Decision - for freight transportation between the UK and Continental Europe, lo-lo and ro-ro vessels[40] should be deemed to comprise part of the same product market and that such vessels compete with freight trains that use the Channel Tunnel[41]. In the DFDS Decision, the OFT "*assessed the merger on the basis of all freight (accompanied and unaccompanied) transported by ferry operators and Eurotunnel*"[42]

8.3 **Passenger transport services:** In relation to passenger services, in the DFDS Decision it was noted that third parties considered "*low cost airlines do provide a viable alternative to passengers travelling between the UK and continental Europe*". However, in the same Decision, the OFT admitted that it took "*a cautious approach in assessing the merger and has considered the product scope for passenger services to include ferry operators and Eurotunnel only*".[43]

8.4 GET considers that airlines do represent a competitive constraint that should be fully taken into account by the CC when evaluating the Asset Acquisition, but more importantly that Eurostar services between London and Brussels/Paris should also be taken into account. For example:

8.4.1 at page 25 of the prospectus for securities issued by GET in 2008[44] there is a discussion about the competitive environment which mentions, in particular, the competitive threat to Eurotunnel from airlines.

8.4.2 an April 2005 report commissioned by Kent County Council and Comité Régional de Tourisme Nord Pas de Calais[45] conducted a study of passengers crossing the channel between Dover/Folkestone and Calais titled 'Cross Channel Tourism Study'. The report concluded that:

(a) "*The number of trips by UK residents is increasing so this suggests that other modes of transport are increasing in popularity. The number of trips made by air has increased, especially for independently arranged holidays. The impact of low cost airlines and national airlines competing with these carriers has opened up new destinations from regional airports at affordable prices. The evidence suggests that the choice for consumers has opened up in terms of who they travel with across the channel and where they*

[38] Decision dated 7 August 2012 concerning the anticipated acquisition by DFDS of certain routes between the UK and continental Europe operated by Louise Dreyfus Armateurs SAS.
[39] These issues were also discussed in section 3 of the notification dated 27 July 2012 by Eurotunnel to the FCA, a convenience translation of which was provided to the OFT.
[40] In the way that those terms are used in the DFDS Decision.
[41] DFDS, together with its competitors and customers, considered that all such vessels are in the same market as the Channel Tunnel - see paragraphs 14 and 17 of the DFDS Decision.
[42] Paragraph 18
[43] DFDS Decision paragraphs 21 and 22
[44] http://www.eurotunnelgroup.com/uk/shareholders-and-investors/get-sa-archives/sdes/
[45] http://www.visitkentbusiness.co.uk/library/researchdevelopment/CrossChannel-Full-Report.pdf at pages 10-12

can go. As local departure points are a real benefit for travellers, airports to the North of London (Stansted & Luton) are likely to be attracting passengers who may previously have taken the train to cross the Channel."

9. GEOGRAPHIC MARKET

- *Competition wider than Short Sea and includes Western Channel and North Sea ferry services to the Continent.*
- *Substitutability between these routes shown by inter-availability across route groupings.*

9.1 In the DFDS Decision, the OFT noted there is "*some substitutability (depending on departure and final destination points) between the North Sea routes and the Short Sea on the one hand and the Western Channel and the Short Sea on the other*"[46]. Ultimately, although in the DFDS Decision the OFT assessed the "*merger*" on the basis of the Short Sea route, it did not reach a final conclusion on the precise geographic scope. GET considers that in doing so the OFT has adopted an extremely cautious approach.

9.2 GET is aware that ferry operators on other routes (such as Brittany Ferries which operates on the Western Channel route) have inter-availability arrangements with ferry companies on the Dover Straits. In fact, in September 2012 Brittany Ferries, whose ferry services have been badly affected by strike action, sought assistance from P&O and MFL pursuant to inter-availability arrangements between them. The fact that the operators involved had (and invoked) inter-availability arrangements between them, clearly indicates that they considered there to be substitutability between the Short Sea and Western Channel routes.

9.3 GET also considers that the competitive constraint imposed by the other routes between the UK and Continental Europe, and the potential for freight and passenger customers to use routes other than the Short Sea[47], should be taken fully into account when evaluating the Asset Acquisition. In particular, it should not be overlooked that there are the following maritime routes available, in addition to the potential for transport by air, especially using low cost airlines:

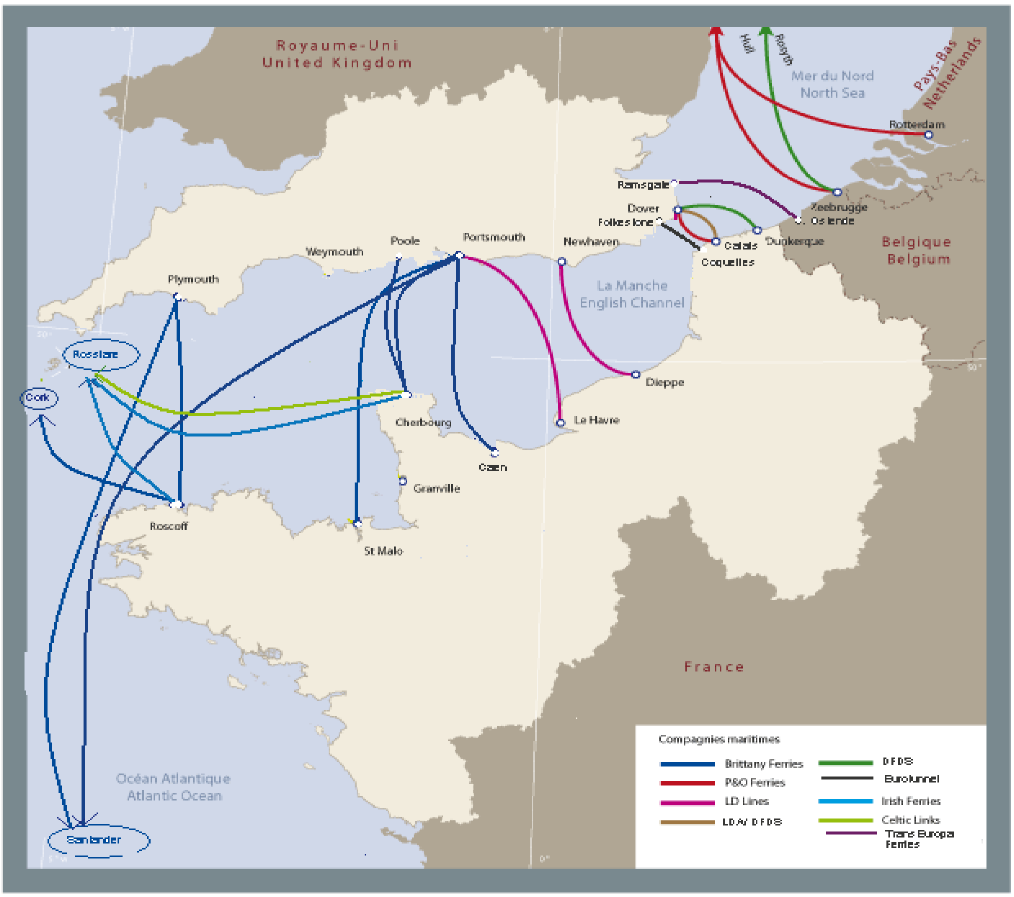
9.3.1 The Short Sea, including the short-distance routes between England and France or Belgium, in other words the Pas-de-Calais routes (between Dover, Folkestone, Ramsgate and Newhaven and Calais, Dieppe, Boulogne and Dunkirk) and the services crossing the "*Belgian Strait*" (Ramsgate-Ostend);

9.3.2 The North Sea, including the sea routes between the Eastern Coast ports of England and the ports of Belgium and the Netherlands; and

9.3.3 The Western Channel comprising the sea routes between the ports of the South Coast of England and those of the North Coast of France.

[46] Paragraph 25

[47] See section 3 of the notification dated 27 July 2012 by Eurotunnel to the FCA, a convenience translation of which was provided to the OFT.



9.4 The above map of course illustrates only certain of the routes between the UK and Continental Europe, and does not demonstrate routes further up the east coast of England or the extent to which the UK acts as a "*land-bridge*" for customers travelling to Ireland. For example, GET understands that other cross-Channel operators[48] provide a "*land-bridge*" package under which they offer a travel service to customers from France and other countries to Ireland via the UK. Eurotunnel and MFL, operating only on the Dover-Calais route, cannot offer equivalent integrated transport packages. An indicative overview of the routes between the UK and Continental Europe (though not by individual operator and based on passenger routes) is shown in the map below[49]. There are a number of additional freight only routes, details of which (including the vessels which operate the routes) can be found on the internet resource http://www.ferry-site.dk.[50]

[48] http://www.4ni.co.uk/northern_ireland_news.asp?id=24948
[49] Taken from http://www.eurodrive.co.uk/routes.asp.
[50] Please see http://www.ferry-site.dk/ferryroutelist.php?lang=en for links to detailed pages for routes from Great Britain to: Belgium, France, the Netherlands, Ireland and Northern Ireland.

9.5 In footnote 7 of the OFT Submission, GET referenced the websites of DFDS and P&O which clearly envisage themselves as operating much more widely than just on the Short Sea route. They offer customers route and pricing packages which are based on customers utilising several routes, and not just a single route such as Dover-Calais.

9.6 These considerations are all consistent with the relevant geographic market being much wider than just the Short Sea route. In any case, they show that when offering transport services on the Short Sea route, GET faces strong competitive pressure from transport services offered by ferry operators on other routes.

9.7 The Decision[51] stated that about half of the large freight customers responding to the OFT's inquiry indicated that, in response to a small but significant non-transitory increase in price, they would either definitely not switch between routes or would be unlikely to do so. GET has not seen the methodology or statistical basis underlying this statement and so cannot comment on its reliability. However, GET considers that in practice freight customers have a range of routes that they can use between the UK and Continental Europe, and that they will vary the route chosen according to the location of the drops to be made. Consequently, it may be the case, for example, that a freight customer will use the Dover-Calais route into the UK and exit the UK via the North Sea or Western Channel route. In GET's opinion, similar considerations apply in relation to the routes used by passengers, meaning that there are in practice constraints on the Short Sea from the Western Channel and North Sea routes, contrary to the observations in the Decision[52].

9.8 In GET's opinion, the fact that Eurotunnel and the Vessels previously operated by SeaFrance were used only on the Short Sea provides no basis for considering that the relevant geographic market is just the Dover-Calais route[53]. Brittany Ferries' invoking its inter-availability arrangements with P&O and MFL indicates in practice the way customers regard individual cross-Channel routes within the Short Seas route as being substitutable for each other. This is consistent with the market definition being no narrower than all cross-Channel routes as a whole. This approach is supported by the frequency with which ferries can be moved across routes, and the extent to which they have in practice done so between operators on cross-Channel routes[54].

[51] Decision paragraph 79
[52] Decision paragraph 80
[53] Decision paragraph 81
[54] See for example paragraphs 2.3 and 6.6 in this submission.

10. THE NATURE OF COMPETITION

- *Ferries and airlines compete with Eurotunnel's services, but they are not homogenous.*
- *Freight customers can and do use ferries and the Tunnel and there is **no** "must have" with regard to Eurotunnel's services.*
- *Passengers can and do use a range of options such as flights or Eurostar to make their journey.*
- *MFL has **less than 1%** share of supply.*
- *Market characterised by: low barriers to entry, excess ferry capacity, a capacity constrained Eurotunnel and a growing market.*
- *Ferries operate multiple vessels and routes, whereas MFL and Eurotunnel only operate on Dover-Calais.*

10.1 Competition between ferries/Eurostar/airlines and the Channel Tunnel

10.2 There is a difference between the services offered by Eurotunnel and ferries/Eurostar/airlines. Eurotunnel's commercial offering is focused on maintaining the high frequency of its departures and the short check-in and journey time. Eurotunnel offers up to four passenger shuttle departures per hour[55] and up to 6 departures per hour for freight shuttles (versus about 2 departures per hour for ferries) and the crossing lasts 35 minutes (versus 90 minutes for ferries departing from Calais and 120 minutes for ferries departing from Dunkirk).

10.3 On the other hand, unlike ferries, Eurostar and airlines, the Eurotunnel passenger shuttle cannot cater for pedestrian passengers to be transported[56]. Only passengers accompanied by their vehicle may travel via the Eurotunnel shuttle service. Eurotunnel, therefore, is not able to meet all of the demand for passenger transport services.

10.4 In addition, ferries offer passengers the possibility of eating at restaurants and shopping on board. Due to space constraints, Eurotunnel is not able to offer such services on board its shuttles. Nevertheless, Eurotunnel offers the possibility of eating in restaurants and making some travel-related purchases (newspapers, magazines etc.) in its terminals in Calais and Folkestone. However, only a portion of Eurotunnel's clients visit the Eurotunnel terminals and they only stay an average of around 10 minutes. In comparison, clients of the ferry companies can take advantage of restaurant services and shopping for the entire duration of the crossing (between 90 and 120 minutes). P&O ferries in particular have a wide offering of restaurants and shopping on board, which represents a lost revenue opportunity for Eurotunnel.

10.5 **In addition, certain types of loads cannot be transported through the Channel Tunnel for safety reasons.** These include certain dangerous materials and oversized heavy loads (i.e. more than 18 metres in length and more than 44 tonnes). Thus, the Asset Acquisition will also enable GET (through MFL) to transport certain types of load (see below) that cannot be accommodated in the Tunnel. GET estimates that such customers would together account for about [REDACTED]% of overall market volume.

10.5.1 **Dimensions of vehicles** **(**http://www.eurotunnelfreight.com/uk/about/vehicle-restrictions/)

10.5.2 **Dangerous Goods: L**ike other forms of transport, Eurotunnel allows the carriage of a wide variety of goods classified as 'dangerous', subject to strict

[55] Up to 5 is possible in peak periods e.g. during the summer holidays.

[56] In fact, Eurotunnel is prevented for security reasons by the Tunnel Concession agreements from carrying pedestrian passengers.

regulations (http://www.eurotunnelfreight.com/uk/safety-and-security/dangerous-goods/)

10.5.1 **Other:** For safety reasons, campervans are not authorised to travel on freight shuttles and no livestock, animals or domestic pets are accepted for carriage on the Freight shuttles. (http://tickets.eurotunnel.com/freight-booking/?utm_content=beethoven|referral)

10.6 As explained above, one important commercial advantage that the ferry companies have over Eurotunnel/MFL is that they operate on a range of routes between the UK, Ireland and Continental Europe. For example, the ferry companies can offer customers the option of travelling to the UK via Calais-Dover and then returning to the Continent via the Western Channel or North Sea routes. The ferry companies can also offer their freight and passenger customers prices for using the UK akin to a "*land-bridge*", i.e. offering a through price and a through route package for a return trip from Continental Europe to the UK and on to Ireland, and then the return trip back to Continental Europe (but with the route flexibility to return to a different port from the original point of departure). This allows the ferry companies to offer their customers much more flexible packages of routes and prices for using multiple routes, whereas GET can only compete on the Dover-Calais route.

10.7 **Options available to freight customers**

10.8 Freight transport customers generally contract with several operators in parallel. GET believes that most of Eurotunnel's freight clients also have an account with ferry operators.

10.9 **Freight transport customers do not have to use the Channel Tunnel and the same lorries can travel without any modifications or unloading being required on either Eurotunnel freight shuttles or on ferries. The decision to travel on one or the other can be made on the spot by the freight operator or truck driver.** This is illustrated by the events following the 11 September 2008 fire. All services were suspended with severely limited service being reintroduced on 13 September using one running tunnel. Service was increased in stages on 22 and 29 September 2011, eventually using both tunnels except for the damaged one-third of one tunnel from 22 September. A full service was not resumed using both tunnels until 9 February 2009. During the repair period Eurotunnel was only able to run [REDACTED]% of its freight shuttles and [REDACTED]% of its customers moved at least some of their business to ferries. Those customers did not immediately return to Eurotunnel once the Tunnel reopened. It took more than [REDACTED] for Eurotunnel to regain the shares of supply lost as a result of the 2008 fire. Even then, much of the volume which Eurotunnel had recovered was attributable to a change in customer mix, reflecting attempts to increase the number of vans travelling on its freight shuttles (see paragraph 11.10 below).

10.10 This, along with changes over time in the volume and identity of traffic from Eurotunnel's 10 largest freight customers[57], demonstrate that [REDACTED] of freight customers that had used Eurotunnel's shuttle services could completely or materially bypass Eurotunnel and use ferries.

10.11 In effect, after the 2008 fire, Eurotunnel lost about [REDACTED] of market share for freight transport, with about [REDACTED]% of the customers it lost moving to P&O[58]. This is principally explained by the fact that P&O has the greatest frequency of service amongst ferry operators operating on the Short Sea.

[57] See for example the details of Eurotunnel's 10 largest freight customers over the last three years, contained at Appendix 4.
[58] The 70% figure was calculated on the basis of the shares of supply of Eurotunnel and SeaFrance, and those of their principal ferry competitors between the third quarters of 2011 and 2012.

10.12 **Options available to passenger customers**

10.13 Passenger customers wishing to travel by foot cannot travel by Eurotunnel and must use Eurostar, ferries[59] or airlines. Business passengers, who are more likely to be time-sensitive, would be likely to travel by airline or Eurostar, rather than by ferry. Passengers who are not time-sensitive and are less price-sensitive than leisure passengers have an option between travelling by airline (and possibly hiring a car at their destination), travelling by ferry (either on the Short Sea, or one of the other routes between the UK and France) or by Eurotunnel. Depending on the passengers' starting point and ultimate destination, they could choose, rather than by travelling on the Short Sea (whether by ferry or Channel Tunnel), to use either the Western Channel or the North Sea route.

10.14 **Shares of supply**

10.15 As mentioned previously, Eurotunnel and MFL operate only on the Short Sea route – neither operates on the Western Channel or North Sea routes. GET does not have any reliable estimates concerning shares of supply by value. It has however provided in Table 1 below details of the shares of supply of freight by volume of Eurotunnel and its ferry competitors on all routes between England and Continental Europe.

Table 1:
Details of shares of supply of Eurotunnel and its competitors between England and Continental Europe
Source: IRN Ferrystat

	2008	2009	2010	2011	JANUARY – JUNE 2012	JULY - OCTOBER 2012
EUROTUNNEL	31%	22%	30%	34%	38%	38%
MFL	0%	0%	0%	0%	0%	0,3%
P&O	27%	33%	29%	29%	35%	34%
DFDS (CALAIS + DUNKIRK)	13%	15%	13%	13%	16%	18%
SEAFRANCE	17%	18%	15%	14%	0%	0%
BRITTANY FERRIES	5%	5%	4%	4%	4%	3%
LD LINES	2%	3%	3%	2%	2%	2%
STENA LINE	4%	4%	4%	4%	4%	4%
COBELFRET	2%	2%	2%	1%	1%	1%

10.16 **Tables 2 and 3 below illustrate the shares of supply that have been achieved** by Eurotunnel, MFL and their ferry competitors on the Short Sea route – which Eurotunnel considers to be the narrowest possible relevant geographic market - since MFL began operating on 20 August 2012. As is clear from Tables 2 and 3 below, MFL's current sales equate to an annual share of supply of about 1%. As a new start-up ferry operator the shares of supply attributable to SeaFrance whilst it was operational are of **no relevance when considering the (very limited) share of supply currently being achieved by MFL.** GET considers that the OFT's use in the Decision of SeaFrance's 2011 turnover (adjusted to reflect the Vessels that GET has actually purchased) as a proxy for MFL is inappropriate because only the current trading performance of MFL is relevant to an assessment of whether an SLC may arise from the Asset Acquisition.

[59] Though of the cross-Channel operators only P&O currently accepts foot passengers.

10.17 Taking a worst-case scenario in terms of possible relevant geographic market, GET has provided in Tables 2 and 3 below its best estimates of shares of supply (by volume) for it and ferry competitors (including, SeaFrance[60]) for preceding years, in January-July 2012 and since MFL began operating on 20 August 2012 on the Short Sea in respect of passenger and freight transport services. Please note that Eurotunnel's shares of supply in 2008 are affected by the Tunnel fire which occurred on 11 September 2008 and seriously disrupted traffic through the Tunnel.

Table 2:
Short Sea – Passengers transport share in volume (in units of vehicles[61]) of Eurotunnel and of its principal ferry competitors
Source: IRN Ferrystat

	2008		**2009**		**2010**		**2011**		**2012 (January – June)**		**2012 (July - September)**	
Eurotunnel	2 216 258	40,04%	2 221 419	41,11%	2 443 663	42,81%	2 587 327	45,55%	1 215 563	50,23%	909 779	45,48%
MFL	0	0	0	0	0	0	0	0	0	0	9 612	0,48%
SeaFrance	835 953	15,10%	698 239	12,92%	753 591	13,20%	635 589	11,20%	0	0	0	0
P&O	1 549 816	28,00%	1 544 426	28,58%	1 552 822	27,20%	1 594 319	28,07%	796 619	32,91%	651 782	32,58%
DFDS (Dunkirk)	690 601	12,47%	801 667	14,84%	858 014	15,03%	862 457	15,18%	336 100	13,88%	304 112	15,20%
LD Lines	0	0	138 046	2,55%	99 937	1,75%	0	0	0	0	0	0
SpeedFerries	243 045	4,39%	0	0	0	0	0	0	0	0	0	0
DFDS (Calais)	0	0	0	0	0	0	0	0	71 638	2,96%	125 157	6,26%
TOTAL	**5 535 673**	**100%**	**5 403 797**	**100%**	**5 708 027**	**100%**	**5 679 692**	**100%**	**2 419 920**	**100%**	**2 000 442**	**100%**

[60] Please note that the SeaFrance shares of supply are derived from operating at least four ferries, whereas Eurotunnel has acquired just three ferries of which only two are currently operational on a day-to-day basis.
[61] *Car Equivalent Unit* (CEU): 1 car = 1 CEU; 1 motorbike = 0.5 CEU, 1 camping-car = 1.5 CEU and 1 coach = 5 CEU.

Table 3:
Short Sea – Freight transports share in *volume* (in units of vehicles) of Eurotunnel and of its principal ferry competitors
Source: IRN Ferrystat

	2008		2009		2010		2011		2012 (January – June)		2012 (July – October)	
Eurotunnel	1 254 282	35,5%	769 268	25,4%	1 089 051	34,8%	1 263 322	38,4%	731 098	43,7%	496 451	43,3%
MFL	0	0	0	0	0	0	0	0	0	0	4 144	0,4%
SeaFrance	709 494	20,1%	625 436	20,6%	544 540	17,4%	530 911	16,1%	0	0	0	0
P&O	1 031 684	29,2%	1 113 099	36,7%	1 007 548	32,2%	1 031 459	31,4%	631 055	37,7%	416 285	36,3%
DFDS	535 607	15,2%	508 954	16,8%	446 056	14,2%	462 247	14,1%	271 347	16,2%	167 440	14,7%
LD Lines	0	0%	13 170	0,4%	44 288	1,4%	0	0%	0	0	0	0
DFDS (Calais)									39 369	2,4%	61 221	5,3%
TOTAL	**3 531 067**	**100%**	**3 029 927**	**100%**	**3 131 483**	**100%**	**3 287 939**	**100%**	**1 672 869**	**100%**	**1 145 541**	**100%**

10.18 **Growing market**

10.19 GET considers that overall volume demand for maritime freight and passenger transport (including through the Channel Tunnel) between the UK and France (including on the Short Sea route) will grow at about [REDACTED]% pa. This level of growth would not however be sufficient to utilise anything close to the levels of spare capacity currently possessed by ferry companies, which would also not take account of their scope to expand capacity or the potential for further new entry. As discussed in section 5 above, GET has purchased the Vessels, amongst other things, in order to try and benefit from this anticipated growth in market volume. The Port of Dover also anticipates significant growth in HGV (accompanied) freight demand, quoting the UK government's 2007 Ports Policy Review Interim Report which forecasts a 101% growth in ro-ro demand in the UK by 2030. **Despite the recession, the Department for Transport ("DfT") has restated these figures (growth from 85m tonnes in 2005 to 170m tonnes) in its National Policy Statement for Ports**.[62]

10.20 **Port expansion;** Both the Port of Dover and Port of Calais have well established plans to expand their operations to meet forecast demand. In the case of Dover, the Port Authority has two schemes[63]:

10.20.1 the reconstruction of the current Eastern Docks facility to include a holding area for HGVs in case of delays or other difficulties, as opposed to these vehicles blocking road infrastructure and causing delays; and

10.20.2 the construction of a brand new 4 berth ferry terminal ("*Terminal 2*") in the former western docks, which was approved in 2011.[64]

10.21 There is no suggestion that berthing slots are not available at Dover at present, nor that this is the reason why the port plans an expansion from its current 9 berths to 14. Indeed, by reference to the port's own traffic statistics[65], on a Q3 year to date basis the port had 15,868 ferry entries in 2009 (along with 429 catamaran entries), compared to just 12,131 on the same basis in 2012 (a reduction of 24% in terms of ferry movements). As a result, there is clearly capacity available at Dover for operators to expand operations or enter the port. The main driver for both port improvement plans is traffic congestion and demand, i.e. space for HGVs to be properly accommodated without causing gridlock as demand increases. The additional "*Terminal 2*" project will allow further expansion of ferry services to meet forecast high demand.

10.22 **Low barriers to entry and expansion**

10.23 GET considers that new entry onto the Short Sea route is perfectly feasible. For example, since it began operating in February 2012[66] with two ferries, LD Lines (now part of DFDS) has achieved over the 2012 year to date average estimated shares of supply of about 3% and 2.4% for passenger transport services and freight transport services, respectively, on the Short Sea route. LD Lines' share has however been growing steadily and on the basis of current trends it is now estimated by GET to have achieved a circa. 6% share of supply for freight share and circa. 7% share for passenger transport. On a route that is characterised by significant overcapacity, the operation of two new ships on the Short Sea route has increased the pressure on prices for all operators present in the short-haul cross-Channel area (including MFL and Eurotunnel).

10.24 GET considers that other companies (including existing ferry operators such as Stena Line (which previously operated with P&O on the Short Sea route), Brittany Ferries,

[62] Both DfT documents can be found at http://www.dft.gov.uk/topics/ports paragraph 3.4.3.
[63] See http://www.doverport.co.uk/?page=PorDevelopmentTerminal1.
[64] See http://tinyurl.com/cgs3dfm.
[65] See http://www.doverport.co.uk/?page=QuarterlyFerryStatistics.
[66] i.e. less than three months after SeaFrance ceased operating.

Mann Lines etc could begin operating on the Short Sea route. Such operators could begin operating on the Short Sea route by leasing vessels, such as the *Molière* (now operated by DFDS), or any number of ferry vessels as it is easy to achieve charters from vessel owners and this regularly occurs e.g. to cover service expansion or heavy maintenance, or by relocating one of their existing ferries from another route to the Short Sea. A ferry has a service life of around 30 years and it is also common for vessels to be sold and subjected to refits during its life for use by different operators on their routes. SeaFrance's former vessel *Manet* for example was originally built in 1984 and has seen service on a number of routes including Dover-Calais and Newhaven-Dieppe under SNCF and SeaFrance before being sold to Stena in 2009 for use on the Stranraer-Belfast route; it has since been sold to Spanish operator Baleària in 2012.

10.25 By way of recent example, on 18 October 2012 a new entrant "*Euroferries*" announced that it is looking to provide a fast craft ferry service between Ramsgate and Boulogne from 2013; copies of relevant press articles are attached at Appendix 2. A copy of the AFP report and company press release in English are copied below.

> "*Euroferries has already set up a website ahead of service launch in February 2013: http://www.euroferries.co.uk/. This shows details of the 1h15 crossing time, prices (from £49 return), terms and conditions and timetable with 4 daily crossings in each direction. It also has links to press releases for its new service and from the manufacturer of its new vessel.*"

10.26 The new service illustrates clearly the feasibility and timeliness of new entry, that existing spare ferry capacity does not deter new entry and that a new entrant can launch a fast-crossing service that competes directly with Eurotunnel's shuttle service. Although a previous attempt at new entry by Euroferries in 2009 had failed, it has indicated in public comment why its recent announcement of new entry will be successful (see Appendix 2).

10.27 Similarly, on 24 October 2012 DFDS announced (see Appendix 3) that with effect from 4 November it would:

10.27.1 charter the Moliere (which had previously been used by SeaFrance) and use it on the Dover-Dunkirk route,

10.27.2 return a chartered ship (the Deal Seaways) used by DFDS on the Dover-Calais route to its owners, Brittany Ferries for use on the Western Channel, and

10.27.3 replace the Deal Seaways on the Dover-Calais route with the larger vessel, the Dover Seaways, which was previously used by DFDS on the Dover-Dunkirk route.

10.28 The overall effect of the reshuffle by DFDS will be to increase the reliability of its schedule and to increase its transport capacity on both the Dover-Dunkirk and Dover-Calais routes. As DFDS' own press announcement (see Appendix 3) put it, "*The competitiveness of DFDS' set-up on the Channel will be strengthened by a combination of a reshuffle of ships between the two routes, Dover-Dunkirk and Dover Calais, and the charter of a new ship, MOLIERE.*" In a later press article (see Appendix 3), the senior vice president and head of DFDS' Channel ferry business said, "*our Dover-Calais route will be greatly enhanced by Delft Seaways [the renamed Moliere]. **Her speed and large capacity will enable us to deliver the very high capacity and frequency that our customers need***" (emphasis added).

10.29 GET considers that the announcements by DFDS and Euroferries indicate that the Short Sea route is a highly competitive one, where existing operators continuously look for new sources of competitive advantage (e.g. like P&O investing in new and bigger vessels with more capacity) and where new entry is feasible and happens in practice. The announcements also indicate the ability of ferries to be quickly moved across routes by operators, to accommodate changes in customer demand patterns and market conditions.

10.30 In a more general sense, GET estimates that a new entrant on the Short Sea route would face relatively few barriers to entry. The initial investment, principally consisting of the cost of purchasing or renting a ferry, is far from being prohibitive, especially given the option of chartering a vessel. Moreover, GET stresses that the fixed operating costs (registered office, advertising, etc.) are relatively small in relation to the variable operating costs, while the volume of staffing is adapted, depending on the number of ships and the number of crossings made. The port fees are, in themselves, also a function of the number of ships and crossings. Therefore, an operator may very well (like GET via MFL, or Euroferries) enter the market with a single or even two ships.

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 [REDACTED]% of its turnover in 2013. For example, [REDACTED]. Consequently, the barriers to entry are relatively weak, in particular for maritime operators possessing ships ready to be re-routed. In GET's opinion, the costs of expansion by an existing operator (increasing its rotation numbers but without buying or leasing additional ferries) are very low, essentially comprising just additional staff/fuel costs and harbour dues, and additional routings could be readily added should demand exist.

10.32 **Significant excess ferry transport capacity**

10.33 There is currently considerable spare capacity on the Short Sea route, and also on other routes. This capacity has of course been supplemented by GET's acquisition of the Vessels, two of which have so far resumed day-to-day operational service with MFL. Given its nature as a new start-up, MFL has considerable spare capacity on the *Berlioz* and *Rodin*. In contrast to "low-cost" entry which can be achieved (especially by renting vessels), P&O has recently acquired two new so-called "*superferries*", the "*Spirit of Britain*" and the "*Spirit of France*", reputed to have cost £300 million, for use on the Short Sea. Given its considerable expenditure on these "*superferries*", P&O can be expected to engage in extremely aggressive price competition to try and ensure that these ferries are fully utilised[67].

10.34 Also, DFDS announced in October 2012 that it was relocating the Dover Seaways in order to increase its operating capacity on the Dover-Calais route and capacity on the Short Sea route will increase again once Euroferries begins operations in 2013. **In other words, there is already significant spare capacity on the Short Sea route which is being further increased as a result of recent announcements by GET's competitors and by MFL beginning operations, replacing the ex-SeaFrance capacity which had been removed from the market.** GET does not recognise the comment in the Decision that there are general capacity constraints on the Short Sea[68]. For its part, the FCA in its decision found "*the existence of excess capacities in the cross-channel transport market, the overall average capacity usage rates of the maritime operators being between 50% and 70% over the period from January to June 2012, this being a period when MFL's ships were not in service. Eurotunnel's average capacity usage rates over the same period were around [*REDACTED*]% for freight and [*REDACTED*]% for passengers*"[69]. The charter of the Moliere will have further increased DFDS' operational capacity, as discussed elsewhere in this submission.

[67] The magnitude of investment already made in buying these new "superferries" by P&O, which is of course indirectly owned by the Emirate of Dubai, makes it highly unlikely that P&O would react passively to any attempt by GET to engage in bundling or predatory pricing, which are two of the possible theories of harm raised by the OFT.
[68] See, for example, Decision paragraphs 111 or 125. This is also inconsistent with the statement at paragraph 58 of the FCA's decision.
[69] FCA decision paragraph 58

The FCA further found, "*the possibilities of finding an alternative maritime operator to MFL therefore exist, even during so-called peak periods*"[70].

10.35 Although this additional transport capacity has been brought to the Short Sea route, GET estimates that in 2011:

10.35.1 the overall volume of passenger vehicle traffic carried on the Short Sea has dropped by about 0.4%, with the proportion carried by ferries declining by about 6.9% ([REDACTED]%); and

10.35.2 the overall volume of freight traffic on the Short Sea has increased by about 3%, but the proportion carried by ferries declined by about 7% ([REDACTED]%).

10.36 **GET has provided in Tables 4 and 5 in Appendix 9 its best estimates of overall capacity and utilisation for the period 2004-2012. It is clear from Appendix 9 (and also from MFL's traffic numbers) that there is considerable spare capacity amongst ferry operators on the Short Sea route, meaning that they are all competing very aggressively to win business in order to try and cover their fixed costs.**

10.37 This is also confirmed by the FCA who noted in their decision that the data collected from ferry operators show that their average capacity utilisation between January 2012 and June 2012 was between 50% and 75%.[71]

10.38 The extremely tough trading conditions and significant over-capacity mean that ferry operators such as DFDS[72] and P&O can be expected to compete very aggressively on price and quality of service for new passenger and freight transport business. Customers can switch easily and quickly because there are no or minimal costs or barriers to switching between suppliers and for many customers price is the main (or one of the key) purchasing criteria. Larger freight customers in particular negotiate prices individually with the operators and retain the option of splitting their volume amongst two or more operators to play them off against each other and/or to maintain flexibility.

10.39 **Constraints on Eurotunnel's pricing**

10.40 **In GET's opinion, customers or groups of customers could easily find, via the ferry companies already operating, alternative suppliers of transport services on the Short Sea route (including on Dover-Calais route) that would be able to provide them with the same transport services as they currently source from Eurotunnel or MFL.** In GET's opinion:

10.40.1 no individual customer (even its largest freight customers) would have any problem in sourcing its transport services other than from GET without delay,

10.40.2 this would be the case even if large groups of customers (or large individual freight customers) wanted to do so at the same time, and even if the level of ferries' spare capacity is lower than that currently estimated by GET, and

10.40.3 even if for some customers they may have a limited share of their demand that must use Eurotunnel's freight shuttle because of its shorter crossing time and more frequent schedule those customers can still move the rest of

[70] FCA decision paragraph 63
[71] FCA decision, page 12, paragraph 58.
[72] As with P&O, DFDS has significant financial and operational resources as Northern Europe's largest shipping and logistics company, operating a network of 25 routes with 50 freight and passenger ships in the North Sea, Baltic Sea and the English Channel. The company is also listed on the OMX stock exchange and was founded in 1886. DFDS can also therefore be expected to react decisively to any attempt by GET to engage in bundling or predatory pricing. See http://www.dfdsgroup.com/.

their (less time-sensitive) demand to ferry competitors. The threat of doing so gives those freight customers real bargaining power when negotiating with Eurotunnel in relation to the prices and service quality for their time-sensitive demand volumes.

10.41 The significance of this is not just that customers would be able to switch supplier, but, crucially, that their ability to do so implies that any threat of switching they make must be seen as very realistic by GET. Moreover, GET is aware that its ferry competitors have idle capacity and would be willing to supply transport services at low margins. Eurotunnel's larger freight customers, who have extensive experience of bargaining in this sector, are able to exploit this and drive hard bargains in negotiation which leads to competitive pressure throughout companies operating on the Short Sea (including on the Dover-Calais route).

10.42 In practice, only a proportion of Eurotunnel's sales would need to be absorbed by its ferry competitors to prevent GET from profitably raising prices. In order to prevent GET from raising prices it is sufficient that each of the larger freight customers is able to credibly threaten to move capacity to a ferry provider. This is because negotiations between Eurotunnel and its larger freight customers are conducted independently. Competitors have the capacity to compete for each large customer, so each large customer can credibly threaten to switch.

10.43 As well as individual customers having the ability to switch (which would be consistent with how negotiations actually take place in the market) competitors have sufficient spare capacity that whole groups of customers, including Eurotunnel's larger freight customers, could attempt to switch at the same time.

10.44 Even if there should be a minor element of diversion of customers from Eurotunnel to MFL, should the former attempt uncompetitively to increase its prices, there would be a financial loss to GET overall because the ticket prices and margins on the additional customers using MFL would be materially lower than for the lost customers no longer using Eurotunnel.

11. COMPETITIVE ASSESSMENT

- *Competition wider than Short Sea and includes Western Channel and North Sea ferry services to the Continent.*
- *In any event the Asset Acquisition creates a minimal increase in Short Sea share of supply.*
- *Substitutability between these routes shown by inter-availability across route groupings.*
- *All Short Sea ferry companies have considerable spare capacity sufficient to accommodate customer switching.*

11.1 Minimal increase in share of supply as a result of the Asset Acquisition

11.2 Even if the Asset Acquisition is considered to be a relevant merger situation, at the time of the OFT's Decision, MFL had increased GET's turnover, capacity and share of supply by about 1%, which was acknowledged by the OFT at paragraph 85 of its Decision. The OFT nevertheless attributed to MFL the passenger and freight transport volumes and shares of supply achieved by SeaFrance in 2011[73]. The OFT did so on the basis that "*the OFT does not consider the current share of MyFerryLink to be a realistic representation of what Eurotunnel has gained as a result of the Transaction*"[74]. GET disagrees and considers that the current turnover of MFL is precisely the basis on which the OFT should have, and the CC should, evaluate the Asset Acquisition and form a view on whether it may give rise to an SLC.

11.3 In attributing to MFL the 2011 turnover achieved by SeaFrance using the Vessels, the OFT made the following mistakes:

11.3.1 First, it ignored the fact that only two of the three Vessels acquired by GET are currently operational, whereas the 2011 SeaFrance figures in the Decision assumed that the *Nord-Pas-de-Calais* is currently being used operationally by MFL (which is not the case) and will in the future only be used to a limited extent by MFL as mentioned above in section 5.

11.3.2 Secondly, the OFT did not take account of the actual sales and turnover achieved by MFL, using instead the much higher figures which SeaFrance had achieved. However, because SeaFrance went into liquidation its shares of supply had already been redistributed in full amongst the other operators by the time of the Asset Acquisition. Attributing to MFL all of the 2011 SeaFrance turnover from the Vessels would imply that it will recover all of SeaFrance's turnover and market share which could well not be achievable, and which is not consistent with MFL's current trading performance.

11.3.3 Thirdly, given the importance of a high frequency of rotations for customers, the relation between the number of ships and market share is not proportional. An operator with five or six ferries would get a disproportionate market share compared to an operator with two ships because it can achieve a much higher frequency of rotations. It is therefore not sufficient to exclude only the share of the Moliere as SeaFrance, when operating with four ferries, could offer a much more attractive commercial proposition than MFL which is currently just operating two Vessels.

11.4 As a new business starting from scratch, MFL's ships have been travelling almost empty. For example, a Nord Littoral journalist reported that only five vehicles left the *Rodin* upon its arrival in Dover and then he was the "*only single passenger on board the ferry"* in the direction of Calais *"while the waiting line stretched in the embarkation corridors of DFDS Seaways and P&O*"[75]. A copy of an article published by Nord

[73] The OFT"s Decision (paragraph 85) did however properly exclude turnover and capacity attributable to the *Moliere* which was not acquired by GET from the liquidator of SeaFrance.
[74] Decision paragraph 85.

Littoral on 10 November 2012, discussing the low volumes being carried by MFL, is provided at Appendix 11.

11.5 In fact, since 20 August 2012 to 14 November 2012 the *Berlioz* and *Rodin* have together carried [REDACTED] cars, and [REDACTED] lorries. In terms of future bookings, MFL has advance orders in total of [REDACTED] one-way crossings for cars; it has no advance orders for lorries simply because freight operators do not in practice book ahead (see paragraph 11.50 below). These actual volumes carried by MFL are considerably below the ferries' potential operating capacity, giving a capacity utilisation of only about [REDACTED]%[76].

11.6 SeaFrance had ceased operating for almost nine months before MFL began operating under new branding[77]. Consequently, GET considers that there is no basis for the CC to evaluate MFL as a continuation of the ex-SeaFrance business and to accredit to MFL the 2011 turnover and share of supply previously enjoyed by SeaFrance.

11.7 If only MFL's minimal turnover and share of supply generated since 20 August 2012 are taken into account, Eurotunnel's share of supply for freight or passenger transport on the Short Sea will in each case increase by less than 1% as a result of the Asset Acquisition. GET considers that such an increase is *de minimis* and cannot be considered sufficient to risk giving rise to an SLC on the balance of probabilities test.

11.8 **Transfer of customer demand on SeaFrance ceasing operations**

11.9 SeaFrance ceased operating on 16 November 2011 and its customer-base immediately diverted to using other operators. As noted above, the nearest replacements for the services formerly operated by SeaFrance are maritime transport services; these are closer to ex-SeaFrance in terms of price, frequency of service and crossing time, rather than Eurotunnel's rail services. This is supported by GET's estimates (see Table 6 below).

[75] Article published on 21 August 2012 in the daily newspaper Nord Littoral, "La (re) naissance de My Ferry Link" ["The (Re) birth of My Ferry Link"].

[76] To give a sense of the low utilisation this represents, the *Berlioz* and *Rodin* can each carry 700 cars or 120 HGVs and 780 passengers and on average they achieve 8 round trips (rotations) per day.

[77] The nature of the receivership process as undertaken by the Paris Court, as can be seen from its June 2012 judgment, gave rise to no expectation or likelihood that the SeaFrance business would be continued or that it would be substantially resumed by any purchaser of the Vessels and other assets.

Table 6:
Redistribution of SeaFrance Freight Share

	Eurotunnel	P&O Ferries	SeaFrance	DFDS Dunkirk	DFDS Calais	MyFerryLink	Total Market
Sep 11	108,101	84,310	53,549	38,044	0	0	284,004
Sep 12	121,232	101,828	0	41,175	16,075	1,332	281,642
Variance	13,131	17,518	-53,549	3,131	16,075	1,332	-2,362

Share 2011	38%	30%	19%	13%	0%	0%	100%
Share 2012	43%	36%	0%	15%	6%	0%	100%
Variance	**+5 pts**	**+6 pts**	**-19 pts**	**+1 pts**	**+6 pts**	**-**	

Redistribution	**+5 pts**	**+6 pts**	**-19 pts**	**+1 pts**	**+6 pts**	**+0 pts**
Redistr.in %	**+26%**	**+34%**	**(100%)**	**+6%**	**+30%**	**+3%**

Redistribution of SeaFrance Passenger Share

	Eurotunnel	P&O Ferries	SeaFrance	DFDS Dunkirk	DFDS Calais	MyFerryLink	Total Market
Sep 11	200,423	115,957	55,491	83,798	0	0	455,669
Sep 12	223,644	142,596	0	72,259	32,922	7,982	479,403
Variance	23,221	26,639	-55,491	-11,539	32,922	7,982	23,734

Share 2011	44%	25%	12%	18%	0%	0%	100%
Share 2012	47%	30%	0%	15%	7%	2%	100%
Variance	**+3 pts**	**+4 pts**	**-12 pts**	**-3 pts**	**+7 pts**	**-**	

Redistribution	**+3 pts**	**+4 pts**	**-12 pts**	**-3 pts**	**+7 pts**	**+2 pts**
Redistr.in %	**+22%**	**+35%**	**(100%)**	**(27%)**	**+56%**	**+14%**

11.10 It can be drawn from the above data that:

11.10.1 the ferries took 74% and 78% of the SeaFrance traffic (for freight and passenger traffic, respectively) following its demise,

11.10.2 the new DFDS route to Calais has taken over a quarter and over half of the traffic for freight and passenger, respectively, and

11.10.3 the distribution of customers supports GET's view that it was not SeaFrance's closest competitor, as GET took in share of traffic from the demise of SeaFrance far less than its pre-liquidation market share.

11.11 In Table 3 of the Decision, the OFT purported to identify diversion ratios from SeaFrance to other operators, concluding that a majority of passenger traffic diverted to Eurotunnel. However as the Decision acknowledged at footnote 59, the OFT's analysis did not take account of seasonality. As such, GET considers that the OFT's conclusions are flawed, being inconsistent with GET's own analysis (see Appendix 8) which does take account of seasonality, and which indicates that P&O and DFDS are the closest competitors to SeaFrance for passenger and freight traffic.

11.12 It is also worth noting that the mix of vehicles carried by Eurotunnel changed over this period, with Eurotunnel experiencing a material increase in the number of vans carried by it on its freight (rather than on its passenger) shuttles. [REDACTED].

11.13 **It is clear from the above that SeaFrance's customers considered P&O and DFDS to be closer competitors than Eurotunnel, which is why a higher proportion of SeaFrance's customers diverted to P&O and DFDS rather than to Eurotunnel** – even though Eurotunnel's overall shares of supply were higher for freight and passenger transport. These outcomes also indicate that, more generally speaking, the competitive offerings of the maritime operators and that of Eurotunnel are differentiated and that, due to this, ferry customers are more likely to switch to other ferry operators than to Eurotunnel.

11.14 Eurotunnel considers P&O to be its closest competitor. For example, after the fire that occurred in the Tunnel under the English Channel in September 2008, Eurotunnel's share of freight transport on the Short Sea decreased by about [REDACTED], and it estimated that about [REDACTED]% of the lost customers moved to P&O[78]. This is principally explained by the fact that the ships operated by P&O are on average newer and perform better than those of the other maritime operators, offering greater reliability and increased speed gained in loading and offloading merchandise. P&O also offers a 24 hour per day service. In short, Eurotunnel considers that P&O was (and still is) its closest competitor on the Short Sea route in terms of frequency and quality of service.

11.15 By way of support, the Compass Lexecon paper at Appendix 8 considers a number of "*shocks*" including the 2008 Tunnel fire and illustrates in section 2 that (a) competition amongst the ferry operators appears to be stronger than competition between ferry operators and Eurotunnel, and (b) that P&O appear to have provided the most important competitive constraint on both Eurotunnel and SeaFrance. As GET submitted to the OFT[79], following the 2008 Tunnel fire, there was an initial but transitory transfer of sales to SeaFrance from Eurotunnel (reflecting the fact that SeaFrance had more immediate spare capacity), but traffic in turn moved on a lasting basis to P&O, indicating that P&O is a closer competitor to Eurotunnel than was SeaFrance (contrary to the statements at Decision paragraphs 95-96).

11.16 **Strong existing competitors and potential for new entry and expansion**

11.17 As noted above, post-acquisition Eurotunnel shall continue to face strong competition from other existing ferry operators on the Short Sea (i.e. P&O and DFDS) and from other operators, such as airlines and ferry companies operating on other routes between the UK. The ferry companies also have the material advantage over Eurotunnel/MFL of being able to offer their customers packages of routes and packaged prices across routes, and the flexibility of different ports of departure and return, whereas GET operates only on Dover-Calais.

[78] Diversion calculated on the basis of the parties' growth shares and those of their principal competitors between 2011 and April 2012.
[79] See Issues Paper Response paragraph 129.

11.18 **Ferry competitors' spare capacity:** GET believes that other ferry companies operating on the Short Sea and other routes have considerable spare capacity that would allow them to increase materially the volume of freight or passenger traffic carried by them. In GET's opinion, such spare capacity means that ferries could easily accommodate considerable switching of demand by customers away from Eurotunnel (if the latter should attempt to increase its prices or reduce the quality or frequency of its service) or from MFL.

11.19 P&O and DFDS each operate three times as many ferries as MFL[80], which currently has just two operational ferries, which means that they have considerably more spare capacity than MFL, allowing them to service any freight or passenger customers that they may win from MFL or Eurotunnel. In fact, the spare capacity within P&O and DFDS means that they have (and will retain) considerable incentive to reduce their prices to increase their occupancy levels. In any case, this incentive would increase if GET raised its prices (or even attempted to do so).

11.20 Further, as noted above and as is clear from the recent DFDS/LD entry on the Calais-Dover route, the barriers to and costs of entry are low (and are even lower for companies already operating ferries).

11.20.1 The recent announcement of Euroferries' intention to start operating on the Short Seas route indicates clearly the potential for new entry.

11.20.2 Similarly, DFDS' recent announcement of its intention to expand its operational capacity on the Short Seas route by changing its portfolio of ferries indicates the ability of ferry companies to expand should it be commercially attractive to do so.

11.21 It is clearly not feasible for the Asset Acquisition to give rise to an SLC given the ability of customers to switch to competitors who have ample spare capacity to accommodate them, and the further constraint from new entry and expansion by competitors should that spare capacity not be sufficient.

11.22 GET notes the comments made in the Decision[81] to the effect that DFDS is a weak competitor compared to Eurotunnel or P&O. GET rejects this observation as unfounded; it considers DFDS to be as strong a competitor as P&O and considers that the recent adjustment of its ferry portfolio (introducing a larger ferry onto the Dover-Calais route) will further strengthen DFDS as a competitor (Appendix 14 also illustrates this). GET considers that the Decision implicitly, but incorrectly, presumes that DFDS needs to be as large an operator as Eurotunnel before it can exercise a material competitive constraint[82]. GET considers that such an assumption is fundamentally flawed; as a smaller operator (albeit a materially larger ferry operator and with a much greater frequency of sailings than MFL) with significant spare capacity, DFDS exercises a material competitive constraint because it has every incentive to reduce prices to win business away from its rivals in order to improve its capacity utilisation. Conversely, if it was maintained that DFDS is a weak competitor of P&O, it could only be concluded that MFL is an even weaker (if any) competitor of P&O and DFDS for exactly the same reasons (insufficient scale of operations). Then, MFL could hardly compete for ferry traffic against P&O and DFDS and the launch of MFL by GET could not be considered to change the pricing incentives of Eurotunnel in any significant manner;

11.23 On the issue of capacity, the Decision wrongly notes that it is unclear whether the Asset Acquisition will introduce more capacity onto the Short Seas route[83]. In GET's opinion, it is evident that SeaFrance no longer operates and consequently, by

[80] P&O and DFDS are currently understood to have 7 and 6 ferries respectively operating on the Short Sea whereas MFL currently has just two ferries operating on a day-to-day basis.
[81] Decision paragraph 102
[82] Decision paragraph 103
[83] Decision paragraph 106

commencing a ferry business using the Vessels MFL has increased the amount of ferry capacity operating on the Short Sea route. GET considers that this is the obvious effect of MFL beginning operations, because absent the Asset Acquisition there is no certainty that the Vessels would have been used on the Short Sea route by any other purchaser.

11.24 Further, **the Decision states[84] that competing ferry operators may not have sufficient spare capacity to be able to thwart any attempt by GET to increase its prices. As noted above, however, there is very material spare capacity just within P&O and DFDS, given that they are understood by GET to be generally operating at about 60% capacity utilisation**. It has also been noted above that customers, including freight customers, face no material barriers or costs to switching and in fact that freight customers often multi-source. As such, customers can switch to alternate service providers if GET should attempt to increase prices. Eurotunnel's experience following the 2008 Tunnel fire[85] indicates that freight customers can (and do) readily switch to (and remain with) ferry providers.

11.25 **Eurotunnel cannot raise its prices uncompetitively:** Even during periods of peak demand, Eurotunnel will have no capability of increasing its prices because:

11.25.1 at peak periods, passengers have two options. First, as noted by the FCA in its decision,[86] they can slightly alter their travelling schedule to benefit from lower prices at other times of day, or during periods with lower demand and lower prices. Second, since ferry operators have lower average capacity utilisation than the Tunnel, customers may be able to switch to those ferry operators who possess spare capacity even when the Tunnel is constrained; and

11.25.2 for freight customers, as noted by the FCA in its decision,[87] capacity constraints are not experienced at the same time by the Tunnel and by ferry operators (i.e. there is usually a ferry operator with spare capacity when the Tunnel capacity utilization is particularly high). In addition, freight prices are set annually on the basis of predicted traffic volumes, thus their setting is also/mainly driven by periods with overcapacity and GET has no incentives to undermine Eurotunnel's capacity utilization at those periods, which are much longer in duration than are the periods of peak demand. Further, prices are negotiated individually with each freight customer, none of which is large enough to saturate available ferry capacities.

11.26 In any case, GET has no incentives to unilaterally increase Eurotunnel's prices as a result of operating MFL. Given MFL's very low market share, and lower frequency than other ferry operators, very few customers would be expected to switch to MFL. Any price increase by Eurotunnel would instead largely benefit MFL's competitors. In addition, to the extent that customers did switch to MFL, given the lower margins that MFL earns, GET would be earning lower margins on these customers than it would have earned had they used the Tunnel in the absence of a price increase.

11.27 **Customers can switch:** [88]The Decision refers at paragraph 112 to discount systems as a possible barrier to customer switching. However, Eurotunnel does not operate an explicit conditional rebate scheme. Where Eurotunnel offers discounts these are granted up-front to freight customers in the form of lower ticket prices on the premise that they will achieve certain volume targets. Consequently, because customers have already received the financial benefit of the discount there is no disincentive to them switching supplier, in the same way that there would be a disincentive if those

[84] Decision paragraphs 107 - 112
[85] See, for example, the Compass Lexecon report at Appendix 8.
[86] FCA decision, page 13, paragraph 60.
[87] FCA decision, page 13, paragraphs 61 to 66.
[88] Eurotunnel has a small and declining number of retrospective volume rebates for freight customers, which are limited to [REDACTED] of its customers and their maximum value is less [REDACTED] of Eurotunnel's total revenue.

discounts were paid retrospectively by Eurotunnel (as GET understands is the usual approach with ferry operators.

11.28 It is accepted by GET that not <u>all</u> of its customers may be able to switch at the same time to ferry operators. However, <u>enough</u> of Eurotunnel's customers could switch to alternate suppliers to thwart any attempt by Eurotunnel to increase its prices, reduce its service quality or otherwise act in a way that is injurious to competition. This analysis is unaffected by the fact that Eurotunnel is operating at a [REDACTED]% load factor for freight traffic or that ferry companies on the Short Sea do not currently have enough spare capacity to be able to absorb all of Eurotunnel's current freight capacity.

11.29 This stems naturally from a simple critical loss reasoning, whereby GET would balance both the increase in unit margins triggered by a small (e.g. 5%) increase in prices which would apply to the sales volume handled by GET after the price increase and the loss in volume triggered by that price increase. The operational model of GET involves *inter alia* [REDACTED]. Then a small increase in their prices would imply a small increase in margin over variable costs. In these circumstances, even a limited amount of sales volume diverted to competitors because of the price increase would make this price increase overall unprofitable.

11.30 For the sheer purpose of illustration and without prejudice to the actual levels of margins over variable costs, with a margin over variable costs of 75%, a price increase of 5% would mean an increase in unit margin over variable cost of 6.7%; this 5% price increase would be unprofitable if the corresponding loss in volume was 8% of the volume addressed by GET pre price increase. Given the ability and incentives of freight customers to switch to rival ferry operators if facing such a 5% price increase, it is likely that the actual diversion of demand from Eurotunnel to rival ferry operators would make such a price increase unprofitable. As the threshold of demand diversion to make a price increase unprofitable is low, ferry operators would not experience capacity constraints to meet extra demand at this threshold level or above.

11.31 **<u>Entry and expansion</u>**: The recent example of DFDS' ability to shuffle its ferry fleet to increase its freight operating capacity indicates that there is a ready source of additional ferries that can be hired if commercially attractive by existing (or new – see, Euroferries' example, which could be replicated by a freight new entrant) ferry operators, which in turn exercises an additional competitive constraint on Eurotunnel. For MFL, of course, as a much smaller and nascent operator, its entire customer base (and even its entire operating capacity) could easily be absorbed by DFDS and P&O, indicating the extent to which customers could switch easily to alternate ferry operators.

11.32 This is confirmed by the decision of the FCA which considers that given competitors' overcapacities, the Asset Acquisition will not have horizontal effects.[89]

11.33 In the Decision, the OFT considered the likelihood and timeliness of new entry on the Short Sea; it concluded that entry is achievable but that successful and long-lasting entry is difficult[90]. GET agrees that entry is feasible, as borne out by the examples cited in the Decision, by DFDS' recent entry onto the Short Sea and the announcement of its ferry changes, and by the announcement of Euroferries' planned new entry. It is also clear from these examples that entry on the Short Sea route can occur within one year. In contrast to the comments in the Decision, GET does not consider that harbour slots are a material barrier; it acquired from scratch new slots within a matter of weeks at Dover and Calais, and Euroferries is obtaining new slots (albeit at Ramsgate rather than at Dover in the UK) without difficulty.

[89] FCA decision, page 14, paragraph 67.
[90] Decision paragraphs 113 - 118

11.34 The Decision also notes that new entry may be discouraged by the scale of the existing spare capacity on the Short Sea route[91]. GET has the following comments on this. First, it validates GET's own comment that there is sufficient spare capacity amongst ferry companies to ensure that Eurotunnel cannot increase prices (see GET's comments at section 10 above in response to a claim elsewhere in the Decision[92] that there is insufficient spare capacity). Secondly, it is the intensity of current levels of competition that discourages some new entry; if there were to be any attempt by Eurotunnel to increase prices or reduce its service quality this would alter the existing dynamic and make new entry more attractive. Thirdly, the statement in the Decision is at odds with the recent expansion by DFDS and P&O.

11.35 **Continuing inter-availability agreements**

11.36 Eurotunnel has long-standing inter-availability agreements with P&O and DFDS. GET also understands there generally to be inter-availability agreements between the ferry operators. MFL has signed an inter-availability agreement with Eurotunnel and has inter-availability arrangements with P&O, Brittany Ferries and DFDS.

[91] Decision paragraph 117 competitor comments
[92] For example, Decision paragraph 125

11.37 These inter-availability agreements only address passenger transport and have been provided in order to accommodate an accident or serious incident causing an interruption of passenger transport, in order to maintain continuity of service for users. The agreements might be used, for example, in the event of a material disruption to traffic during the Channel Tunnel (e.g. a fire), or during strikes blocking a port or in the event of unfavourable weather conditions.

11.38 The inter-availability agreements are in practice implemented only approximately a few times annually. GET has provided at Appendix 6 details outlining the value and volume of traffic between it and other ferry companies which has taken place pursuant to the inter-availability agreements. Even during 2008, when the Channel Tunnel was badly affected by a fire, Eurotunnel only invoked the inter-availability agreements with ferries to an aggregate cost of [REDACTED] (equivalent to [REDACTED] vehicles).

11.39 There are no inter-availability agreements in respect of freight transport. If there is a service interruption for the ferries or the Channel Tunnel, freight companies would be expected to make their own alternative arrangements. In practice, however, this is unlikely to be a problem because most freight companies are understood to have contractual transport arrangements with ferry companies in addition to Eurotunnel.

11.40 The inter-availability agreements signed by Eurotunnel are in standard form, apply for a year and provide a single price at which the signatories to an agreement would carry the other party's customers. Under the inter-availability agreements, if there is a service disruption a participant may ask its customers who have already checked-in if they would be willing to use another service. If the customer agrees, and if an operator signatory to the inter-availability agreements has space which they are willing to make available, then the company with whom the customer is already checked-in would give that customer a pre-paid ticket (from a stock that would be held for that purpose) allowing it to travel with the other operator. The customer would then need to make its own way to the other operator where it would check-in again using the pre-paid ticket with which it had been provided. The inter-availability agreements avoid the need for the customer to have to purchase its own replacement ticket.

11.41 The operators would not reserve space in case there is an event that leads a company to use the inter-availability agreements and if there is such an event then space is taken on a "*first come first served*" basis. If the other operators are already operating at maximum capacity, then they may decline to accept another party's customers and there have been situations when both Eurotunnel and the ferries have done so.

11.42 Given the historically low value and volume of traffic that is subject to the inter-availability arrangements (and given there is no foreseeable reason why usage levels should change materially in the future), GET considers that there is no reasonable prospect of the inter-availability arrangements being misused by GET to raise rivals' costs or as a means of foreclosing rivals[93].

11.43 In any event, Eurotunnel does not intend to cease operating, or to change, any of the inter-availability arrangements it has simply because it has acquired the Vessels. In fact, with only two ferries in service, MFL will not be best placed in terms of capacity or comparable service to absorb all of the passenger traffic of the Eurotunnel shuttle service in the event of disruption of the traffic in the Tunnel (such as for example during the 2008 fire). The events causing Eurotunnel to enter into such inter-availability agreements remain unchanged. In any case, the ferry operators are not in any way dependent on traffic from Eurotunnel via the inter-availability agreements for their operations, as is evident from the low value and volume of traffic that has taken place under them (see Appendix 6).

11.44 **"*Bundling*" of services across MFL/Channel Tunnel**

[93] This appears to be accepted by the OFT in the Decision, see paragraph 133.

11.45 Currently, tickets from MFL and Eurotunnel are each marketed, priced and sold separately.

11.46 As explained above, Eurotunnel has very limited spare capacity within the Channel Tunnel, whereas there is considerable spare capacity amongst ferry operators. Equally, although there is a price differential between Eurotunnel's tickets and those charged by the ferries, Eurotunnel considers that for freight customers the price gap is minimal once proper account is taken of the savings in journey time, driver working hours and fuel cost for freight customers using Folkestone instead of Dover. That is, the price differential between Eurotunnel and ferry services merely reflects the value of freight customers' benefits from using Eurotunnel rather than ferry services.

11.47 The differential in time between travelling through the Tunnel and by ferry on the Short Sea is however not so large as to prevent even the most time-sensitive customers from moving from one option to the other. This capacity to adapt has been demonstrated subsequent to the fire that occurred in the Tunnel at the end of 2008: demand naturally and substantially moved away from the Tunnel to the maritime route. Further, almost all of the larger freight customers use both the Tunnel and ferry operators in order to ensure flexibility and to maintain a sufficient degree of competition between their various suppliers. The result is that GET will not be in a position to use its ownership of the Tunnel to inhibit competition from or between ferry operators.

11.48 In other words, Eurotunnel offers freight customers benefits in terms of shorter crossings and greater frequency of services when compared to ferries; but its ticket prices are higher. This price differential does not mean that Eurotunnel is an unavoidable business partner for freight customers, it simply means freight customers evaluate the direct economic benefits (time savings) of using Eurotunnel as opposed to ferries; but they have a meaningful choice between using Eurotunnel and the ferries and would switch to the former if the price differential was larger than it currently is.

11.49 Given the above, GET considers that there is no incentive or ability for it to bundle or tie sales of freight tickets through the Tunnel with ferry crossings on MFL in a way that would be to freight and all customers' detriment.

11.50 In this context, GET agrees with the findings in the Decision that ferries and Eurotunnel cannot identify or price differentiate between express and non-express freight customers at the time when they set their prices, because freight operators will not pre-book crossings with a particular operator but will instead arrive at the operator's point of departure and take the next available crossing[94]. In fact, drivers or freight operators will often call ahead and, based on issues such as queue and travel times and traffic conditions, decide whether to use Eurotunnel or a ferry. GET also agrees with the finding in the Decision that, for similar reasons, ferries and Eurotunnel are unable to price discriminate between freight customers for hazardous and oversized goods because such loads cannot be identified at the point at which prices are set by operators[95].

11.51 Any attempt by GET to discriminate against customers that did not purchase a bundle of services from GET would likely precipitate even more intense price competition from the ferry operators who have considerably more spare capacity than Eurotunnel has in the Tunnel and/or MFL has on its two operational ferries for these customers and therefore for all customers.

11.52 For the same reason, even if customers may be considered as time-sensitive on one leg of their return journey between the UK and France, there would be no incentive or scope to require or unduly incentivise them to use MFL on the non-time-sensitive leg of their journey, because that would simply be likely to precipitate even more intense

[94] Decision paragraph 71
[95] Decision paragraph 72

price competition from the ferries for both legs of that customer's return trip. In GET's opinion, freight customers could negotiate separately with ferry providers the price payable for tickets on the ferry leg of any return journey and the extent of over-capacity amongst ferry operators means that they would be likely to compete intensely for the ferry business.

11.53 There may however be potential benefits for some customers if GET offered the flexibility of being able to deal in a coordinated manner with MFL and Eurotunnel, in terms of flexibility of routes and potentially even of pricing packages combining outward and return routes across MFL and Eurotunnel. Such flexibility might allow GET (and especially MFL) to compete more effectively with the packages of routes and pricing being offered by the ferry companies, which are discussed above.

11.54 The lack of incentive or scope for Eurotunnel to engage in bundling or tying in a way that would be to customers' detriment is discussed in a separate report by Compass Lexecon, a copy of which is provided at Appendix 8. In particular, the Compass Lexecon report identifies in section 2 potentially material benefits of the Asset Acquisition to competition and customers. This is because SeaFrance competed most closely with P&O and DFDS (not Eurotunnel) and SeaFrance's market exit may well have allowed P&O to increase prices (see, for example, paragraph 2.85 of the report)[96]. The Asset Acquisition will enable MFL to exercise a greater competitive constraint on P&O, and DFDS which will increase competition between ferry operators and benefit customers.

11.55 In addition, in the issues paper dated 5 October 2012, the OFT mentioned that to exclude effectively rival ferry operators, i.e. ensure that they would only be able to match Eurotunnel's commercial proposition with prices that would be at or below their average avoidable costs, would imply an estimated discount on GET's train shuttle services in a €[REDACTED] to €[REDACTED] range. This represents a very important profit sacrifice in comparison to the margin GET currently earns on shuttle services, which manifestly undermines GET's hypothetical incentives to indulge in exclusionary behavior through "bundling" services across MFL/Eurotunnel.

11.56 **No scope to engage in exclusionary pricing behaviour**

11.57 GET considers that there is no realistic scope for it to try and exclude ferry competitors to MFL, by the pricing practices of either MFL or Eurotunnel.

11.58 As mentioned previously, Eurotunnel is on average currently operating at [REDACTED] utilisation on freight traffic, and during peak demand periods is also [REDACTED] utilisation on passenger traffic (see section 5 above). GET considers that within [REDACTED] years Eurotunnel will [REDACTED]. For GET to try and increase Eurotunnel's capacity would require very considerable investment (potentially of about €[REDACTED]) in some or all of [REDACTED]. By contrast, as discussed above, the ferry operators have very significant spare traffic capacity that allows them easily and at much lower cost to accommodate a significant volume of additional passenger and freight traffic.

11.59 The high fixed costs of the Channel Tunnel concession also mean that Eurotunnel needs to operate a yield management strategy in relation to pricing to offset those fixed costs and the high costs of servicing its debt (which was originally used to build the Tunnel).

11.60 Consequently, there is no incentive or scope for Eurotunnel to change its commercial approach in favour of significantly lowering its Channel Tunnel prices to try and win traffic volumes from ferry operators. Eurotunnel's current capacity constraints preclude it from accommodating a significant increase in traffic volumes and adopting

[96] Anecdotally, Eurotunnel has also recently heard i from some customers that P&O has been increasing its freight prices on the Short Sea route.

anything other than a yield optimisation strategy would be financially very damaging for Eurotunnel. Consequently, there is no reason to believe that GET would use its Channel Tunnel operations to adopt an aggressive low-price strategy to try and exclude ferry operators.

11.61 Conversely, there is no scope for MFL to initiate an extremely aggressive pricing strategy with the aim of trying to exclude existing ferry operators on the Short Sea route, including for the following reasons.

11.61.1 Because MFL only operates two ferries on a day-to-day basis it simply does not have the capability of running sufficient rotations on the Short Sea route to try and exclude via a predatory pricing policy P&O and DFDS who each operate three times as many ferries on the same market and who would be able to spread the costs of fighting a price war amongst a much larger number of rotations on the Short Sea route (and also on other routes).

11.61.2 MFL lacks the financial resources to itself fund such a predatory pricing strategy against its ferry competitors and Eurotunnel's high fixed cost base and existing debt levels mean that it would be unable and also unwilling to subsidise such predatory pricing behaviour by MFL. By contrast, P&O - a subsidiary of Dubai Ports which is in turn controlled by the government of the Emirate of Dubai – has very significantly more financial resources at its disposal than GET.

11.61.3 The combined MFL/Eurotunnel entity would lack the degree of market power needed to facilitate such a predatory pricing approach. As noted above, Eurotunnel's share of freight and passenger transport on the Short Sea will increase by materially less than 1% as a result of MFL beginning operations. MFL is not re-assuming the turnover and share of supply that were previously enjoyed by SeaFrance and is offering ferry services with materially less capacity and crossing frequency than its competitors.

11.61.4 Even if it did seek to adopt a predatory pricing strategy, there is no realistic opportunity of recoupment by MFL/Eurotunnel. In such a hypothetical (and unlikely) scenario, the intensity of competition from (a) the existing ferry operators on the Short Sea and other routes, (b) other operators (including low cost airlines) and (c) the scope for new entry and expansion on the Short Sea and other routes would all effectively preclude GET from recouping any costs of predation by charging supra-competitive prices.

11.62 The lack of incentive or scope for GET to engage in predatory pricing or other exclusionary pricing practices is discussed in a separate report by Compass Lexecon, a copy of which is provided at Appendix 8. In section 3 of its report, Compass Lexecon concluded that Eurotunnel:

11.62.1 would have no incentive to engage in predatory pricing behaviour,

11.62.2 would not be able to foreclose its most direct rivals (especially P&O), and

11.62.3 would not be able to recover its initial sacrifice during a recoupment phase.

11.63 **No scope for coordinated effects**

In the DFDS Decision, the OFT considered, and excluded, the possibility of whether that transaction might create or strengthen coordination between freight and passenger transport operations. GET considers that the OFT's analysis and conclusion applies equally to the Asset Acquisition for the reasons outlined in section 11 of the OFT Submission[97].

[97] Following the approach outlined in the Joint Guidelines, paragraphs 5.5.1 to 5.5.19.

12. CONCLUSIONS

12.1 By way of conclusion:

12.2 GET considers that the Asset Acquisition, including the Vessels, does not amount to an "*enterprise*".

12.3 Further, even if the Vessels and other acquired assets do amount to an enterprise, it would be improper for the CC to attribute to them the turnover and share of supply previously enjoyed by SeaFrance. This is because MFL is a new start-up business operating under a new brand, and is not a continuation of the ex-SeaFrance business[98], which ceased operating in November 2011. The turnover and share of supply of the SeaFrance business should be treated as having been dispersed amongst all remaining competitors, consistent with the exiting firm scenario, prior to the Asset Acquisition.

12.4 Even if GET's acquisition of the Vessels is considered to represent a relevant merger situation then it cannot feasibly be considered to give rise to an SLC – even if considered just on the Short Sea route - because:

12.4.1 The only turnover properly attributable to the MFL business is that which it has generated from the Vessels since it began operating on 20 August 2012 – and the increment that such sales represents to GET's shares of supply for freight and passenger transport on the Short Sea route is *de minimis* (about 1% on the Short Sea route for either freight or passenger transport).

12.4.2 Of the continuing strong competition from other ferry operators (especially P&O and DFDS on the Short Sea route, and from ferry companies operating on other routes from the UK) and from other operators such as low-cost airlines,

12.4.3 There are low barriers and costs of entry and expansion, especially for ferry companies operating on other routes, especially when it is taken into account that traffic volumes between the UK and France are projected to grow,

12.4.4 There is very significant spare capacity amongst other existing ferry operators who could absorb considerable additional traffic from freight and passenger customers (and who would face no or insignificant costs to switching from Eurotunnel/MFL to other operators),

12.4.5 There is no scope or incentive for Eurotunnel post-"*merger*" to cease operating inter-availability agreements, or to engage in bundling/tying or predation to the detriment of customers.

12.5 For the reasons outlined above, the proper counterfactual against which to assess the Asset Acquisition is one under which the Vessels and other assets were not used on the Short Sea route or other routes from the UK. The SeaFrance business had already ceased operating in its entirety and all third parties had been given an opportunity to acquire the Vessels but had declined to try and do so under a transparent sales process that had been administered by the Paris Court. In other words, the essential requirements of the Exiting Firm Scenario had been satisfied before the Asset Acquisition, with the turnover and market share of SeaFrance being distributed amongst the remaining operators.

[98] Further, it should be recalled that Eurotunnel has acquired three ferries, of which only two are currently being used for day-to-day operations, whereas SeaFrance had operated four vessels immediately prior to its liquidation.

12.6 There is therefore no prospect that the Asset Acquisition can be expected on the balance of probabilities to lead to an SLC in any market(s) in which the parties are active.

12.7 In fact, the Asset Acquisition enhance GET's competitive offering and widens the degree of choice available to consumers. The Asset Acquisition also offers the potential for Eurotunnel/MFL to become a stronger competitor to the ferries (who are able to benefit from their wider route network by offering route and pricing packages across routes).

12.8 The CC should therefore unconditionally clear the Asset Acquisition.

19 November 2012

Appendices

Appendix 1:	Details of significant events in the preceding five years
Appendix 2:	Press comments in relation to Euroferries' October 2012 announcement of new entry
Appendix 3:	Copy press comment re: DFDS' changes in its ferries on the Short Sea route
Appendix 4:	Details of Eurotunnel's top 10 freight customers over each of the last three years
Appendix 5:	Copy article discussing the Asset Acquisition from the Financial Times dated 8 November 2012
Appendix 6:	Details of inter-availability usage by Eurotunnel and ferry companies
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Appendix 7:

A further copy of submissions made by GET to the FCA

Without reviewing the FCA's decision as a whole, there are the following aspects of the decision which GET would like to bring to the CC's attention:

1. The FCA rejected as hypothetical a possible counterfactual based on the purchase of the Vessels by a third party (paragraph 41). The FCA considered there to be two possible counterfactuals: either the market as it existed before SeaFrance went into liquidation, or the situation as it existed between December 2011 and August 2012 after SeaFrance had exited the market. The FCA did not decide between these possible counterfactuals (paragraphs 36 – 41).

2. The FCA:

    (a) considered that passenger transport by ferries and Eurotunnel's shuttle services were in the same market (paragraphs 14 -16);

    (b) worked on the basis of the transport of all freight (paragraphs 14 -16);

    (c) reviewed the Asset Acquisition on the basis of a geographical approach comprising just the Short Sea route (paragraphs 27 and 32);

3. The FCA considered that the Asset Acquisition was **not likely to give rise to concerns about unilateral effects** for the following reasons (paragraphs 42 – 67):

    (a) the ferries have spare operating capacity, with overall average capacity utilisation rates of 50% - 75% over the period January to June 2012 (paragraph 58);

    (b) the periods of peak capacity utilisation for Eurotunnel and the ferries are not at the same time and freight operators can find alternative ferry operators to MFL even during "so-called peak periods" (paragraphs 62 - 64);

    (c) if Eurotunnel increased its prices at times of its peak capacity utilisation, demand would divert to MFL and to the other ferry operators who offer more frequent crossings (paragraph 64);

    (d) Eurotunnel's freight rates are calculated on the basis of a price per linear metre rather than by reference to the time of travel (paragraph 65);

    (e) Eurotunnel could not increase its freight prices targeted on periods of peak demand (paragraph 66).

4. The FCA considered there was a **risk that the Asset Acquisition might give rise to concerns about conglomerate effects** for the following reasons (paragraphs 68 – 92):

    (a) the Asset Acquisition extended Eurotunnel's rail transport activities to ferry operations (paragraph 70);

    (b) there was no foreseeable adverse effect on tour operators (paragraph 75);

    (c) there is customer demand for combined purchases of rail and ferry crossings and there are customer benefits to transport by Eurotunnel's shuttle service (paragraphs 76 and 77);

    (d) GET could offer to freight customers deals that combined travel through the Tunnel with travel on MFL (paragraph 80);

(e) there might be a reduction in the ability of existing or potential competitors to cope with the competition from GET (paragraph 88).

5. The FCA consider that the Asset Acquisition was **not likely to give rise to concerns about coordinated effects** because of asymmetries in market share, differences in cost structure between Eurotunnel and the ferry operators, differences in cost structures and existence of spare capacity (paragraphs 105 – 112),

6. GET offered undertakings to the FCA in order to ensure that the FCA approved the Asset Acquisition at an initial merger review stage. GET believes that, if there had been an in-depth investigation of the transaction by the French competition authorities, the Asset Acquisition would have been approved unconditionally. **GET gave the undertakings to the FCA, which it does not consider are necessary, solely to avoid fighting two concurrent in-depth merger investigations by separate competition authorities in the UK and France**.

Appendix 8:

Analysis of diversion ratios undertaken by Compass Lexecon which was submitted to the OFT on 10 October 2012 as part of the Issues Paper Response

Appendix 9:

GET's best estimates of overall capacity and utilisation (2004-2012)

GET has outlined in Table 4 below its best estimate of overall capacity and utilisation and in Table 5 its best estimate of individual operators' spare capacity, in each case over the period 2004-2012.

Table 4:
GET's best estimates of overall capacity and utilisation (2004-2012), measuring changes in transport capacity and changes in rate of capacity utilisation measured in linear kilometres

[REDACTED]

Source: GET's internal best estimates. Note that North Sea is not included as data are not available)

Table 5:
GET's best estimates of individual operators' capacity (2004-2012) measuring changes in transport capacity and changes in rate of capacity utilisation measured in linear kilometres

[REDACTED]

Source: GET's internal best estimates

Appendix 10:

Data from GET's IT department about usage of the weblink from GET's homepage to the OFT's inquiry page

Appendix 11:

A copy of an article published by Nord Littoral on 10 November 2012, discussing the low volumes being carried by MFL

Appendix 12:

Eurotunnel capacity and pricing

1. **Channel Tunnel capacity:** Traffic within the Tunnel is subject to capacity constraints. A maximum of half of the Tunnel's capacity is available to the Eurotunnel shuttle for passenger vehicle and freight use, with the remainder being reserved for the Eurostar passenger trains and unaccompanied bulk freight. The amount of Tunnel capacity available to Eurotunnel might however decrease if new operators of through trains were to wish to access the Tunnel.

2. GET calculates that Eurotunnel is currently achieving a circa. [REDACTED]% average load factor (i.e. utilisation rate) for freight traffic through the Tunnel. Using the existing infrastructure and rolling stock, and allowing for routine Tunnel maintenance, GET does not consider that this current average load factor can be materially exceeded on a consistent basis without potential adverse effects on service quality. It should also be noted that the figure of [REDACTED]% is an average; at periods of peak demand, [REDACTED]. Because completely different wagons are used for freight and passenger vehicle transport, there is no capacity to divert spare capacity on passenger shuttles for HGV use.

3. In its decision, the FCA concluded at paragraph 58 that Eurotunnel has significant spare capacity and that the freight volume actually transported by Eurotunnel only represents [REDACTED]% of its theoretical capacity. The FCA also found that although Eurotunnel and ferry companies each have periods of peak utilisation they tended not to occur at the same time[99]. As a result, the FCA concluded that it would be possible for freight customers to find ferry operators with spare capacity, even during so-called peak periods of demand[100].

4. **Channel Tunnel pricing:** The FCA also noted that Eurotunnel's prices to freight customers [REDACTED]. Consequently, the FCA noted that Eurotunnel could not increase its freight transport prices targeted at periods of its peak demand. Further, the FCA found that if Eurotunnel attempted to do so it would likely be unsuccessful because, for the reasons discussed above, there would likely be ferry operators with sufficient spare capacity to accommodate switching away from Eurotunnel by its freight customers, even at times of what might be peak demand for Eurotunnel[101].

5. Unlike ferries, to take account of the capacity constraints, Eurotunnel's pricing approach for passenger shuttles through the Channel Tunnel is based on [REDACTED].

6. Eurotunnel will determine its current passenger pricing by [REDACTED].

7. For freight transport, Eurotunnel offers standard prices on its website for individual tickets. For larger freight customers, [REDACTED]. In Eurotunnel's experience, freight customers will often split their volumes between using ferries and the Tunnel for reasons of customer choice and flexibility.

8. Based on anecdotal evidence, Eurotunnel understands that its freight and passenger vehicle tickets are on average about €[REDACTED] per journey higher than equivalent ferry prices, but freight ticket prices are generally individually determined. The Compass Lexecon report submitted to the OFT (see Appendix 5 to the OFT Submission) considers in more detail the price differentials between Eurotunnel and the ferry operators.

9. In comparing freight transport prices between the most local competitors on the cross-Channel route it is however necessary to take into account the savings in distance

[99] See FCA decision paragraph 62
[100] See FCA decision paragraph 63
[101] FCA decision paragraph 66

(and therefore diesel costs, drive time and enhanced flexibility in driver working hours) that would be achieved by vehicles travelling from Eurotunnel's location in Folkestone rather than from the ferry ports located 17km further away in Dover, and also the shorter crossing time by Channel Tunnel. GET considers that this would erode much of the €[REDACTED] cost differential for freight customers.

10. Any comparison of costs between Eurotunnel's tickets with low cost airlines would need to take account of likely costs of car hire at their destination for passengers flying, compared to petrol and other motoring costs of passengers taking their vehicle through the Channel Tunnel.

11. The difference in ticket costs between Eurotunnel and ferries on the Short Sea route is explained in particular by Eurotunnel's cost structures which also include the Tunnel's construction and operating costs. In effect, Eurotunnel has to deal with a huge starting investment (costs for construction of the Channel Tunnel amount to approximately €[REDACTED]), whereas the unit costs of crossings are relatively low. Conversely, for ferries the ports (rather than the ferry operators) have incurred the infrastructure costs. However, the unit costs of ferry crossings are considerably higher than those of Eurotunnel (due in particular to the relative cost of oil which is higher than that of electricity). Eurotunnel compensates for this imbalance (and its high infrastructure costs) by offering a Shuttle frequency that is higher than that of ferries.

Appendix 13:

Eurotunnel's customers and their bargaining power

1. **Customer bargaining power:** Eurotunnel's passenger clientele is extremely fragmented. As regards its freight customers, GET calculates that Eurotunnel's [REDACTED] principal freight customers[102] represent about [REDACTED]% of its sales turnover in freight while its [REDACTED] top customers represent about [REDACTED]% of its freight turnover. By way of further detail, as at 8 November 2012, Eurotunnel had [REDACTED] active freight customer accounts of which:

    1.1.1 about [REDACTED]% ([REDACTED]) accounts paid rates that were negotiated individually with Eurotunnel, and

    1.1.2 about [REDACTED]% ([REDACTED]) accounts paid a standard published rate for freight tickets.

2. As mentioned above, its top [REDACTED] live freight account customers would negotiate rates individually with Eurotunnel through bilateral negotiations. In such a situation, customers have bargaining power through their ability to switch to competitors.

3. **Customer switching:** Freight customers can replace purchases made from Eurotunnel by switching to alternative suppliers (i.e. ferries) who can expand to accommodate additional sales (or who already have the necessary spare capacity). Freight customers can threaten to switch their entire account. Alternatively, freight customers that multi-source can threaten to switch a proportion of their volumes. In either case, this threat to switch is sufficient to constrain GET's prices. Further, given the very low volumes of traffic accounted for by each of Eurotunnel's [REDACTED]% of small freight customers (and also represented by each of its individual passengers), their demand can also easily be accommodated by ferry competitors, which means that they can easily switch to Eurotunnel's competitors.

4. Consequently, regardless of the shares of supply currently held by GET, what matters is whether GET's competitors can accommodate increased sales – and GET considers that the ferry competitors could do so. Importantly, the availability of spare capacity amongst the ferry companies gives customers credible opportunities to threaten to switch away from GET should Eurotunnel or MFL attempt un-competitively to raise prices post-Asset Acquisition.

5. **Example of** [REDACTED]: To give just one live example of customer's buyer power, [REDACTED]

6. [REDACTED] Eurotunnel disclosed details of its top 10 freight customers over each of the last three years in its response to question 26 of the CC's Annex C questionnaire. It should be clear from these data (attached again at Appendix 4) that [REDACTED].

[102] Eurotunnel provided the OFT with details of its largest UK customers by email on 26 July, comprising [REDACTED].

Appendix 14:

Screenshot from DFDS' website re: offering route packages

A to B by sea

One-stop shipping with DFDS Seaways - your service partner

DFDS Seaways is one of the largest European shipping companies, running one of the region's most comprehensive networks. With more than 530 weekly departures, the network covers 20 countries and more than 42 destinations with our modern fleet of 51 vessels.

Our 5,000 employees all take part in making sure that more than 1,500,000 trailers, containers, self-drives and abnormal loads reach their destinations on time every year.

Gate to gate with DFDS Seaways

DFDS Seaways offers a gate-to-gate solution that is quick and easy.

When using DFDS Seaways as your shipping solution, you and your drivers are sure to get simple booking procedures, optimal terminal operations and quality accommodation onboard all our vessels.

Simple booking

At DFDS Seaways we aim to make the booking procedure as simple as possible. That is why DFDS Seaways customers only need one account number and one contact number for all bookings.

Our simple IT-system, “InfoBridge” makes the booking procedure fast and efficient. Simply book via our website dfdsseaways.com/freight or by email or fax.

InfoBridge - Online Booking System

InfoBridge is a secure online booking system that connects DFDS Seaways with our customers. The benefits of InfoBridge include simplified booking procedures, electronic and customised invoicing.

InfoBridge can be accessed 24/7 and provides data that allows track and trace of cargo within the DFDS Seaways network.

Efficient operation

Our terminal operations have been developed with your efficiency in mind.

Access to cargo is fast and easy, enabling drivers to maximise their time. All units arriving and departing through our gates are digitally photographed or checked manually. This is part of our quality process, ensuring that all units received into our care are returned in the same condition.

Our terminal facilities also offer a range of services to help your business operations. These include:

- 24 hour operations
- Transhipment/cross-docking facilities
- Maintenance facilities offering cost-effective services
- Access to rail facilities at many terminals
- Secure terminal parking with CCTV surveillance

Comfort onboard

Onboard our Ro-PAX and PAX vessels, drivers will benefit from DFDS Seaways onboard facilities.

The standard of onboard accommodation is high, featuring leisure activities, restaurants, and much more - all to ensure that your driver will arrive relaxed and rested.