COMPETITION COMMISSION

EUROTUNNEL/SEAFRANCE MERGER INQUIRY REMITTAL

Provisional findings on the question remitted to the Competition Commission by the Competition Appeal Tribunal on 4 December 2013

Notified: 21 March 2014

The Competition Commission has excluded from this published version of the provisional findings report information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. Some numbers have been replaced by a range. These are shown in square brackets.

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Appendices

Summary

1. On 6 June 2013, the Competition Commission (CC) published a report (the report) on the completed acquisition by Groupe Eurotunnel S.A. (GET) of certain assets of former SeaFrance S.A. (SeaFrance). We found that we had jurisdiction in this case as the transaction constituted a relevant merger situation within the meaning of the Enterprise Act 2002 (the Act). We also concluded that the transaction may be expected to result in a substantial lessening of competition (SLC) in the market for the supply of transport services to passengers on the short sea[1] and in the market for the supply of transport services to freight customers on the short sea.

2. Following challenges to our decision by GET and the Société Coopérative de Production SeaFrance S.A. (SCOP),[2] the Competition Appeal Tribunal (CAT) found in its judgment dated 4 December 2013 (the judgment)[3] that the question of whether the CC has jurisdiction by virtue of the fact that in this case two enterprises ceased to be distinct should be remitted to the CC for its reconsideration.

3. This document sets out our provisional findings on the remitted question. We provisionally find that the CC has jurisdiction—in other words, that this is a case of two enterprises ceasing to be distinct within the meaning of section 26(1) of the Act, such that a relevant merger situation arises within the meaning of the Act, in particular that GET/SCOP acquired an 'enterprise'.

4. The Act defines an 'enterprise' as: 'the activities, or part of the activities, of a business'. 'Business' 'includes a professional practice and includes any other

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[1] The short sea consists of routes between Dover, Folkestone, Ramsgate, Newhaven in the UK and Calais, Dieppe, Boulogne, Dunkirk in France, as well as the Channel Tunnel and the routes across the Belgian Straits (Ramsgate/Ostend).
[2] The SCOP is a workers' cooperative founded on 7 October 2011 by a group of 14 former SeaFrance employees. It is referred to as 'SCOP SeaFrance' in various court documents as well as, on occasion, in its own documents. We use the abbreviation 'the SCOP' in this document, except where quoting from documents in which the 'SCOP SeaFrance' abbreviation is used.
[3] *Groupe Eurotunnel S.A v Competition Commission [2013] CAT 30*; no remittal order was issued.

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'.

5. In making a judgement as to whether or not in this case enterprises ceased to be distinct, we have had regard to the substance of the arrangements rather than merely their legal form. We did not find that one single factor was determinative in reaching a provisional conclusion; instead we based this on the totality of all the relevant considerations, taking into account the nature of the industry and the particular characteristics of the assets that were acquired in that context.

6. We reconsidered the remitted question anew and with an open mind. We invited submissions from the parties on the remitted issue and sent a number of information requests to parties and third parties; we also reviewed and took into account evidence from our original inquiry into the merger. We focused particularly on issues that the CAT had highlighted in the judgment.

7. As invited to by the CAT, we have focused in particular on whether what was acquired was something more than 'bare assets'. This involved two steps, namely *(a)* defining or describing exactly what, over and above 'bare assets', the acquiring entity obtained; and *(b)* asking whether—and if so how—this placed the acquiring entity in a different position than if it had simply gone out into the market and acquired the assets.

8. We regard the following matters as being important to the analysis of the remitted question.

9. We note that the decisional practice of the CC and the Office of Fair Trading (OFT), their Guidelines, as well as the judgment of the CAT,[4] all recognize that in the context of 'enterprises ceasing to be distinct', it is not necessary—for the purpose of establishing that an enterprise rather than an asset is acquired—that the activities of the acquired business continue up to the date of completion of the transaction. Were it otherwise, it would be very easy for businesses to evade UK merger control law.

10. SeaFrance operated ferries on the Dover–Calais route, using two bespoke combined passenger/freight vessels ('Ropax') that it owned outright, the *SeaFrance Rodin* and the *SeaFrance Berlioz*, as well as a third Ropax which it leased, the *SeaFrance Molière*, and a freight ship, the *SeaFrance Nord Pas de Calais*. SeaFrance experienced significant financial difficulties and was ultimately liquidated. Following a period of inactivity, certain liquidated assets were purchased by GET/SCOP, and they started ferry operations on the Dover–Calais route using three of the SeaFrance vessels and employing ex-SeaFrance employees. The question before us is whether or not transactions resulted in enterprises ceasing to be distinct with the meaning of the Act.

11. A review of the background to the transaction shows that there is considerable, and deliberate, continuity and momentum as between the time of SeaFrance's operation of the Dover–Calais ferry service and MyFerryLink SAS's (MFL's) resumption of operation of the same ferries on that route involving ex-SeaFrance employees. We also note that a considerable portion of the period of inactivity (at least from 9 January 2012 until 2 July 2012) was due—directly or indirectly—to the requirements of the liquidator's sale process which followed on from the failure of the SCOP's two attempts to purchase the SeaFrance business as a going concern; both

[4] ibid, paragraph 106(a).

of these explicitly intended to continue SeaFrance's activities and to provide employment to SeaFrance employees.

12. In our opinion, there is little doubt that Dover and Calais ports have very specific requirements for ferries operating from their terminals and that the two sister vessels that the parties acquired, the *SeaFrance Rodin* and *SeaFrance Berlioz*, are particularly suited to this Dover–Calais route by virtue of having been designed specifically for it. The three acquired vessels are sufficient to operate a viable ferry service and of a size and configuration designed to permit scale economies in operation to be achieved. While the SCOP and GET would have been able to commission similar new builds, this would have been very significantly more expensive and more time-consuming. While it may have been possible to buy or charter a vessel that could be converted for use on the Dover–Calais route, there appear to be a limited number of vessels potentially suitable in size and configuration for operation on this route.

13. In addition, given that the *SeaFrance Berlioz* and *SeaFrance Rodin* are sister ships, GET/SCOP would need to acquire two similar vessels for service (as well as a third) to be in a similar position to acquiring the SeaFrance assets. Whilst it might be possible to charter or buy one vessel, acquiring two of a similar size would present additional challenges. The cost implications of converting a vessel so that it is suitable for operation on the Dover–Calais route are difficult to estimate since they vary depending on the characteristics of the vessel that is converted, but are likely to be at least €1.5 million per vessel (similar to the amount spent by the SCOP to get both the *SeaFrance Berlioz* and *SeaFrance Rodin* operational again) and conversion may take around six months (longer than the seven weeks it took the SCOP to have the *SeaFrance Berlioz* and *SeaFrance Rodin* operational again). We also note that the operating efficiency of such converted vessels is likely to be suboptimal compared with vessels that are bespoke to the route.

14. The use of the SeaFrance vessels reduced commercial risk for GET/SCOP compared with either chartering or buying, given the known history of operation on the route. We also considered that the commercial risk for GET/SCOP would have been lessened as a consequence of the retention of the vessel names which maintained a link between their past and future use on the route and the fact that these vessels were known to the port authorities.

15. The fact that the vessels were maintained in hot lay-up had the consequence that they could be put into service within a shorter time frame (and probably more cheaply) than if they had been laid up cold, but less quickly than if they had been fully operational. The latter, however, was not an option in view of the cost implications. We acknowledge that a significant amount of work was carried out on the vessels before MFL's operations commenced on 20 August 2012. But both the time and cost were small relative to the value of the vessels. The time taken to do the work was seven weeks; the cost was [€1–€3] million. This cost was factored into the purchase price.

16. Turning to consider staff, we note first that the SCOP was established for the purpose of providing employment for ex-SeaFrance staff; it had attempted to acquire SeaFrance's assets in order to provide employment for those employees on the SeaFrance vessels operating on the Dover–Calais route, just as SeaFrance had done.

17. The €25,000 indemnity that Groupe SNCF agreed to pay created a strong incentive for ex-SeaFrance employees to be employed on the *SeaFrance Berlioz*, *SeaFrance Rodin* and *SeaFrance Nord Pas de Calais* in similar operations to those of SeaFrance. It forged a link between the vessels and the employees and it ensured that—to the greatest extent possible—ex-SeaFrance employees transferred from

SeaFrance to GET/SCOP. The indemnity reinforces our provisional view that it is not the case that contracts of employment were terminated 'with no thought as to how they might be reemployed in future'.[5] Our provisional conclusion is that many employees transferred from SeaFrance to GET/SCOP. As a result, around [70–80] per cent of the SCOP workforce comprised ex-SeaFrance employees.

18. We are also of the view that acquiring crew for the vessels other than via the route actually used by MFL would not have been as easy as GET/SCOP anticipated. The evidence indicated that GET/SCOP had not actually investigated this option and that one of the two crewing companies that they mentioned did not provide the relevant services. The second company they mentioned indicated that it would take two to three weeks to assemble the staff and train them. While the parties submitted that a 2-hour familiarization process would be sufficient, the crewing company told us that it would take 10 to 15 days to train staff to work on the vessels.

19. Overall, we are persuaded that the steps taken in relation to staff were similar in nature to the steps taken in relation to the vessels. They were designed to ensure that there would be continuity to the maximum extent possible in the circumstances of the liquidation. In the result, those steps substantially achieved their aim.

20. In relation to other activities that GET/SCOP needed to undertake to commence operations, such as obtaining berthing slots at Calais and Dover and booths at the ferry terminals, we do not consider that the time and/or cost implications of these were significant. Moreover, we are of the view that the combination of the vessels being known to the port authorities, together with the fact that the ex-SeaFrance officers were familiar with the port, materially facilitated the process of obtaining berthing slots with Dover Harbour Board. Having some staff who still had valid

[5] Citation from paragraph 115 of the judgment of the CAT.

pilotage exemption certificates, or had previously held them, was helpful in order to allow a quick and efficient start-up.

21. Our overall conclusion is that a variety of steps were undertaken, as noted above, that had the effect of preserving to the maximum extent possible in the circumstances the key assets (both physical and employees) of the former SeaFrance business. That was understandably and deliberately done in order to make it as easy as possible for that business, or something closely resembling it, to be resumed. There were perceived to be real advantages in taking those steps—not the least of which was that the easier the resumption, the more valuable the business assets would be; and the more likely it would be that a greater number of former employees would be able to resume employment. The intended and achieved effect of those steps was that, once the acquisition of the liquidated assets completed on 2 July 2012, operations were recommenced very swiftly—by 20 August 2012, that is a period of only seven weeks. Those operations were on the same Dover–Calais route using the former SeaFrance vessels operated by a significant number of the same former SeaFrance employees.

22. Three other categories of assets were acquired: *(a)* brand and domain names and customer lists; *(b)* ferry management software SeaPax and SeaFret; and *(c)* UK assets (including a lease of premises at Whitfield, Dover). We consider that the acquisition of all of these conferred a material benefit on GET/SCOP in the context of their ability to start the new ferry operation more quickly and/or with less risk than they could have done otherwise.

23. There are two main categories of assets that were not acquired: customer contracts and supply contracts. We considered the implications of this in the context of the ferry industry and concluded that the nature of the contracts was not such that it

placed GET/SCOP in a materially different position than if these had been acquired. In this industry passenger contracts are ad hoc and freight contracts consist of annual framework agreements. It would have been of some advantage to have the latter in place from the start, but having the list of customers is likely to have been helpful in this context. In relation to the supply contracts, we observe that supplies which can be readily obtained from third parties, or which are commonly provided centrally by parent companies, are less likely to be essential to the transfer of an 'enterprise', even if they are necessary to the running of the business.

24. By way of provisional conclusion therefore:

(a) We consider that the combination of acquired assets (in particular, but not limited to, the vessels and employees) means that what was acquired was more than a 'bare asset' in that it enabled the acquirer to establish ferry operations, more quickly, more easily, more cheaply and with less risk than if the relevant assets had been otherwise acquired in the market.

(b) Although, in light of the period of inactivity, GET/SCOP did not acquire the SeaFrance assets 'as a going concern', in reality they obtained much of the benefit of so acquiring them. That is because, in our view, the commercial operability and coherence of the assets used by SeaFrance for the Dover–Calais ferry service was not materially impaired by the period of inactivity.

(c) The combination of steps taken in relation to the vessels and the staff was that substantially the same business activities as had previously been undertaken by SeaFrance were able to be, and were in fact, resumed within a very short period of time following the acquisition. The intention, for good and understandable commercial and employment reasons, was to seek to preserve the former business or something as closely approximating to it as possible. That intention was achieved.

(d) Moreover, GET was significantly motivated to acquire the assets that it did by the advantages of continuity (and the consequent ability to resume substantially the same operations as had previously been undertaken by SeaFrance) that those steps had preserved.

25. We are thus provisionally of the view that the collection of tangible and intangible assets (including the transferred ex-SeaFrance employees) that GET/SCOP acquired meets the legal definition of an enterprise in that together they constitute the activities or part of the activities of a business.

26. In its judgment, the CAT remitted to the CC the question of whether GET/SCOP had acquired an ‘asset’ or an ‘enterprise’ and to that extent, our decision was quashed. As a result, the only matter on which we are required to make a new decision is this narrow jurisdictional point. If after having considered the representations of the parties we decide to confirm our provisional findings on the remitted question, the effect of our decision will be to reinstate the report on all other matters.

Provisional findings

1. Introduction

1.1 On 6 June 2013, the CC published a report[6] (the report) on the completed acquisition by GET of certain assets of former SeaFrance. We found that the transaction constituted a relevant merger situation within the meaning of the Act, and concluded that it may be expected to result in an SLC in the market for the supply of transport services to passengers on the short sea and in the market for the supply of transport services to freight customers on the short sea.

1.2 By applications made before the CAT, respectively dated 18 June 2013 and 3 July 2013, GET and the SCOP[7] challenged our decision, pursuant to section 120 of the Act. One of the grounds of challenge put forward by the SCOP was that we had erred in concluding that there was a relevant merger situation since the assets acquired by GET were not an enterprise.

1.3 By judgment dated 4 December 2013 (the judgment),[8] the CAT unanimously found that the question of whether the CC has jurisdiction in this case should be remitted to the CC for its reconsideration:

> The question is whether this is a case of two enterprises ceasing to be distinct within the meaning of section 26(1) of the Act, such that a relevant merger situation arises within the meaning of section 35(1)(a) of the Act. We consider this question to be an open one: our detailed reasoning is set out in Section II above. Accordingly, and for the reasons given in Section II above, we remit to the [CC] the question of

[6] *A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A*.
[7] The SCOP is a workers' cooperative founded on 7 October 2011 by a group of 14 former SeaFrance employees.
[8] *Groupe Eurotunnel S.A v Competition Commission* [2013] CAT 30; no remittal order was issued.

whether Eurotunnel/SCOP acquired an 'asset' or an 'enterprise'. To this extent, and for that reason alone, we unanimously quash the Decision.[9]

1.4 This document sets out our provisional findings on the remitted question, namely the matter of whether or not this is a case of two enterprises ceasing to be distinct within the meaning of section 26(1) of the Act, such that a relevant merger situation arises within the meaning of the Act, in particular whether GET/SCOP acquired an 'asset' or an 'enterprise'.[10] Our provisional conclusion is that a relevant merger situation has arisen on the evidence we have considered.

1.5 We first outline the process that we followed for the remittal. We then set out the statutory context and summarize the conclusions of the CAT on the asset/enterprise question that was remitted to us. This is followed by a brief reference to the French Competition Authority's decision.

1.6 Our assessment of the remitted issue begins with an outline of the background to the transaction, setting out the events that led to the period of inactivity. We then consider whether or not ex-SeaFrance employees transferred from SeaFrance. This is followed by a consideration of the characteristics of the acquired vessels and the combination of vessels and employees, including the parties' ability to obtain berthing slots at Dover and Calais. We then consider the other SeaFrance assets that were acquired, namely trademarks and domain names, information systems and software and customer lists. Finally, we consider which assets were not acquired, namely customer and supplier contracts and premises. We conclude with our overall provisional

[9] ibid, paragraph 432.
[10] The CAT confirmed the decision in the report that GET and the SCOP are associated persons for the purpose of section 127(4)(d) of the Act (judgment of the CAT, paragraph 57). Formally, GET acquired the liquidated assets and the employees transferred to the SCOP. For ease, we refer to GET/SCOP as the acquirer of all of the relevant assets and employees, unless we consider that the context requires a distinction between the two entities.

assessment of the remitted question and some general observations on the jurisdictional test.

2. Background to the remittal

The process on remittal

2.1 On 8 January 2014, we published a Conduct of Remittal Notice (Remittal Notice) setting out how we intended to conduct the remittal process, particularly with regard to gathering and considering further evidence.[11]

2.2 We invited submissions on the jurisdictional question and stated that we proposed to hold hearings following receipt of submissions on our provisional findings.

2.3 We were not required to reconsider the competitive assessment as part of the remittal. We noted, however, that if we were to conclude that a 'relevant merger situation' had been created, since our report identified an SLC, we would come under a duty under section 41 of the Act to take remedial action. Pursuant to section 41(3) of the Act, our decision on remedial action must be consistent with our report unless there has been a material change of circumstances since preparation of the report or we have a special reason for deciding differently.

2.4 We stated in our Remittal Notice that if we provisionally found that a 'relevant merger situation' had arisen, we would invite submissions and evidence on matters falling within section 41(3) of the Act. Given that we have provisionally found that such a situation has arisen, we are now inviting submissions and evidence on whether there has been a material change of circumstances by means of a Notice published alongside these provisional findings.

[11] Remittal Notice.

The statutory framework and CC/OFT Guidelines[12]

2.5 Under section 35 of the Act and pursuant to the terms of reference,[13] we are required to decide whether a relevant merger situation has been created. A relevant merger situation is created if two or more enterprises cease to be distinct within the statutory period for reference and either the share of supply or turnover test set out in the Act is satisfied (the jurisdiction test). In our report, we concluded that the share of supply test was met (paragraphs 4.73 to 4.76); we reached no conclusion on whether or not the turnover test was met (paragraph 4.77). We found that the statutory time limit for reference had been observed (paragraphs 4.78 and 4.79). Overall, we concluded that the jurisdiction test under the Act was satisfied and a relevant merger situation had been created (paragraph 4.80). Following the remittal, we are reconsidering whether what was acquired by GET/SCOP was an enterprise.

2.6 The Act defines an 'enterprise' as: 'the activities, or part of the activities, of a business'. 'Business' 'includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.[14]

2.7 The OFT/CC Merger Assessment Guidelines[15] provide the following guidance:

> The term 'enterprise' is defined in section 129 as the activities, or part of the activities, of a business. The enterprise in question need not therefore be a separate legal entity. The definition states that the activities in question should be carried out for 'gain or reward'. However, there is no requirement that the transferred activities should be profitable, or gener-

[12] From 1 April 2014, see *Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2*, paragraphs 4.6–4.11.
[13] Terms of reference.
[14] Section 129(1) of the Act.
[15] *Merger Assessment Guidelines, CC2,* September 2010, paragraphs 3.2.2–3.2.4. This guidance was originally published jointly by the OFT and the CC and was adopted unamended by the Competition and Markets Authority Board on 12 March 2014.

> ate a dividend for shareholders, and the definition may include transferred activities conducted on a not-for-profit basis.
>
> In making a judgement as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the Authorities will have regard to the substance of the arrangement under consideration, rather than merely its legal form.

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

2.9 The OFT's jurisdictional and procedural guidance contains more detail on the principles that it will apply in situations where the business being acquired is no longer actively trading:

> 3.11 … The fact that the business is no longer actively trading does not in itself prevent the business acquired from being an enterprise for the purposes of the Act. In addition to the factors generally applicable, in such a situation the OFT will consider:
>
> - The period of time elapsed since the business was last trading
> - The extent and cost of the actions that would be required in order to reactivate the business as a trading entity

- The extent to which customers would regard the acquiring business as, in substance, continuing from the acquired business, and
- Whether, despite the fact that the business is not trading, goodwill or other benefits beyond the physical assets and/or site themselves could be said to be attached to the business and part of the sale.

3.12 None of these factors, individually, is likely to be conclusive. The OFT will assess all of the above factors, and any other relevant circumstances (including whether there is evidence that the closure of the business was designed to avoid merger control), in the round, with a view to determining whether the business in question should be considered as an enterprise given the structure and purposes of the Act.[16]

2.10 Business acquisitions are complex transactions that may be structured in a number of different ways to reflect different commercial considerations and circumstances, for example tax implications or employee liabilities. It is relevant to note in this context that the Act is not phrased in terms of shares or assets being acquired; the jurisdictional test is based on 'enterprises ceasing to be distinct', inherently recognizing that there are a number of different ways of structuring business acquisitions.

2.11 An enterprise can be acquired through the acquisition of the key assets that enable business activities to be undertaken, resulting in the transfer of those activities from one person to another. The range and nature of the assets that need to be acquired in order to achieve the transfer of business activities will vary from case to case and will depend on, for example, the nature of the transferred activities and any pre-existing activities of the purchaser. Acquisitions that take place by the sale and purchase of assets give the acquirer the flexibility (subject to negotiation with the

[16] Paragraph 3.11 of OFT 527 Mergers: Jurisdictional and Procedural Guidance (June 2009).

vendor) to buy the assets that it needs and to exclude those that it does not need. For example, the purchaser may already have a head office and infrastructure dealing with matters such as IT, legal and human resources and so it may not wish to acquire another head office and infrastructure. Asset acquisitions also allow liabilities or onerous contracts to be wholly or partly excluded.

2.12 In making a judgement as to whether or not the acquisition by GET of certain SeaFrance assets has resulted in enterprises ceasing to be distinct under the Act, we have had regard to the substance of the arrangements rather than merely their legal form. We did not find that one single factor was determinative in reaching a provisional conclusion; instead we based this on the totality of all the relevant considerations,[17] taking into account the nature of the industry and the particular characteristics of the assets that were acquired (as well as those that were not acquired) in that context. The substance of this report is specifically focused on what we understand the CAT asked us to address. However, we set out some broader observations on the jurisdictional test at the end of this report (see paragraphs 4.22 to 4.28 below).

The judgment and basic approach to the remitted question

The judgment

2.13 In its judgment, the CAT outlined the statutory framework and noted that the Act did not further define the term 'activities'. It considered that a report of the Monopolies and Mergers Commission (the MMC) presented to Parliament in May 1992 on the merger between AAH Holdings plc and Medicopharma NV[18] (the MMC report) was helpful in this context:

[17] OFT 527, *Mergers: Jurisdictional and procedural guidance*, June 2009, paragraph 3.9.
[18] AAH Holdings plc and Medicopharma NV: a report on the merger situation.

Before the MMC, it was contended that no merger situation arose because Medicopharma NV's United Kingdom operation 'had ceased to trade prior to the acquisition and that AAH had acquired only stock, certain assets and three depots' (see paragraph 6.62 of the MMC report). However, the period during which the United Kingdom operation had not traded was extremely short – essentially comprising the period between 3 November 1991 (paragraph 6.78 of the MMC report) and 7-8 November 1991 (paragraph 6.87 of the MMC report). The MMC rejected the argument that no merger situation arose (paragraph 6.102 of the MMC report): 'In our view, however, although AAH did not in terms acquire the depots as going concerns, in reality it obtained much of the benefit of so acquiring them and it clearly acquired more than bare assets, as described in greater detail above.'

2.14 The CAT observed in paragraph 105:

Essentially, the MMC was drawing a distinction between the acquisition of 'bare assets' – which would not constitute the activities of a business – and the acquisition of something more than bare assets. The key to distinguishing between 'bare assets' and an 'enterprise' lies in:

(a) Defining or describing exactly what, over-and-above 'bare assets', the acquiring entity obtained; and

(b) Asking whether – and if so how – this placed the acquiring entity in a different position than if it had simply gone out into the market and acquired the assets.

The question, then, is whether this difference is capable of constituting what would otherwise be bare assets into something that may properly be described as the activities of a business. Inevitably, this is a question of fact and degree, and there will be no single criterion giving a clear

answer. However, if a guiding principle is sought, then we consider that it lies in an understanding of what an enterprise – the activities or part of the activities of a business – does. An enterprise takes inputs (assets of all forms) and by combining them transforms those inputs into outputs that are provided for gain or reward. It thereby also may generate intangible but valuable assets such as know-how or goodwill. It is in this combination of assets that the essence of an enterprise lies. In those cases where the acquiring entity takes over the business of the acquired entity, the answer will be self-evident: the same enterprise is simply continuing, albeit under different ownership or control. The difficult case arises where the combination of assets is fractured, such that the assets are no longer, or no longer to the same extent, being used in combination. This case is a particularly good one, where what was clearly once an enterprise was wound down: the difficult question is whether, even though the business of SeaFrance had been wound down to a very considerable extent, there still remained the embers of an enterprise.

2.15 The CAT went on to summarize the relevant questions in the context of this merger as follows (paragraph 107):

> The short, but difficult distinction that we have to draw is that between an asset purchase and the acquisition of an enterprise. Had Eurotunnel simply gone to a shipbuilder and commissioned the building of three vessels identical to the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais* or with similar capabilities and used these vessels to establish a Dover-Calais ferry service using a crew or crews comprising anyone other than ex-SeaFrance employees, then this would not involve the acquisition of an 'enterprise'. Rather, Eurotunnel would be using assets

that it had acquired to create an enterprise. The question we must answer is whether the fact that the vessels were acquired from SeaFrance and the fact that the crews were largely drawn from ex-SeaFrance employees changes this outcome.

2.16 The CAT noted in paragraph 111 that it was accepted and uncontroversial that the activities carried on by SeaFrance were the provision of ferry services (both passenger and freight) across the short sea, using the vessels that it did and staffed with its crews.

2.17 In this context, the CAT noted in paragraph 112 that the factors identified by us in the report pointed towards there being no more than the acquisition of assets by Eurotunnel/SCOP, namely: *(a)* for seven and a half months preceding the acquisition, SeaFrance carried out no activity; *(b)* SeaFrance's berthing slots were surrendered; and *(c)* SeaFrance's workforce was dismissed and its vessels placed into hot lay-up.

2.18 The CAT noted in paragraph 113 the factors that we considered outweighed the seven and a half month hiatus, namely: *(a)* the acquired vessels were of a suitable design and sufficient number to operate a passenger and freight transport business on the short-sea route; these vessels were in a condition from which they were able to be brought into operation within two months of the acquisition taking place; *(b)* the 'acquisition' of former SeaFrance employees who now comprised some three-quarters of the staff engaged in running the MyFerryLink[19] service; and *(c)* the acquisition of the brand and goodwill of SeaFrance, carrying some, but limited, positive value.

[19] Having prepared the vessels for service and acquired berthing slots at the ports of Calais and Dover, GET launched ferry services between Calais and Dover on 20 August 2012 under the MyFerryLink brand. Its newly-created subsidiary, MyFerryLink SAS (MFL), assumes the commercial risk for the operation, while the SCOP operates the ships and acts as a sales and marketing agent for MFL.

Hot lay-up of the vessels

2.19 The CAT noted in paragraph 114 that the vessels acquired by GETwere appropriate to short-sea crossings and had been maintained in hot lay-up in order to maintain their condition. While this had the effect of making it possible to bring them into service quickly, the CAT doubted whether this was enough to turn these assets into an enterprise, at least without a more detailed explanation of the extent to which this expedited the return of the vessels into service.

Ex-SeaFrance employees

2.20 The CAT expressed the view in paragraph 115 that, on the face of our report:

> it is difficult to see how these employees were "acquired" from SeaFrance at all. … These employees were made redundant by SeaFrance over a period of time. Their contracts of employment were terminated, with no thought as to how they might be employed in the future. Subject to one, to our minds important, proviso … their relationship with SeaFrance simply came to an end. However, it can easily be said that the formation of the SCOP, and the subscription of a number of ex-SeaFrance employees to the SCOP, and the subsequent employment of some of them by the SCOP, constituted the creation of a new legal relationship, with no element of transfer from SeaFrance to the SCOP.

2.21 The CAT then observed in paragraph 116 that:

> Of course, it is possible to imagine cases where the employment of a workforce by one employer ceases, but that the workforce migrates – as a workforce – to a new employer. That, we consider, could amount to the 'acquisition' of that workforce by the new employer, and could amount to the acquisition of a business activity. That might well be the

> case even if the workforce's contracts of employment were not formally transferred from the old employer to the new one, but terminated and new contracts entered into. If the reality is that a workforce is being transferred, then the fact that wholly new legal relationships are forged as part of that process should not affect the position.

2.22 In that context, the CAT considered that relevant considerations emerged from other parts of our report, namely that under the terms of the liquidation agreed between SeaFrance's owner, the French Court and the SCOP, the SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed.[20] The liquidator agreed to pay these funds and part payment of these funds was made by the liquidator to the SCOP in late January 2013. The CAT considered in paragraph 119 that:

> [such contribution] might, if fully explored, provide a cogent reason, on the part of Eurotunnel/SCOP to employ ex-SeaFrance employees. Equally, it is clear that this was a benefit that derived from the fact of the relevant employees' employment by SeaFrance. In short, this seems to be a benefit emanating from employing an ex-SeaFrance employee that would not be gained were an employee from elsewhere to be retained.

The interrelationship between vessels and employees

2.23 The CAT suggested that it would be relevant to explore the relationship between the condition of the vessels being such that they could be brought into operation extremely quickly and the significance of having a crew (namely, the ex-SeaFrance employees) comprising persons fully familiar with both these particular vessels and their intended operation (across the short sea). The view expressed by the CAT in paragraph 120 was that:

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[20] Further details regarding the origin of this indemnity and the conditions under which it became payable are contained in paragraphs 3.94–3.108.

It may very well be the case that this combination enabled MyFerry to begin operations much more quickly than it could have done had it acquired crew and vessels from other sources. In short, there may have been a momentum or continuity in the combination between the vessels and workforce that takes this case over the line from an asset acquisition to the acquisition of an enterprise.

Our basic approach

2.24 In our assessment we have taken into account and sought to apply the principled approach set out in the judgment of the CAT.

2.25 We invited submissions from the parties on the remitted issue and sent a number of information requests to parties and third parties; we also reviewed and took into account evidence from our original inquiry into the merger. We focused particularly on issues that the CAT had highlighted. Some other issues were not materially disputed by the parties or called into question by the CAT; however, where new evidence relevant to those issues came to light we took it into account.

2.26 Our assessment involved a range of factors that are interlinked in a variety of ways. However, we reached our provisional conclusion by considering all the relevant factors in the round. We reconsidered the remitted question anew and with an open mind.

Point in time at which the enterprise/asset question must be determined

2.27 Section 23(9)(b) of the Act provides that the question of whether a relevant merger situation has been created shall be determined immediately before the time when the reference has been made. We therefore need to determine whether a relevant merger situation had been created as at 29 October 2012, the date on which the

reference to the CC was made. There are no other temporal restrictions in section 23(9)(b); therefore all arrangements, transactions and events can be taken into account provided that they took place on or before 29 October 2012. Moreover, events that took place after that date can be taken into account to the extent they cast light on the question of whether or not a relevant merger situation had been created or to the extent that they are a consequence of the binding arrangements entered into by that date.

2.28 Section 24(1)(a) of the Act provides that enterprises must cease to be distinct enterprises before the day on which the reference to the CC is made and that they did so not more than four months before that day. The four-month time limit is relevant only to determining whether or not a reference to the CC has been made on time pursuant to section 23(1)(a) of the Act, that is within four months of enterprises having ceased to be distinct enterprises. In other words, these sections are concerned with preventing 'stale' references that have occurred more than four months after the date on which the enterprises in question ceased to be distinct, provided that the OFT is aware (or is deemed to be aware) that they have ceased to be distinct. However, section 23 is not concerned with and does not restrict the relevant matters that can be taken into account in determining whether or not two enterprises have in fact ceased to be distinct.[21] Section 27(1) and (2) of the Act provides that in respect of transactions or arrangements not having immediate effect, enterprises cease to be distinct at a time when parties become bound by the arrangements or transactions.

2.29 The CAT noted:

[21] The time limit for referring a merger to the CC was changed from six to four months by The Deregulation (Fair Trading Act 1973) (Amendment) (Merger Reference Time Limits) Order 1996 (SI 1996/345); this amended section 64(4)(a) and (b) of the Fair Trading Act 1973. The discussion of the Order in Hansard (Lord Hansard Text for 8 February 1996 (160208-15)) notes that the effect of the order is to shorten the period of time during which a merger reference can be made and makes the point that this 'should reduce commercial uncertainty and costs for business'.

> Whilst, no doubt, the Commission may look to prior events so as to understand transactions or arrangements concluded within the section 24 time frame, it is quite plain from the Act – so far as acquiring entities are concerned – transactions or arrangements pre-dating the section 24 period cannot be taken into account.[22]

2.30 The CAT considered that transactions or arrangements in which the SCOP participated between the date of the reference (29 October 2012) and the period beginning four months before that date (29 June 2012) fell within the relevant time frame.[23] We take this to mean that arrangements or transactions prior to completion cannot be taken into account as triggering the four-month window within which a reference must be made, as any other interpretation would invite merger parties to seek artificially to divide aspects of an overall transaction so as to avoid merger control.

2.31 In this case our primary conclusion is that there were no arrangements or transactions that fell outside the relevant time frame as outlined by the CAT.[24]

2.32 The SCOP noted the CAT's statement quoted in paragraph 2.29 above, and submitted that since the employee indemnity arrangements set out in the 'Plan de sauvegarde de l'emploi' (PSE3)[25] predate this period by some five months, they cannot be taken into account.[26] The SCOP also pointed out that it did not receive any payment under the indemnity until some three months after the end of the relevant

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[22] Judgment of the CAT, paragraph 66.
[23] ibid, paragraphs 67–68.
[24] We are aware that some contracts of employment were entered into between the SCOP and ex-SeaFrance employees after 29 October 2012. The CAT left open the question of whether or not these could be taken into account within the context of what it considered to be the relevant time frame (judgment of the CAT, paragraph 70). We agree with the CAT that there would have been an intention to continue to employ persons on the ferries operated by the SCOP and the subsequent employment of such persons would have demonstrated such an intention. However, for the purpose of our assessment of the asset/enterprise question we have not found it necessary to take a position on this; we have reached our provisional decision on the basis of employee contracts in existence on 29 October 2012.
[25] An explanation of the Plan de sauvegarde de l'emploi is set out in paragraphs 3.82 & 3.83.
[26] SCOP response to Remittal Notice, paragraphs 4.19, 4.20 & 4.35. By way of background, the first plan (known as PSE1) involved voluntary redundancies to be agreed prior to 30 June 2010 for those employees who would leave on a voluntary basis between March and September 2010. The second plan (known as PSE2) involved two authorized redundancy programmes. The first of these resulted in 74 redundancies in October 2010 and the second in a further 279 redundancies in November 2010 (Witness Statement of Raphael Doutrebente dated 2 July 2013, paragraph 9).

period.[27] In addition, since placing the vessels into hot lay-up was a decision taken on 16 November 2011, nearly 12 months prior to the reference, in its view this also could not be taken into account.[28] In the SCOP's view, these factors could not be considered in determining whether there was a relevant merger situation.

2.33 We consider that this is an overly wide interpretation of the CAT's approach. In our view, it is clear from the judgment that the arrangements and transactions to which the CAT refers in this context are limited to arrangements and transactions entered into by the acquirers, the SCOP or GET, to acquire SeaFrance's assets (including employees).[29]

2.34 The SCOP is not a party to the PSE3, had no role in the negotiation of the €25,000 special indemnity[30] and the payment it received is not a SeaFrance asset. The PSE3 is a statutory arrangement, in this case negotiated between the liquidator and the SeaFrance comité d'entreprise (the works council, made up of employee representatives).[31,32] PSE3 provides that Groupe SNCF (SNCF) will fund certain payments in order to incentivize third parties to employ ex-SeaFrance employees; that is the capacity in which the SCOP received the indemnity payments. The PSE3 arrangements are considered in more detail at paragraph 3.92.

2.35 Similarly the decision to lay up the vessels is not an arrangement entered into by an acquiring entity with respect to the acquisition of SeaFrance assets. That decision was taken by the liquidator.

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[27] SCOP response to Remittal Notice, paragraph 4.32.
[28] ibid, paragraph 4.9.
[29] Judgment of the CAT, paragraphs 69–71.
[30] A member of the SeaFrance works council was also a founding member of the SCOP.
[31] http://vosdroits.service-public.fr/particuliers/F2811.xhtml#N10143.
[32] This accords with the SCOP's own views that PSE3 was a consequent legal step taken by the liquidator imposing obligations reon SNCF (SCOP response to Remittal Notice, paragraphs 4.20–4.23).

2.36 We therefore consider that we are, in any event, able to take into account both the indemnity which the SCOP received and the decision to place the vessels into hot lay-up because they are not arrangements and transactions entered into by the acquirers (the SCOP and GET) to acquire SeaFrance's assets and therefore whether or not they occurred in the four-month window preceding the date of reference is not relevant. These developments elucidate the arrangements and transactions entered into by GET/SCOP during the four months prior to the reference. We also note that this was the approach contemplated by the CAT in its judgment.[33] However, if, contrary to our primary conclusion, the SCOP is correct that the indemnity and the decision to place the vessels into hot lay-up should be treated as part of the relevant arrangements and transactions, we nevertheless consider, in the alternative, that we are lawfully entitled to take them into consideration in reaching our conclusions not-withstanding that they arose more than four months prior to the date of the reference on 29 October 2013, for the reasons set out in paragraph 2.27 above.

French Competition Authority's decision

2.37 France has a mandatory merger regime, which means that transactions qualifying as mergers must be notified before they are implemented; GET ultimately notified its acquisition of SeaFrance assets to the French Competition Authority. We set out in Appendix E further details regarding how the French Competition Authority viewed this transaction.

2.38 The French Competition Authority applies a different legal test from that used in the UK; we consider the similarities below.

2.39 According to the French Merger Guidelines, an undertaking is deemed to be an entity carrying out an economic activity, which appears not dissimilar from the concept of

[33] Judgment of the CAT, paragraph 66.

an enterprise in the UK, namely the activities, or part of the activities, of a business. Similarly, an economic activity involves offering goods or services on a market, while a business is defined as any undertaking in the course of which goods and services are supplied otherwise than free of charge (section 129 of the Act).

2.40 Given the similarities between the French and UK regimes, in particular the approach to the undertaking/enterprise matter, it is interesting to note that the parties notified their transaction to the French Competition Authority. However, given that the legal frameworks are not identical and in light of the relatively high-level consideration given to this issue in the French Competition Authority's decision, we found that decision to be of limited assistance in addressing the asset/enterprise question generally and the points the CAT highlighted in its judgment more particularly.

3. Our assessment of the remitted issue

Background to the transaction and reason for period of inactivity

3.1 In this section, we set out the events leading up to the transaction and we explore why the SeaFrance business had not been operational for some time at the point when the liquidated assets were acquired by GET/SCOP. We also describe the transaction itself. By way of overview, we have included a chronology of main events in Appendix A.

3.2 Unless otherwise indicated, the sources for the information in this section are two judgments of the Paris Commercial Court (the French Court) dated 16 November 2011 and 9 January 2012 and the Excerpt of the Minutes of the French Court dated 11 June 2012[34] (French Court Minutes). We refer to the English language

[34] Extrait des Minutes Du Greffe du Tribunal De Commerce de Paris (publicly available).

translations of these documents, which we consider to be relevant in their entirety to the background to the transaction.[35]

Safeguard procedure (April 2010 to June 2011)

3.3 SeaFrance was, prior to its liquidation and the transaction, a wholly-owned subsidiary of SNCF. Its business activity consisted of the operation of ferry services between Calais and Dover. From 2009, SeaFrance operated this business using a fleet of four vessels (namely three ferries and one freight ship) operating under the French flag.

3.4 In April 2010, SeaFrance was placed under the protection of the French Court as part of a safeguard procedure. On 30 June 2010, the company was put into administration. In order to finance the business, SeaFrance and the court administrators sought and received financial support from SNCF. A rescue package was implemented which allowed SeaFrance to cover its cash requirements pending a restructuring plan. The business continued to operate while, in July 2010, the administrators searched for buyers for the vessels, contracts and staff as part of a plan to sell the business as a going concern. No acceptable offers were received, and the sale process was suspended in early 2011. SNCF had also invited bids for its shares in SeaFrance but it informed the administrators in February 2011 that it had suspended its sales process.

3.5 Towards the end of 2010 a significant number of staff were made redundant (354), leaving a workforce of 872 employees in the summer of 2011.

State aid

3.6 In February 2011, the French authorities notified the European Commission of restructuring aid in favour of SeaFrance amounting to €223 million, accompanied by

[35] We obtained translations of the judgment dated 9 January 2012 and the French Court Minutes from the parties; we obtained a translation of the judgment dated 16 November 2011 from an agency; a copy of this was provided to the parties.

a restructuring plan.[36] In September 2011, the proposal was changed to a capital increase of €166.3 million, supplemented by two loans of €99.8 million and [€40–€70] million. The restructuring plan at that point involved: *(a)* the sale of the *SeaFrance Nord Pas-de-Calais* and two vessels (the *Cézanne* and *Renoir*) which had already been sold in July 2011; *(b)* the reduction in workforce of 922 employees in total (from 1,550 employees in December 2009); and *(c)* a decrease in the number of crossings and savings of [€1–€5] million.[37]

3.7 The European Commission opened a formal investigation procedure because it concluded that the notified measure constituted state aid and it had doubts regarding: *(a)* the prospects for return to long-term viability of the company under the restructuring plan; and *(b)* the level of the company's own contribution. In October 2011, the European Commission held that SNCF's assistance constituted illegal state aid because SeaFrance's own contribution to its restructuring costs was less than 5 per cent, instead of the 50 per cent required by European rules. The European Commission also decided that the earlier rescue package, in the form of a loan from SNCF (see paragraph 3.4 above), constituted aid that was incompatible with the common market and that this aid had to be repaid within four months.[38] At a hearing on 25 October 2011, the French Court acknowledged the withdrawal of the SeaFrance recovery plan owing to the decision of the European Commission of 24 October 2011 (see paragraph 3.17 below).

[36] For details, see European Commission decision of 24 October 2011, SA.32600 (2011/C); see also European Commission press release IP/11/1239, 24 October 2011.
[37] Ranges in this paragraph are from the European Commission's decision referred to in the preceding footnote.
[38] We note that there are a number of other European Commission decisions relating to state aid to SeaFrance.

Invitation of offers to buy SeaFrance as a going concern (July 2011)

3.8 On 1 July 2011, the administrators invited new bids with a deadline of 26 July 2011. Two takeover bids were received, one from the SCOP and a joint bid from a Danish company, DFDS, and Louis Dreyfus Armateurs (referred to as DFDS-LDA).[39]

3.9 The offer from DFDS-LDA was rejected by the Court because it envisaged the redundancy of almost half the employees and renegotiation of collective agreements that were disadvantageous to employees. In addition, staff were wholly opposed to it and there was a risk of serious industrial conflict. Furthermore, the price offered was €5 million whereas the market value was in the order of €50–€60 million, according to lowest estimates provided to the French Court. The bid, if accepted, would allow for a very large deferred capital gain for this takeover candidate and would leave to be paid by the proceedings deferred company liabilities of over €5 million,[40] leading to a negative sale price and complete impossibility of compensating creditors. Finally, the bid was subject to the authorization of the competition authority.[41]

3.10 At the time of its first bid, the SCOP had not been formally established. It was created on 7 October 2011 by a group of 14 former SeaFrance workers. The Deputy Chief Executive of the SCOP described it as a 'workers' cooperative'. He stated that:

> the purpose of the SCOP at the time of its creation was to make an offer to acquire the assets of the SeaFrance business (at that time in administration). In other words, the SCOP was created with the aim of securing employment for its subscribers, in particular by ensuring that the SeaFrance vessels continued to operate between Dover and Calais.

[39] A third bid was also received but this was subsequently withdrawn.
[40] We understand this to mean that these company liabilities would be paid from the funds available to the liquidator.
[41] Judgment of the French Court, 16 November 2011, pp22–23.

3.11 At the time of the SCOP's registration (on 29 December 2011), it had 827 subscribers (individuals who had expressed their support for the SCOP and who had signed up to it without paying any share capital, but who had made a minimum contribution of €50 per person). The majority of the subscribers had been working for SeaFrance. These members subscribed to the SCOP with a view to future employment which was (at that stage) anticipated on the basis that the SCOP would acquire the entire SeaFrance fleet (at that time, the *SeaFrance Rodin*, the *SeaFrance Berlioz*, the *SeaFrance Nord Pas-de-Calais* and the *SeaFrance Molière*).[42]

3.12 In the judgment of the French Court dated 16 November 2011, the SCOP's offer is described as follows:

> The business plan provides for the operation of the company in an area close to the current entity. The main provisions of the takeover bid are as follows:
>
> – all of the intangible assets, in particular the customer base, the right to claim successor ship, goodwill, the software and licences required for the operation, all permits, registrations, licences and administrative authorisations, technical approvals and certificates, as well as the intellectual property rights of the SeaFrance brand;
> – all the vessels as well as all the equipment, machines, facilities and furnishings belonging to SeaFrance and located both in premises purchased and on board the vessels;
> – all stocks on board the vessels or in premises purchased, in particular the fuel, spare parts as well as all food and beverages;
> – all of the immoveable property of SeaFrance;
> – all equity securities held by SeaFrance;

[42] Following the acquisition by GET, the vessels were renamed *Berlioz*, *Rodin* and *Nord Pas-de-Calais*.

- receivables corresponding to reservations made by SeaFrance customers for services provided after the commencement date, these services to be provided by the acquirer;
- encumbered assets under Article L.641-12 to be included in the takeover as a voluntary option, it being understood that the SNCF has expressly agreed to forego its guarantees for all the vessels
- all current contracts for provision of service or supplies of goods, except the Benelux contracts;
- the property leases and recoverable tenancy agreements, with the exception of the registered office in Paris;
- the leasing contract for the Molière without change; and
- licence contracts and time slots.

3.13 The SCOP bid would have involved the takeover of the entirety of the jobs on the date of completion, excluding some executives or managers. The takeover was to be in line with article L.1224-1 of the French Labour Code (the equivalent of TUPE[43] Regulations in the UK). The SCOP proposed that all costs and charges relating to salaries up to the commencement date were to be paid by the proceedings with no confirmation by the court administrators. The SCOP would be responsible for any modifications to the terms of employment and place of work of the retained employees.

3.14 The sale price was €1, to which might be added in due course 25 per cent of the turnover after tax of the SCOP, paid each year on 31 December and at the latest on 31 December 2016, with a cap of €20 million.[44]

[43] Transfer of undertakings (protection of employment) Regulations 2006.
[44] Judgment of French Court, 16 November 2011, pp16–17.

3.15 The court administrators considered that the bid price of €1 was not acceptable given that it understood that the value of the vessels was between €60 million and €150 million; they also noted that the offer would require external financing of between €47 million and €80 million, which had not been secured at the date of the bid.[45] The court-appointed receiver pointed out that neither the SCOP nor the DFDS-LDA bid was in the interests of creditors. He stated that he had allowed for liabilities in the order of €164 million and commitments for paid leave and employee bonuses came to €5.1 million.[46]

3.16 Ultimately the French Court decided that it could not accept the SCOP's offer given the lack of financing.[47]

Liquidation of SeaFrance (November 2011)

3.17 Following the rejection of the bids of DFDS-LDA and the SCOP, and since the European Commission had decided that SNCF's proposed restructuring aid for SeaFrance was incompatible with the state aid rules, on 16 November 2011 the French Court ordered the liquidation of SeaFrance.

3.18 Although, at that point, SeaFrance was permitted to continue its activities until 28 January 2012, the operation of the ferries ceased on the night of 15/16 November 2011.

Invitation of further bids (December 2011)

3.19 New bids were invited by 12 December 2011. Only one bid was received: from the SCOP. The SCOP's bid was originally out of time, but was eventually considered—following adjournment—in early January 2012. This bid, which was broadly similar to

[45] ibid, p18.
[46] ibid, p19.
[47] ibid, p23.

the SCOP's previous bid, was outlined in a document dated 12 December 2011 (and the SCOP later submitted a business plan dated 6 January 2012).[48] It consisted of an offer of €1 and envisaged the operation of the ferries on the Dover–Calais route and the employment of almost all SeaFrance employees.

3.20 In the context of proceedings before the French Court, various parties commented favourably on the intentions of the SCOP to ensure employment for the SeaFrance employees, but they also considered that the lack of financing was problematic, both in jeopardizing the goal of ensuring continued employment and in providing funds to pay the company's creditors. For example, the 'Juge Commissaire'[49] stated that while the creation of the SCOP attracted a lot of sympathy, given that the lack of financing remained, its plan was not credible because it consisted simply of utilizing the capital in the vessels in order to maintain the status quo for some time. In addition, he said that the Court needed to consider its responsibility vis-à-vis the creditors.[50]

3.21 The French Court noted that the offer the SCOP filed on 6 January 2012 brought clarifications and improvements; however, it was not very different from the previous one. While it had the advantage of making arrangements for almost all of the personnel to be taken over, it had the serious drawback of not making provision for the necessary financing for carrying out the plan envisaged. As previously, the SCOP had stated the need for €50 million in start-up capital. The Court held that it could not accept the offer as continuity of the business had not been assured due to the absence of financing.[51]

[48] SCOP, Offre de reprise par plan de cession des actifs de la société SeaFrance (3 December 2011).
[49] We understand that this is an officer comparable to the official receiver.
[50] Judgment of the French Court, 9 January 2012, p18.
[51] ibid, p20.

3.22 By judgment dated 9 January 2012 the French Court rejected the SCOP's offer. It is in this judgment that we find the first mention of GET's involvement: namely an indication on the part of GET that it wished to buy the SeaFrance vessels in order to lease them to the SCOP. This arrangement was linked to a loan from certain local entities in the Nord Pas-de-Calais region or from SNCF, as well as employee redundancy packages:

> An indication was given of the wish of the company Eurotunnel, by its Chairman and Managing Director, Mr Gounon, to buy SeaFrance's vessels and lease them to SeaFrance Cooperative Enterprise either directly or through a mixed ownership company. This provision, coupled with a cash loan from local collectives in the Nord Pas-de-Calais region or from SNCF, as well as the voluntary conversion into capital by personnel of their redundancy compensation payments, improved as the government has indicated, would allow the plan proposed to overcome its two main handicaps: 1. Initial financing, and 2. availability of the vessels.[52]

3.23 On 9 January 2012, the French Court also decided not to allow the further adjournment requested by the SCOP. The French Court noted that two consecutive adjournments had already been granted to allow the SCOP to improve its offer, in particular in relation to financing; the French Court also appeared unpersuaded by GET's proposal and by the SCOP's further efforts to secure financing. Hence it ruled that a new delay would be incompatible with the urgency of the decision that needed to be taken.

[52] ibid, p15.

Formal cessation of activities (January 2012) and invitation of bids for liquidated assets (May 2012)

3.24 On 9 January 2012, the French Court further decided that the activities of SeaFrance in liquidation should cease. However, the bankruptcy judge also observed that:

> the end of the temporary continuance of business is not the end of the road. On pronouncement, the liquidator under the control of the bankruptcy judge and the Court must undertake any discussions that are necessary with the interested parties. Clearly, there must be a trade-off between the value of the assets, which are mainly the vessels, and the continuance of employment contracts. The market exists; the vessels are quite new and even the business may be sold later on. He will ensure that the bodies governing the proceedings are particularly attentive to the dramatic social company aspects and to do this he knows that SNCF will do its duty regarding its Group obligations and its capacity to reclassify collaborators under conditions to be negotiated. In all cases, the procedure must follow three lines of action as follows:
>
> - Reclassification of the business as a competitive and competent organisation in the sea transportation business with enhancement of the assets (rejection of speculative offers aimed at making a rapid capital gain);
> - A solution for all employees who would not find employment with their current skills, by indemnification, training, enterprise creation aid and reclassification; and
> - In all situations, complete transparency in any action carried out.[53]

3.25 In the two weeks following the date of liquidation, the liquidator appointed by the French Court (the liquidator) met with the SeaFrance works council to negotiate and

[53] ibid, p19.

agree the terms of the PSE3. In certain circumstances, employers are legally required to establish such a plan when employees are dismissed in order to facilitate reassignment and job creation. At the first meeting between the liquidator and the SeaFrance works council, employee representatives requested the insertion of a clause intended to provide special assistance to buy the assets of SeaFrance. Ultimately, this resulted in SNCF agreeing to fund a €25,000 payment for each ex-SeaFrance employee employed on the SeaFrance vessels used for a similar operation and provided certain other conditions were satisfied (for further details on the indemnity, see paragraphs 3.79 to 3.87).

3.26 Once SeaFrance had been put into liquidation, the liquidator's aim was to sell the company's assets under the best possible conditions. A shipbroking firm (Parimar) was appointed to advise the liquidator with regard to selling the three ships, namely the *SeaFrance Nord Pas-de-Calais*, *SeaFrance Berlioz* and *SeaFrance Rodin*. A decision was taken to lay up the vessels during the sales process.

3.27 The three vessels and the firm's other assets (trademarks, customer lists, information systems and perfume, tobacco and alcohol inventories) would be sold privately, using a procedure for submitting bids in two schedules: one for the vessels and one for the non-vessel assets. The vessels could be bought outright or procured by way of a bareboat charter of between 18 and 60 months' duration.[54]

3.28 A deadline of 4 May 2012 was set for receipt of sealed bids in respect of the vessels and the non-vessel assets. Four bids were received. DFDS-LDA bid €30 million for the *SeaFrance Berlioz* and €25 million for the *SeaFrance Rodin* (or €50 million for both ships). Stena RoRo AB bid €[✂] million for the *SeaFrance Rodin*. P&O bid for the customer lists and domain names (see paragraphs 3.182 to 3.202). Ultimately,

[54] A bareboat charter refers to the hiring of a ship for a stipulated period on terms which give the charterer possession and control of the ship, including the right to appoint the master and crew.

these three bids were all rejected and we do not consider them further here. The fourth bid was by GET; it was described in the Court Minutes of 11 June 2012 in the following terms:

> The bidder [GET] presents a comprehensive, integral bid bearing simultaneously on the ships and other tangible assets and intangible assets whose acquisition is proposed, as part of an industrial project integrating the participation, via a SCOP composed of SeaFrance's former employees.
>
> The relevant local authorities, the Regional Council and the Calais Mayor's Office, have clearly demonstrated their desire to be associated with the proposed recovery through a financial contribution to the acquisition of the ships on terms currently being finalised.
>
> The bidding company continues in this industrial rationale by proposing to take SeaFrance's industrial assets and operate them through special purpose companies, in accordance with the interests of the Group and its shareholders. A partnership for the long term between Eurotunnel and the SCOP including SeaFrance's former employees is considered; this partnership would provide for an immediate return to employment for SeaFrance's former employees, as well as a perspective for progressive hiring.
>
> The takeover of SeaFrance's activities may be schematically summarised as follows:
>
> A special purpose company, which shall be referred to as EuroTransManche 1 for the purpose of this Offer, controlled by GET SA, shall own the ships; it shall employ no or very few staff and shall operate as lessor/charterer. Financing for the cost of the ships shall be through the equity of this company lent by Groupe Eurotunnel (GET), and bank financing. …

The project by SeaFrance's former employees to regroup within the SCOP, insofar as it has met with the expected success among former SeaFrance employees, and thus their strong attachment thereto, shall be achieved by establishing an operating structure that shall perform the ship crossings. …

As a reminder, SeaFrance's staff was laid-off by the liquidator, following the liquidation without the continuation of the company's activity. However, the project in which Groupe Eurotunnel is participating is aimed at providing for a partnership with SeaFrance's former employees who shall form a SCOP in order to revive the activities previously conducted by SeaFrance. …

In addition to financing the three ships, the project relies on funding from the SCOP's employees limited to about €10 million before corporate income tax and therefore involves additional funding from Groupe Eurotunnel in the amount of €20 million if there is no delay in implementing the plan and €30 million if there is a six month delay.

While outside the take-over domain, it should be noted that the proposed activity involves subscriptions for SeaFrance Ltd's computer/telecom site in England currently in voluntary liquidation, and the lease of premises occupied by that entity is included by Eurotunnel in so far as they are essential to the recovery project presented.

Groupe Eurotunnel (GET SA) or any company controlled by it substituted therefor shall acquire the three ships Berlioz, Nord Pas-de-Calais, and Rodin as well as assets of all kinds contained therein for purposes of their operation.

Groupe Eurotunnel (GET SA) or any company controlled by it substituted therefor shall acquire all of SeaFrance's tangible and intangible assets necessary for their operation, including: the trademark, the trade

> name, computer software, the internet sites and the domain names, customer files, stocks of spare parts and technical equipment, computer equipment and office equipment. And more generally all assets listed in the two schedules of conditions drawn up by Mr. Gorrias in his official capacity, excluding all food and beverages, alcohol, tobacco and perfumes, and tangible assets specifically excluded from the scope of the take-over, such as a few computers, and the assets considered for auction by the liquidator.[55]

3.29 GET's Offer to buy the assets of SeaFrance dated 4 May 2012 (GET's offer document) details the plans of 'the recommencement of SeaFrance operations' and states that 'the project for which Groupe Eurotunnel is signing up is intended, however, to allow a partnership with the former SeaFrance employees who will be involved as part of a SCOP, so as to revive the operations previously undertaken by SeaFrance'.[56]

3.30 GET's offer document explained that in addition to the financing of the three ships, the project was based on financing by the employees within the SCOP that was limited to approximately €10 million before corporation tax, and therefore involved additional financing of between €20 million and €30 million. We understand that the indemnity payments that the SeaFrance works council negotiated with the liquidator (see paragraph 2.34 above), and which the SCOP subsequently received (see paragraph 3.89 below), enabled it to fund its €10 million contribution.

3.31 The French Court Minutes dated 11 June 2012 describe GET's bid as aiming to revive the activities previously conducted by SeaFrance and as 'the takeover of SeaFrance's activities'. Based on this understanding, and given that GET's bid was

[55] Minutes of French Court, 11 June 2012, pp12–14.
[56] GET noted that the original French 'faire renaître' literally translates as 'to cause to be reborn'.

the best bid to compensate creditors, the Court ordered the sale of assets to GET. The Court noted that, while job creation was not a criterion established for the sole realization of assets in liquidation, it remained a significant factor in the subjective assessment. A quick sale would provide for resuming the ships' operating starting next season. The sale to GET of the vessels and assets was duly authorized. The acquisition completed on 2 July 2012. Operations on the Dover–Calais route recommenced on 20 August 2012 under the MyFerryLink brand.

3.32 We have included at Appendix B a more detailed list of the assets obtained and the prices offered by GET.

SeaFrance assets in the UK

3.33 SeaFrance had a UK subsidiary: SeaFrance Ltd. The assets of this company were not included in the French liquidation process. However, GET's offer to the liquidator for SeaFrance's liquidated assets noted that: 'the intended operations involve the IT/telecom subscriptions at the SeaFrance site located in England that is currently in the process of voluntary winding up, and the rent of premises occupied by this body will be assumed by [GET] once they are necessary to the presented purpose.'[57]

3.34 GET said that it realized it would need UK assets early on during its planning for its new business, and that as early as March/April 2012, the liquidator had suggested to GET that it approach the managers of SeaFrance's UK operation to assess the UK assets. GET told us that certain of the UK assets had been advertised publicly for sale, and that the French liquidator made clear during the French sale process that he would be keen to see the UK assets also sold. According to GET, at pre-closing meetings in June and early July 2012, the French liquidator explained that he was keen to sell all of the UK assets as a package and offered them at a price of €[✂].

[57] GET subsequently clarified that this was not a condition of GET's offer at the time, but rather a firm expression of interest.

MFL's offer for SeaFrance's UK assets was accepted by the Finance Director of SeaFrance Ltd.

3.35 GET said that its offer to the French liquidator was not conditional on it obtaining the UK lease and IT operations of SeaFrance Ltd, but rather a firm expression of interest. GET told us that it understood that, at the same time as GET became interested in the UK lease and IT operations, DFDS also displayed an interest in acquiring these. GET said that this would suggest that DFDS itself was looking to facilitate the 'carry across' of SeaFrance's former operations to its own short-sea operations.[58]

3.36 The acquired UK assets consisted of office furniture and IT equipment, SeaFrance-branded uniforms, a back-up generator, three vehicles and a 'Portakabin' located in the port area. They were acquired on 2 July 2012 by Eurotunnel Transmanche 2 SAS (a subsidiary of GET, subsequently known as MFL) for €[✂]. On 1 August 2012, these assets were sold to Dover Calais Ferries Limited (DCFL, a wholly-owned subsidiary of the SCOP) for €[✂]. The 'Portakabin' was subsequently sold to a third party.

3.37 On 14 September 2012, DCFL obtained a lease previously held by SeaFrance Ltd of premises at Whitfield Court, White Cliffs Business Park in Dover (a location approximately 4 miles from the Dover ferry terminal). GET pointed out that this did not happen automatically and was not part of the assets acquired from the French liquidator. DCFL had to pay the landlord a rent deposit of £[✂] in order to secure the site as a new tenant. This was confirmed by the SCOP.

3.38 We note that these transactions were entered into by GET to acquire assets owned by SeaFrance Ltd and used by SeaFrance in its Dover–Calais ferry business.

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[58] GET response to DFDS submission, paragraph 4.3.

SeaFrance Ltd assigned the lease of Whitfield Court premises to DCFL with the consent of the landlord at a cost of £[✂].[59] The transactions occurred before the date of the reference to the CC (and within the four-month period prior to the reference). We have therefore taken them into account in our assessment of the asset/enterprise question as having been acquired by GET/SCOP as part of the merger. It would, however, have made little difference to our analysis if these assets had instead been acquired separately from a third party.

3.39 For completeness, we note that the UK liquidator of SeaFrance Ltd told us that: as at end December 2011, the UK subsidiary had tangible fixed assets, fixtures, equipment and motor vehicles with a book value of £146,000; current assets consisted of £893,000 of trade debtors and £2.9 million cash; the final period of trading was the five months to 31 May 2012; following this the company had no fixed assets, some debtors and cash. In that period, furniture, fixtures and fittings were largely scrapped, with some proceeds received for computer equipment; vehicles with a book value of £43,000 were sold for proceeds of £58,000; there was a significant drop in cash at bank which appears largely attributable to redundancy costs in the period.

Summary of parties' submissions on the period of inactivity

3.40 GET submitted that the length of time for which the vessels and other assets were not operational was relevant, and that during the period from 16 November 2011 to 2 July 2012, it did not solicit business from potential freight or passenger customers using the vessels.[60]

3.41 In GET's view, a nine-month period of inactivity (ie until 20 August 2012) was exceptional, particularly in the context of the industry concerned as it coincided with peak

[59] Licence to assign and deed of variation made between Priority Sites Investments Limited and SeaFrance Ltd and Dover Calais Ferries Ltd, dated 14 September 2012. The term of the original lease was ten years, expiring on 12 December 2020.
[60] GET response to Remittal Notice, section 5, paragraph 5.1.

passenger and freight travel times. In its first three months of trading, MFL carried [✂] freight vehicles and [✂] passenger vehicles.[61] In its view, the 'low' passenger and freight traffic levels were evidence that there was no transfer of the SeaFrance business and no continuation of its previous customer relationships.[62]

3.42 GET argued that the judgment of the French Court on 9 January 2012 was significant as SeaFrance was prohibited, by order of the French Court, from carrying on any business activity from that point on. GET noted that, in contrast, whilst SeaFrance was in administration, a business continuity solution had been sought, and when SeaFrance was put into liquidation on 16 November 2011, the French Court did so expressly, 'with SeaFrance continuing its activities'.[63]

3.43 The SCOP argued that the duration of the period of inactivity was highly relevant and this was recognized by the OFT's Jurisdictional and Procedural Guidance. It noted that there were no crossings for nine months between cessation of SeaFrance's activities and MFL's launch of services; therefore the SeaFrance business was wound down to such an extent that it was not an enterprise. The SCOP considered that *AAH/Medicopharma* was distinguishable from the present case as the period of inactivity was only approximately five days and the arrangements in that case were designed to circumvent merger control rules.[64]

Our views on the history of the transaction and the period of inactivity

3.44 We recognize that there was a considerable period in which SeaFrance was not trading. The period of inactivity was significantly longer than in the AAH/ Medicopharma merger. From 15/16 November 2011, the operation of ferries on the

[61] GET submitted that in the same period in 2013, MGFL carried [✂] freight vehicles and [✂] passenger vehicles (excluding coaches of which it carried [✂]).
[62] ibid, section 5, paragraphs 5.4–5.7.
[63] ibid, section 4.
[64] SCOP response to Remittal Notice, section 3.

Dover–Calais route by SeaFrance ceased. From 9 January 2012, SeaFrance was prohibited by the French Court from carrying out its ferry operation. On 2 July 2012, the acquisition of the liquidated assets completed. There followed a period of seven weeks, during which various activities took place to allow the ferry operation on the Dover–Calais route using the former SeaFrance vessels to recommence on 20 August 2012.

3.45 We note, first, that the decisional practice of the CC and OFT, their Guidelines, as well as the Judgment of the CAT,[65] all recognize that in the context of 'enterprises ceasing to be distinct', it is not necessary—for the purpose of establishing that an enterprise rather than an asset is acquired—that the activities of the acquired business continue up until the date of completion of the transaction. Were it otherwise, it would be very easy for businesses to evade UK merger control law.

3.46 We note, secondly, that a considerable portion of the period of inactivity (at least from 9 January 2012 until 2 July 2012) was due—directly or indirectly—to the requirements of the liquidator's sale process which followed on from the failure of the SCOP's two attempts to purchase the SeaFrance business as a going concern.

3.47 Third, considerable efforts were made to maintain the value of the assets during the period of inactivity. One of the liquidator's aims was to realize the assets at the best price in order to ensure that payments to the company's creditors would be maximized. An expert shipbroker, Parimar, was engaged to advise the liquidator in this regard. The vessels were put into hot lay-up and 190 SeaFrance staff were involved, directly or indirectly, in their maintenance.

[65] Judgment of the CAT, paragraph 106(a).

3.48 Fourth, while various transactions involving the parties were considered, they all had the aim of continuing SeaFrance's activities in some form and providing employment to SeaFrance employees. We noted that many of those involved in the various stages of the sale process—including the liquidator and the French Court—sought to ensure the re-employment of ex-SeaFrance staff in the Dover–Calais region, preferably on the SeaFrance vessels. One reflection of this is the successful negotiation by the SeaFrance works council of an indemnity payment—funded by SNCF—which was significantly higher in the event that the ex-SeaFrance staff were re-employed on the SeaFrance vessels used in a similar operation and which ultimately provided the SCOP with a substantial amount of working capital.

3.49 Fifth, the SCOP was formed with the aim of providing employment for SeaFrance employees who were faced with redundancy. It made a determined attempt to acquire SeaFrance as a going concern when it was in administration. A second attempt (in which GET had some involvement) took place after SeaFrance's activities had ceased. Those attempts failed for two reasons: *(a)* the low bid of €1 was disadvantageous to creditors and unacceptable in light of the perceived value of the assets; and *(b)* the lack of funds available to the SCOP meant that—although it wanted to use the acquired assets to provide employment for SeaFrance employees—its proposal to do so was not credible.

3.50 In our view, the collaboration between GET and the SCOP presented a solution that addressed two main concerns flowing from the liquidation of SeaFrance: *(a)* payment of creditors; and *(b)* ensuring employment for ex-SeaFrance workers. Although the various schemes previously considered by the French Court had at their core the continuation of a ferry service and employment for SeaFrance employees, it had not been possible to find a viable solution producing value for creditors and the continua-

tion of the SeaFrance operation involving all employees under their existing terms and conditions.

3.51 The liquidation process and subsequent termination of employment contracts meant that the TUPE Regulations did not apply and allowed the business and workforce to be restructured. Continuity of employment was effectively safeguarded by the formation of the SCOP, which held the workforce together, and—to a lesser extent—due to the fact that a significant number of employees were involved in the lay-up of the vessels.

3.52 At the point the decision was taken that SeaFrance activities should cease, the French Court recognized that the aim of achieving some form of business continuity remained unchanged. This is clear from statements such as: 'the end of the temporary continuance of business is not the end of the road' and 'there must be a trade-off between the value of the assets, which are mainly the vessels, and the continuance of employment contracts'.[66] PSE3 was designed to support such a business continuity solution (given the fact that the SCOP had been unable to secure finance in the market), and GET's acquisition of the vessels provided funds to pay creditors.

3.53 Overall, we consider that a review of the background to the transaction shows that there is considerable continuity and momentum between the time of SeaFrance's operation of the Dover–Calais ferry and the commencement of MFL's operation of the same ferries on that route involving ex-SeaFrance employees. This is not a situation where a collection of assets (used at some point in the past to carry on a business activity) comes to the market, and a buyer is successful in acquiring them, and then uses them to set up a business similar to the one for which the assets were

[66] Judgment of the French Court, 9 January 2012, p19.

originally used. For reasons set out above, the circumstances of this case are fundamentally different.

3.54 We appreciate that there are material differences between the transactions involving the SCOP that were contemplated in respect of the sale of SeaFrance as a going concern and the acquisition of liquidated assets by GET. Significantly, once SeaFrance was put into liquidation, many of its employees were made redundant within two weeks. However, this also meant that any buyer of the liquidated assets would not have to assume any employee obligations, and this might well be an advantage in circumstances where the new owner envisaged a leaner operation. Further consequences of the liquidation were the termination of customer and supply contracts and the laying up of the vessels; we consider this in the sections that follow.

3.55 For the avoidance of doubt, we do not believe that there was an intention on the part of the SCOP or GET to engineer the transaction such that there might be a greater chance that it fell outside UK merger control rules.[67] We recognize that throughout the process, the SCOP's intention was to secure employment for ex-SeaFrance staff (and indeed to create further employment) in a region where unemployment is high. We also accept that GET's involvement was—in its own words—opportunistic: it saw a business opportunity and it seized this.

Consideration of SeaFrance employees

3.56 In this section, we consider the position with regard to employees. In particular, we consider whether or not employees transferred to (or were 'acquired by') the SCOP from SeaFrance.

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[67] See OFT jurisdictional and procedural guidance quoted in paragraph 2.9 above and the MMC report on AAH/Medicopharma referred to in paragraph 2.13 above.

Judgment of the CAT

3.57 The SCOP's second ground of appeal was founded on the argument that—assuming that the SCOP and GET were associated persons within the meaning of section 127(4)(d), which the CAT found to be the case—GET/SCOP only acquired from SeaFrance the vessels, the brand and goodwill and the customers lists and not the former SeaFrance employees.[68]

3.58 The history of the SCOP is summarized in paragraph 64 of the CAT's decision, starting with the SCOP's creation in October 2011, followed by its formal registration on 29 December 2011 and concluding with the fact that on 20 August 2012 (the date of commencement of MFL's operations) the SCOP had 256 employees on the ships and a further 126 operating at the ports of Dover and Calais (382 in total).[69]

3.59 We understand that in January 2012, when SeaFrance was liquidated, it employed around 820 individuals. Around this time, the SCOP had approximately 800 subscribers. As noted in paragraph 3.10 above:

> the purpose of the SCOP at the time of its creation was to make an offer to acquire the assets of the SeaFrance business (at that time in administration). In other words, the SCOP was created with the aim of securing employment for its subscribers, in particular by ensuring that the SeaFrance vessels continued to operate between Dover and Calais.

The SCOP told us that all employees of the SCOP were also SCOP subscribers (although employees of DCFL are not SCOP subscribers).

[68] Judgment of the CAT, paragraphs 59 & 61–65.
[69] These figures derive from the CAT judgment. Different figures have subsequently been provided by the SCOP.

3.60 In paragraph 72, the CAT concluded that, on the assumption that the former SeaFrance employees constituted a part of the SeaFrance Assets,[70] it found that the 382 employees referred to in paragraph 3.58 above were 'acquired' by the SCOP during what the CAT considered to be the relevant time period (that is, within the statutory period for reference under section 24 of the Act, in this case between 29 June 2012 and 29 October 2012).[71] In paragraph 73 the CAT reiterated its conclusion that GET/SCOP had in fact acquired SeaFrance Assets, including the former SeaFrance employees.

3.61 The conclusions of the CAT in paragraphs 72 and 73 of the judgment were not challenged and we therefore proceeded on the basis that it has been established that, to the extent that the relevant employees were 'acquired' by the SCOP, they were so acquired within what the CAT considered to be the relevant time frame since they were employed pursuant to contracts entered into between 29 June and 29 October 2012.

3.62 The CAT expressed the view that, on the face of our report, it was difficult to see how the relevant employees were 'acquired' from SeaFrance:

- These employees were made redundant by SeaFrance over a period of time.
- Their contracts of employment were terminated, with no thought as to how they might be employed in the future. Their relationship with SeaFrance simply came to an end (subject to matters explored in more detail from paragraph 3.80 below).
- The formation of the SCOP, and the subscription of a number of ex-SeaFrance employees to this organization, and the subsequent employment of some of them

[70] SeaFrance Assets are defined in paragraph 38 of the CAT's judgment, by reference to our decision in, for example, paragraphs 4.3, 4.15, 4.68 & 4.69.
[71] Judgment of the CAT, paragraph 68.

by it, constituted the creation of a new legal relationship, with no element of transfer from SeaFrance to the SCOP.[72]

3.63 The CAT then observed in paragraph 116 that:

> Of course, it is possible to imagine cases where the employment of a workforce by one employer ceases, but that the workforce migrates – as a workforce – to a new employer. That, we consider, could amount to the 'acquisition' of that workforce by the new employer, and could amount to the acquisition of a business activity. That might well be the case even if the workforce's contracts of employment were not formally transferred from the old employer to the new one, but terminated and new contracts entered into. If the reality is that a workforce is being transferred, then the fact that wholly new legal relationships are forged as part of that process should not affect the position.

3.64 This section therefore considers the arrangements relating to ex-SeaFrance employees including the employee indemnity.[73]

Arrangements relating to SeaFrance employees

3.65 Our report discussed staff in paragraphs 4.22 to 4.24. The French equivalent of the TUPE Regulations did not apply to the SeaFrance employees; there was no continuity in the contractual arrangements of the employees as between SeaFrance and the SCOP or GET/MFL respectively.

[72] ibid, paragraph 115.
[73] We use the term indemnity in relation to payments under clauses 3.3.3 and 3.4 of the PSE3. However, clause 3.3.3 is in a section entitled 'aide à la creation ou à la reprise d'entreprise' which could be translated as 'aid to create or takeover activities'. Clause 3.4 is entitled 'incitation à l'employeur qui embauche (hors Groupe SNCF)' which can be translated as 'incentive for the employer hiring (outside the SNCF Group)'.

3.66 SeaFrance employed around 820 individuals when it went into liquidation. According to the liquidator, French law required that SeaFrance's employees be made redundant 15 days after the date of liquidation—on 24 January 2012. The liquidator informed us that 190 SeaFrance staff had their redundancy delayed for periods varying from 2.2 months to 10.2 months.[74] These employees kept their SeaFrance employment terms but received a bonus and were paid by the liquidator.

3.67 We understand that 34 staff (officers and crew) were involved in the hot lay-up of each of the *SeaFrance Rodin*, *SeaFrance Berlioz* and *SeaFrance Molière* (which was not acquired) and 26 for the *SeaFrance Nord Pas-de-Calais*.[75] We understand from the SCOP that this is around one-third of the number of staff that would have been required to operate the vessels. While the vessels were laid up, they needed to be able to leave the dock at very short notice, in case of an incident or bad weather. Further details about the meaning of hot lay-up and the reasons for it are set out in paragraphs 3.118 to 3.122.

3.68 The remainder of the staff whose contracts of employment were extended were described by the liquidator as office staff in various functions, including 6 commercial staff, 1 director, 18 finance staff, 19 operations staff, 16 human resources staff and 2 others. They were engaged in matters such as the procurement of supplies and payroll.

3.69 [✂]

3.70 We obtained the following figures from the SCOP about the numbers of ex-SeaFrance employees that were employed by them at different points in time. We

[74] Of the total number of SeaFrance employees, just over half were then employed by SCOP.
[75] Of the 94 staff involved in the lay-up of the vessels, 47 (50 per cent) subsequently obtained employment with SCOP and around half of these were not previously members of the SCOP.

have also included in Table 1 an indication of the number of employees in respect of which the €25,000 indemnity was paid. Further details relating to the indemnity are in paragraphs 3.81 to 3.87 below.

TABLE 1 **The SCOP employees**

Date	*Total number of SCOP subscribers*	*Total SCOP employees*	*Total ex-SeaFrance employees*	*Ex-SeaFrance where indemnity was paid at a later date*
1 July 2012 (day before completion)	[✂]*	[✂]	[90–100%]	[✂]
2 July 2012 (completion of the transaction)	[✂]	[✂]	[90–100%]	[✂]
20 August 2012 (MFL commences services)	[✂]	[✂]	[80–90%]	[✂]
29 October 2012 (date of reference to CC)	[✂]	[✂]	([70–80%] of total SCOP employees)	([60–70]% of total employees)†

Source: The SCOP.

*The SCOP had [✂]subscribers at the time of registration in December 2011 and this is used as a proxy. There were no SCOP employees employed prior to 1 July 2012. For the purposes of this table, the SCOP considered that ex-SeaFrance employees were those who were made redundant under PSE3 together with all former employees of SeaFrance Ltd who were made redundant in January 2012 or who joined the liquidation cell following the liquidation of SeaFrance and who were made redundant on 30 April 2012.
†Although the SCOP submitted that there were [✂] individuals employed within the relevant period who fell within the definition of relevant employees for the purposes of clause 3.3.3 of the PSE3.

3.71 On 29 October 2012, employees of the SCOP were as set out in Table 2.

TABLE 2 **SCOP employees as at 29 October 2012 (Dover and Calais)**

Employee role	*Total*	*Number of ex-SeaFrance*	*Percentage of ex-SeaFrance*
All	[✂]	[✂]*	[70–80]
On-shore	[✂]	[✂]	[60–70]
On–board vessels	[✂]	[✂]	[80–90]
Officers	[✂]	[✂]	[60–70]
Crew	[✂]	[✂]	[80–90]
IT	[✂]	[✂]	[90–100]
Maintenance	[✂]	[✂]	[90–100]
Operations	[✂]	[✂]	[60–70]
Procurement	[✂]	[✂]	[90–100]
Management	[✂]	[✂]	[60–70]
Other	[✂]		

Source: The SCOP.

*We note that this figure is different in the preceding table ([✂] compared with [✂]). We understand that this is because the higher figure included ex-SeaFrance employees which had been made redundant before PSE3. The lower number reflects employees made redundant under PSE3 as a result of the liquidation.
Note: For the purposes of this table, ex-SeaFrance employees means those made redundant under PSE3 together with all former employees of SeaFrance Ltd who were made redundant in January 2012 or who joined the liquidation cell following the liquidation of SeaFrance and who were made redundant on 30 April 2012.

3.72 The SCOP submitted that, out of the [✂] former SeaFrance employees who were made redundant under PSE3, they only received an indemnity under clause 3.3.3 in relation to [✂] employees employed by the SCOP.

3.73 The SCOP submitted that at least [✂] ex-SeaFrance employees were unsuccessful in their application for employment with the SCOP after the interview stage. The SCOP also noted that it employed none of the former senior management of SeaFrance.[76]

3.74 GET told us that it currently employed [✂] people on its Dover–Calais business; they were recruited via traditional recruitment channels. [✂] Further information is set out in Table 3 below. We have included in the table an indication of the number of employees in respect of which the €3,600 indemnity was paid. Further details relating to the indemnity are in paragraphs 3.81 to 3.87 below.

TABLE 3 **MFL employees who are ex-SeaFrance**

Date	*Total MFL employees*	*Ex-SeaFrance MFL employees*	*Indemnity received (number of employees and amount)*
Pre 2 July 2012 (before completion of the transaction)	[✂]	[✂]	[✂]
2 July 2012 (completion of the transaction)	[✂]	[✂]	[✂]
20 August 2012 (MFL commences services)	[✂]	[✂]	[✂]*
29 October 2012 (date of reference to CC)	[✂]	[✂]	[✂]

Source: GET.

*Pursuant to clause 3.4 of PSE3.

3.75 In respect of UK employees, the SCOP told us that the SeaFrance UK staff were made redundant on 31 January 2012. The former Managing Director of SeaFrance Ltd set up DCFL on 27 June 2012, which became 100 per cent owned by the SCOP on 10 September 2012. From 3 July 2012, DCFL advertised externally for staff. The first [✂] staff employed in the UK on 1 July 2012 were executive directors who were ex-SeaFrance employees. The first UK employees entered into contracts on [✂] and, of those who were employed as at 3 January 2014, the last entered into a contract of employment on [✂].

[76] SCOP response to Remittal Notice.

Our views

3.76 We note that on 20 August 2012 (commencement of MFL ferry service), [80–90] per cent of the SCOP workforce was ex-SeaFrance. As at 29 October 2012 (the date of the reference to the CC), around [70–80] per cent of the SCOP workforce comprised ex-SeaFrance employees. At the same date, approximately [20–30] per cent of the MFL SAS workforce comprised ex-SeaFrance employees.

3.77 We appreciate that not all ex-SeaFrance employees gained employment in MFL's ferry operation. MFL operates one fewer vessel than SeaFrance did (the *SeaFrance Molière* was not acquired by GET). The French Court Minutes dated 11 June 2012 refer to 'reducing staff/position ratio to 2.3 (compared with 2.9 for SeaFrance)'. There are statements by the 'Juge Commissaire' in the judgment of the French Court dated 9 January 2012 that are critical of staff and management and which refer to repeated industrial actionm, in particular during peak times, and a situation of systematic obstruction. In light of those factors, we consider that it was to be expected that the SCOP and MFL would conduct a selection exercise to select what it considered to be the right number of suitable employees (see also paragraph 3.51 above).

3.78 The SCOP stated that of the [✂] former SeaFrance employees who were assigned to a specific vessel during their time with SeaFrance, [✂] per cent were assigned to the same vessel by the SCOP. As at 3 January 2014, there were a total of [✂] employees who are engaged in different jobs with different responsibilities from those they had at SeaFrance ([✂] per cent of the SCOP's total staff who were previously employed by SeaFrance). In our view, given that the *Berlioz* and the *Rodin* are sister ships and they operate on the same route, it is not surprising that staff can work on either ship. Similarly, given that the number of employees has decreased, it is not

surprising that a number of job titles or responsibilities changed to accommodate this. Also, a change in job descriptions is not unusual in the context of a reorganization.[77]

3.79 In the following section, we consider the employee indemnity arrangements in more detail.

The employee indemnity

3.80 The CAT indicated that it would be appropriate for us to take into account that the SCOP would receive an indemnity of €25,000 for each SeaFrance employee that it employed. The CAT considered that such contribution, if fully explored, might provide a cogent reason, on the part of GET/SCOP, to employ ex-SeaFrance employees and that this seemed to be a benefit emanating from employing an ex-SeaFrance employee that would not be gained were an employee from elsewhere to be retained.

3.81 Once SeaFrance had been put into liquidation, the liquidator negotiated a 'plan de sauvegarde de l'emploi' (a plan to safeguard employment) with the SeaFrance works council. The SeaFrance PSE3 was concluded on 23 January 2012. SNCF was responsible for funding the indemnity; the liquidator was responsible for administering the scheme.

3.82 We understand from the liquidator and the SCOP that such 'plans to safeguard employment' are required under French law in certain circumstances,[78] although the content and terms of the statutory arrangement will be specific to the particular situation in which the general legal obligation arises.

[77] See Stagecoach Holdings plc and Lancaster City Transport Limited: a report on the merger situation between Stagecoach Holdings plc and Lancaster City Transport Limited, paragraphs 6.24–6.26.
[78] The SCOP noted that Article L.1233-61 of the French Labour Code required that under certain circumstances, an employer must establish an employment safeguard plan when dismissing employees. This included facilitating reassignment and job creation plans, including assistance to create new businesses. PSE3 arrangement was therefore a legal requirement: SCOP response to Remittal Notice.

3.83 Pursuant to PSE3, it was agreed that €25,000 would be paid for each ex-SeaFrance employee where the French Court sold the liquidated assets such that it allowed 'a similar operation of the vessels belonging to SeaFrance' ('une exploitation similaire') for the benefit of the SCOP project, or any (whatever its form) company, in which the employees would have a direct interest (shareholding) and indirect interest (permanent employment contract) (Clause 3.3.3, page 29 of PSE3).

3.84 The €25,000 indemnity was not included in the initial version of the PSE3.[79] It was first raised at the end of the first meeting between the liquidator and the SeaFrance works council where they asked for special help to buy the assets of the company. The indemnity of €25,000 was negotiated in the context of measures to revitalize and create employment in the Calais region.

3.85 At this point, the SCOP had 800 subscribers and the SCOP noted that around 820 employees were made redundant under PSE3. This suggests that the vast majority of SeaFrance employees were also members of the SCOP (albeit we note that a number of SeaFrance employees had previously been made redundant: for example, on 24 November 2010, 279 SeaFrance employees were made redundant). The SCOP also noted that the SeaFrance works council would have been aware of the existence of the SCOP and the fact that many SeaFrance employees were subscribers to it.[80]

3.86 PSE3 also provided that indemnities—of a lower value—would be payable in other circumstances, namely: [✂].

[79] It was not in a version dated 13 January 2012.
[80] SCOP response to Remittal Notice.

3.87 These indemnities had to be claimed within [✂]. As noted above, the liquidator was responsible for making the payments out of funds provided by SNCF. The liquidator ensured that the terms were such that the funds would cover all likely claims.

3.88 The SCOP considered that it was entitled to the €25,000 indemnity payment in respect of its members/employees who were ex-SeaFrance employees. At the time of GET's hearing with us in the context of the original merger inquiry, Mr Giguet indicated that these indemnity payments were expected and were absolutely necessary for SCOP SeaFrance to be able to run the company. We understand that when the request for payment was made, the liquidator initially queried whether the SCOP was entitled to such payments since the SCOP was not the owner of the vessels. The SCOP approached the French Court for a ruling. We understand from the liquidator that in the meantime, SNCF was not opposed to making the payment to the SCOP despite the fact that the strict terms of the indemnity may not have been met. The liquidator therefore consented to the payment and the court ruling dated 23 January 2013 was made on this basis.

3.89 A total indemnity of €[✂] was paid by the liquidator of SeaFrance out of funds provided by SNCF to the SCOP as follows:

- €[✂] on 24 January 2013;
- €[✂] on 7 March 2013;
- €[✂] on 7 June 2013; and
- €[✂] on 2 January 2014.

3.90 Separately, and under a different clause of the PSE3, MFL received an indemnity of €[✂] for [✂] ex-SeaFrance employees (see second bullet in paragraph 3.86 above).

3.91 In addition to the SCOP and MFL, DFDS, P&O and others received indemnity payments. DFDS employed 220 ex-SeaFrance crew for its Dover–Calais vessels and 36 ex-SeaFrance employees for shore-based operations in Calais. One hundred and twenty of the ex-SeaFrance employees DFDS employed were eligible for an indemnity on the basis of paragraph 3.4 of the PSE3 (see second bullet in paragraph 3.86 above). DFDS received a total indemnity payment of €[✂], equating to €[✂] per eligible employee.

Parties' submissions on indemnity and staff continuity

Indemnity

3.92 GET maintained that the indemnity payments were irrelevant to the question of whether GET had acquired an enterprise. According to GET, PSE3 was created to assist the former employees of SeaFrance and was consistent with the SeaFrance operation having ceased. The indemnity payments were not dependent on the ex-SeaFrance employees being employed by the SCOP nor employed in a continuation of the SeaFrance business.[81]

3.93 GET also stated that the indemnity was not factored into the purchase price paid for the assets nor into its considerations of whether or not to acquire them.[82] It was the SCOP which was responsible for hiring employees and which might benefit from any payment.

3.94 As noted above, the PSE3 was negotiated between the liquidator and the SeaFrance works council and entered into on 23 January 2012. The SCOP argued that PSE3

[81] GET response to Remittal Notice, Section 7.
[82] We note, however, that in its presentation entitled *NewLink Project Proposed Structure* dated 26 April 2012, GET included as exceptional income a figure of €10 million for financing of the SCOP, which we assume derives from the PSE3 payments.

was a consequent legal step taken by the liquidator imposing obligations on SNCF. It had no connection to the transaction.[83]

3.95 The SCOP argued that the language in PSE3 regarding the €25,000 indemnity, 'a similar operation of the vessels belonging to SeaFrance', recognized that there would be no transfer of the activities of SeaFrance.[84]

3.96 The SCOP submitted that payment under Article 3.3.3 was not specific to the SCOP. It argued that there was doubt as to whether it was entitled to payment and it had to obtain a ruling on this point from the French Court on 23 January 2013.[85] The SCOP submitted that the potential payments were not factored into the recruitment process of the SCOP and the SCOP did not target its recruitment activities at those individuals who fell under PSE3.[86] The SCOP also submitted that even if it had an incentive to recruit ex-SeaFrance employees due to the indemnity, it does not follow that GET acquired the activities of SeaFrance—putting this analysis at its highest (which the SCOP does not accept), it involved GET or the SCOP receiving financial payments in the event they reconstructed certain aspects of the way in which SeaFrance operated.[87] Further, GET had committed to the transaction without confirmation that funds from the SCOP would be received.[88]

Staff continuity

3.97 The SCOP submitted that the fact that there was no TUPE transfer was indicative of a lack of continuity in the economic entity. The OFT's Jurisdiction and Procedural Guidance states that an application of the TUPE Regulations is a strong indication that the business transferred constitutes an enterprise. The SCOP submitted that the

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[83] SCOP response to Remittal Notice, paragraphs 4.19–4.20.
[84] ibid, paragraphs 4.25–4.27.
[85] ibid, paragraph 4.32.
[86] ibid, paragraphs 4.32 & 4.41.
[87] ibid, paragraph 4.34.
[88] ibid, paragraph 4.31.

reverse must by implication also be true. The staff were simply made redundant with no material prospect or guarantee of future employment. The SCOP also queried whether, as a matter of law, employees could be said to be 'acquired' and noted that the CAT felt uneasy with this idea.[89]

3.98 GET argued that there was no continuity of employment of staff. The ex-SeaFrance personnel employed by the SCOP were not selected because of their SeaFrance experience nor was there a requirement that applicants had experience of working on the short sea. They were assessed according to their suitability for the role, a significant factor of which was their availability in Calais.[90] GET maintained that in a region where SeaFrance had previously been a major employer, but had since gone into liquidation, it was unsurprising that many of the individuals available and hired by the SCOP had previously worked for SeaFrance.[91] GET also considered other suppliers such as V.Ships UK Ltd (V.Ships)[92] and stated that ferry jobs were not so 'specific or specialised to such an extent that they relate to a particular ferry'.[93]

3.99 The SCOP argued that it was unsurprising that when advertising for ferry employees in Calais, a large number of applicants would be ex-SeaFrance employees. However, recruitment was on the basis of experience and availability.[94] The process was open to anyone who wished to apply. An interview process was conducted and all employees had to undertake a probationary period of [✂].[95]

Our views on the indemnity and staff continuity

3.100 Whilst PSE3 was the result of a legal requirement, its content was open to negotiation. A 'special clause' granting an indemnity of €25,000 per employee was negoti-

[89] ibid, paragraphs 4.15–4.18.
[90] GET response to Remittal Notice, Section 6.
[91] ibid, section 6, paragraph 6.4.
[92] ibid, Annex 2, p17.
[93] ibid, section 6, paragraph 6.2.
[94] SCOP response to Remittal Notice, paragraph 4.33.
[95] ibid, paragraphs 4.37 & 4.47.

ated. While there were lower indemnity payments that would accrue to other employers of ex-SeaFrance employees in a variety of circumstances, the highest level of indemnity (€25,000 per employee) was negotiated for the benefit of the SCOP and with the continuation of the SeaFrance business in mind given: *(a)* the context (two bids by the SCOP to acquire SeaFrance assets and a large number of SeaFrance employees belonging to the SCOP); and *(b)* the terms of the indemnity: 'allowing similar operation of the vessels belonging to SeaFrance in favour of the SeaFrance Cooperative Enterprise [the SCOP] or any other company (of any form) in which the employees have a direct interest (share of the equity capital) and indirect interest (employment contract)'.

3.101 In the context of its first two bids, the SCOP had been unable to obtain financing to fund its working capital requirements (stated at the time to be €50 million).[96] In the context of its bid, GET considered that the MFL operations would require €40 million, €10 million of which would be contributed by the former employees of SeaFrance and the balance by GET.[97] The French Court noted:

> the project relies on funding from the SCOP's [workers' productive cooperative under French law] employees limited to about €10 million before corporate income tax and therefore involves additional funding from Groupe Eurotunnel in the amount of €20 million if there is no delay in the implementing the plan and €30 million if there is a 6 month delay.[98]

3.102 The total indemnity payable to the SCOP was €[✂], which was very near to the €10 million working capital it required for the MFL activities and a significant sum

[96] See judgments of French Court of 16 November 2011 and 9 January 2012.
[97] The report, paragraph 3.49.
[98] Minutes of the French Court.

compared with the €[✂] that DFDS received. We are not aware of anyone other than the SCOP having received an indemnity payment of €25,000 under PSE3.

3.103 In our view, the indemnity demonstrates that it is not the case that SeaFrance's employee contracts of employment were terminated 'with no thought as to how they might be reemployed in future'.[99] The indemnity that SNCF—SeaFrance's parent company at the time—agreed to pay created a strong incentive for ex-SeaFrance employees to be employed on the *SeaFrance Berlioz*, *SeaFrance Rodin* and *SeaFrance Nord Pas-de-Calais* in similar operations to those of SeaFrance. It creates a link between the vessels and the employees and it was aimed at ensuring, and ultimately did ensure—to the extent possible given the points that we highlighted in paragraph 3.76 above—that a significant number of employees transferred from SeaFrance to the buyer of the vessels. We consider that this shows a large proportion of the SeaFrance workforce effectively transferred from SeaFrance to the SCOP.

3.104 We do not consider that the fact that indemnity payments were available to other parties if they offered employment to ex-SeaFrance employees detracts from this position. These payments were considerably lower. Neither are we persuaded otherwise on the basis that according to its strict terms, the indemnity was initially interpreted by the liquidator as only being payable to the owner of the vessels, or on the basis that some uncertainty arose about the SCOP's entitlement. We noted the SCOP's views that some of the ex-SeaFrance employees who were made redundant upon liquidation gained employment elsewhere before being employed by SCOP SeaFrance. We do not consider that this impacts on our provisional conclusions on employees. If anything, we consider that it demonstrates the strong incentives for GET/SCOP to employ ex-SeaFrance staff.

[99] Judgment of the CAT, paragraph 115.

3.105 Although a TUPE transfer may be an indicator of the transfer of an enterprise, the converse is not necessarily true. There may well be circumstances, of which this—in our view—is one, where had TUPE (or its French equivalent) applied, this would have been damaging to the transfer of a viable business. The evidence indicates to us that the SeaFrance business required restructuring in part because it was over-manned and suffered from bad labour relations. The liquidation avoided a TUPE transfer of employees, and as a result GET and the SCOP were in a better position to carry on a viable ferry business (albeit on a reduced scale compared with SeaFrance) and the SCOP was able to offer employment to a number of appropriately skilled persons, drawn substantially from ex-SeaFrance employees. That, in turn, enabled GET to table an acceptable offer for the vessels and other assets, and assisted GET and the SCOP in developing a viable business plan for the Dover–Calais route. In our view, this is consistent with the situation described by the CAT and referred to in paragraph 3.63 above.

Acquired SeaFrance assets

3.106 In this section, we consider the extent and cost of the actions that were required in order to reactivate the business as a trading entity.[100] In particular, we consider the characteristics of the acquired vessels, their suitability for the route and the impact of the period of inactivity on these assets, including the matter of hot lay-up.[101] We also consider the combination of vessels and crew and assess whether or not that combination enabled MFL to begin operations much more quickly than it could have done had it acquired crew and vessels from other sources. The CAT noted that there might have been a momentum or continuity in the combination between the vessels and

[100] *OFT jurisdictional and procedural guidance*, paragraph 3.11, second bullet point.
[101] The CAT noted that we had taken into account that the vessels acquired by GET were of suitable design and of sufficient number to operate a passenger and freight transport business on the short-sea route and in a condition (by virtue of having been maintained in hot lay-up) that they could be brought into operation within two months of the acquisition taking place. However, the CAT doubted whether this was enough to turn the assets into an enterprise, at least without a more detailed explanation of the extent to which this expedited the return of the vessels into service (paragraphs 113–114 of the judgment).

workforce that takes this case over the line from an asset acquisition to the acquisition of an enterprise.[102]

3.107 We then consider other preparations for commencement of MFL ferry services, namely obtaining berthing slots and booths; and finally, we consider the other acquired assets, namely trademark and domain names, information systems, software and data files including customer files; we assess whether the acquisition of these assets may also have helped MFL to begin operations more quickly than it could have done had it not acquired these assets.

3.108 The full list of tangible and intangible assets acquired by GET/SCOP is set out in Appendix B. In particular, GET acquired three out of the four vessels previously operated by SeaFrance on the short sea, namely the *SeaFrance Rodin*, the *SeaFrance Berlioz* and the *SeaFrance Nord Pas-de-Calais*. The *SeaFrance Rodin* and the *SeaFrance Berlioz* are identical 'sister' ships. It did not acquire the *Molière*, which had been chartered and was returned to its owners when SeaFrance went into liquidation. The *Molière* was chartered by DFDS on 24 October 2012 for use on the short sea, where it is still being operated by them. GET confirmed that three ships (including two passenger ships, the *SeaFrance Rodin* and *SeaFrance Berlioz*, with the *SeaFrance Nord Pas-de-Calais* on standby) were sufficient to allow it to offer a competitive service on the Dover–Calais route.[103,104]

3.109 Further details on the vessels and other acquired assets are set out in Appendices C and D respectively.

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[102] Judgment of the CAT, paragraph 120.
[103] This allows for two vessels to be operational while the third is in dry dock, for example undergoing routine maintenance.
[104] DFDS told us that on the Dover–Calais route a ferry operator needed to offer a minimum of eight crossings in each direction (ie eight rotations) per day, which would require a minimum of two vessels, in order to provide a sufficiently frequent service to attract freight customers (Appendix H, paragraph 4, of the report).

Suitability of the acquired vessels for the Dover–Calais route

3.110 Under SeaFrance's ownership, all three vessels had previously carried passengers and freight on the Dover–Calais route and were of a design suitable for this operation without modification. The CAT did not take issue with our assessment of the facts in this regard.

3.111 Evidence obtained in the context of the remittal indicates that vessels operating on the Dover–Calais route have very specific features as a consequence of: *(a)* the nature of the berths at Calais and Dover;[105] *(b)* the fact that it is a short crossing which impacts on fuel capacity and obviates the need for cabins; *(c)* the need for specific communications equipment; and *(d)* the requirement for high manoeuvrability due to operating conditions in both ports.

3.112 DFDS told us that the *SeaFrance Rodin,* the *SeaFrance Berlioz* and the *SeaFrance Nord Pas-de-Calais* all met the requirements of the Dover–Calais route in terms of speed, operational costs and reliability. Parimar[106] considered the vessels to be 'hyper-specializ[ed]'[107] and told the French Court: 'As we have often said, SeaFrance's ships seemed inseparable from the route between Dover and Calais or short Channel crossings'.[108] It also stated: 'the history of SeaFrance illustrates the disastrous consequences of a poor choice of ships for a shipping company. There is no doubt about the quality and entire suitability of the *SeaFrance Rodin* and *SeaFrance Berlioz* on the short and medium term'.[109]

3.113 In our opinion, there is little doubt that Dover and Calais ports have very specific requirements for ferries operating from their terminals and that the vessels that the

[105] The berths in the ports of Dover and Calais are 'male' and are designed to fit 'female' vessels (ie the linkspan is shore-based and drops on to the ships for a port fit).
[106] The shipbroker designated by order dated 15 February 2012 (with a renewal dated 2 May 2012) to assist the liquidator in selling the three vessels.
[107] Minutes of the French Court, p31, report of Parimar.
[108] ibid.
[109] ibid.

parties acquired, specifically the *SeaFrance Rodin* and *SeaFrance Berlioz*, are particularly suited to this route. The *Berlioz* and the *Rodin* are modern, efficient vessels especially designed to operate on the route (which they have done since launch);[110] they are sufficient to operate a viable ferry service and of a size and configuration designed to permit scale economies in operation to be achieved. The fact that—as GET submitted[111]—these vessels could also be used on other routes does not alter this. In the next section, we compare the cost and any benefits to the parties of acquiring these vessels with the cost of alternatives.

3.114 We note also that GET/SCOP chose not to change the vessel names, merely dropping the 'SeaFrance' prefix for the *Rodin*, *Berlioz* and *Nord Pas de Calais*. It appears to us, from a consideration of name changes with respect to vessels operating on the short sea, that vessels tend to change name on change of ownership or change of route. We note that the shipbroker Parimar observed: 'We believe that DFDS would not want to miss an opportunity to acquire cheap ships *known and valued by Channel customers*' (emphasis added)[112] We also note GET's comment that the *Rodin* and *Berlioz* are sister ships, so on each departure they are offering a similar service. If a customer books with another ferry operator on the route, the same service cannot be guaranteed on each crossing—sometimes it will be an old ship and sometimes a new—therefore the quality of service would not be the same. Taking each of these into account, we are of the view that there is a link between the vessel names and the route, and that GET/MFL acquired some advantage through goodwill inherent in the vessel names.

[110] The *Rodin* was launched in 2001 and the *Berlioz* in 2005.
[111] GET response to Remittal Notice, paragraph 11
[112] Judgment of French Court, 11 June 2012, p39.

Acquired vessels and availability of alternatives

3.115 In the following paragraphs we consider the price paid for the vessels, hot lay-up and the work required to recommence operations and the main alternatives open to GET to enter the Dover–Calais route if it had not acquired the SeaFrance vessels.

Cost of acquired vessels

3.116 GET acquired the vessels for €61.4 million: the *SeaFrance Berlioz* for €30 million; the *SeaFrance Rodin* for €28.4 million; and the *SeaFrance Nord Pas-de-Calais* for €3 million.

3.117 Parimar told the French Court that it had received a number of estimates for the sale value of the three vessels. These assessments varied between €156 million and €95.5 million with an average of €121.5 million based on the assumption that the ships were fully seaworthy, were maintained continuously according to the custom in the industry and had all their valid class and navigation certificates.[113]

Hot lay-up and work required for vessels to recommence operations on the short sea

3.118 During the liquidation period the *SeaFrance Rodin* and *SeaFrance Berlioz* were laid up in Calais. The *SeaFrance Nord Pas-de-Calais* was transferred to Dunkirk where it was laid up.[114] All of the vessels were in placed in hot lay-up. They had a reduced crew on board with only some of the machinery maintained under working conditions and kept operational. This meant that the vessels could leave their berthing slots within an hour if requested by the port authority (for example, in the event of bad weather). Furthermore, the vessels could be brought back into operation with reduced cost, time and effort; normally in the range of less than one week recommis-

[113] Minutes of the French Court, p33. Parimar adjusted the brokers' valuations to take account of estimated remedial costs of €11 million. This resulted in an adjusted range of €84.5–€145 million and an average of €110.5 million (see Appendix C, Annex 1).
[114] Appendix C, paragraph 147.

sioning time. The liquidator extended the employment contracts of 190 individuals in the context of the hot lay-up, 94 of whom were involved in maintaining the vessels.[115]

3.119 The rationale for placing the vessels in hot lay-up is set out in the French Court Minutes dated 11 June 2012:[116]

> Complete shutdown of a ship would cause irreversible damage that would result in greatly reducing its market value. The designated broker confirmed that the ships' value would be greatly impacted by their complete shutdown. Therefore, the preservation of the creditors' mutual surety involves placing the ships in 'hot lay-by.' This minimum operating mode preserves the ship's organs by running the engines regularly and conducting all operations required to retain most of the ship's certificates. Such operations require the use of qualified personnel. It thus appeared that the sale in a private transaction while preserving the ships in a 'hot lay-by' situation was the best way to encourage high bids rather than an auction. This solution is justified by the downward pressure on ship prices.

3.120 DFDS argued that the significance of the vessels being placed in hot lay-up did not lie in the time it would take to bring the vessels back into operation but rather recognition by the liquidator that this would retain their value in a quick sale, a value intrinsically linked to the suitability of the vessels to the requirements of the Dover–Calais route.[117]

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[115] Thirty-four people were employed on each of the *SeaFrance Rodin* and the *SeaFrance Berlioz*, and 26 on the *SeaFrance Nord Pas-de-Calais*. The SCOP also stated that it believed there were 94 people. GET told us that there were 65 people on the vessels in this period. We also noted that GET's board minutes for 27 January 2012 include an estimate of 150 people who were retained in SeaFrance's employment in order to keep the vessels in a good state of repair when they were laid up.
[116] References are to the English version of this document. The translation uses the term 'hot lay-by'; the correct term is 'hot lay-up'.
[117] DFDS response to Remittal Notice, paragraphs 3.4–3.8.

3.121 Both GET and the SCOP submitted that putting the vessels into hot lay-up was not enough to keep the vessels operational. The SCOP believed that hot lay-up did not have the purpose or effect of preserving the activities of a business or result in an expedited return to service.[118] The SCOP further argued that even if the process expedited the return of the vessels into service, this was not sufficient to turn a transfer of assets into the acquisition of an enterprise.[119]

3.122 The French Court Minutes of 11 June 2012 stated:

> It should be noted that the ships proposed for acquisition will require significant investment for repairs and improvements on the one hand, and also significant investments related to compliance with new environmental law provisions in accordance with a Community standard applicable starting in 2015. The proposed sale price reflects such investments to come.[120]

3.123 Both GET and the SCOP argued that while MFL had every incentive to launch the service as soon as possible to take advantage of the summer tourist season and the London Olympics, it took 1.5 months of round-the-clock work for the service to become operational.[121] In their view, this undermined the proposition that there was a continuation of the SeaFrance business.

3.124 The SCOP and GET submitted that the vessels had lost their necessary operational certificates (excluding class certificates) so that certification visits were required. A significant amount of work was undertaken to bring the vessels up to an operational standard and to obtain the necessary equipment, including rebranding and flash-

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[118] SCOP and GET responses to Remittal Notice.
[119] SCOP response to Remittal Notice, paragraphs 4.4–4.11.
[120] Minutes of French Court, p13.
[121] GET stated that the vessels at this point only had temporary certificates and in some cases derogations granted pending further necessary work which was completed during the autumn of 2012.

docking. See Appendix C for more information on the vessel conditions, work and certification required.

3.125 The SCOP told us that GET spent in excess of [€1–€3] million on necessary work for both vessels,[122] which took around seven weeks, in order to obtain provisional certificates before the *SeaFrance Rodin* and the *SeaFrance Berlioz* recommenced operations on the route under the MFL brand.[123] It further noted that around 85 per cent of this work was essential and had to be carried out before the necessary certificates could be obtained. Further information on the work undertaken on the vessels prior to operations commencing is set out in Appendix C.

3.126 The SCOP said that GET spent over €[✂] by the time the five-year certificates were granted for the *SeaFrance Rodin*, the *SeaFrance Berlioz* and the *SeaFrance Nord Pas-de-Calais* in February 2013; this is broadly in line with GET's estimate of costs at the time of GET's offer for the liquidated assets.[124]

3.127 Parimar told the French Court[125] that when operations ceased on 15 November 2011, the ships were close to the important classification milestones but also to a lesser extent of compliance (disabled accessibility and watchman vigilance alarm system). Moreover, it stated that the six-month lay-up implied significant restart costs.

3.128 It appears to us that the decision to maintain the relevant vessels in hot lay-up was based on a cost-benefit analysis, motivated primarily by a desire to preserve the value of the assets, balanced against the cost of keeping the vessels fully operational, which was not an option considering that SeaFrance was incurring significant

[122] [✂].
[123] The *SeaFrance Nord Pas-de-Calais* was not refurbished during the initial period to 20 August 2012. It entered service full time in February 2013.
[124] Minutes of French Court.
[125] Minutes of French Court, p33.

losses. In our view, the fact that the vessels had been in hot lay-up had the consequence that they could be put into service within a shorter time frame (and probably more cheaply) than if they had been laid up cold, but less quickly than if they had been fully operational.

3.129 Based on this evidence, we note that the *SeaFrance Rodin* and the *SeaFrance Berlioz* were brought into operation within seven weeks of being acquired and at a cost of [€1–€3] million for both vessels. Relative to the value of the assets concerned, we consider that the time/cost implications of bringing the vessels back into operation after they had been laid up was modest. The fact that a total of €[✂] was eventually spent on the vessels is not relevant since what we are concerned with here is the effect of the period of inactivity.

Alternative ways of commencing operations on the short sea

3.130 The main alternative for GET to commence operations on the short sea other than acquiring the three vessels from the liquidator were: *(a)* bespoke build; and *(b)* purchase or charter and convert for use on the short sea. We look at the evidence in regard to these alternatives below, as well as how these vessels could be crewed if the SCOP had not provided the crew.

- *Bespoke build*

3.131 The evidence we received indicated that acquiring a new-build vessel suitable for the route would be significantly more expensive and more time-consuming than buying the *SeaFrance Rodin* and *SeaFrance Berlioz*. For example, Parimar told the French Court that a new ship similar to the *Rodin* and *Berlioz* would cost about €135–€140 million with a delivery period of 20 to 24 months.[126] Evidence from P&O, the SCOP, and independent expert ([✂]) and DFDS was broadly in line with this.

[126] Minutes of French Court, p31.

However, all estimates depended on a variety of factors such as the vessel specification, chosen construction yard and the number of vessels ordered. P&O told us that its vessels took around four years from drawing board to delivery.

- *Purchase or charter and convert*

3.132 Both the SCOP and GET believed that there were vessels available in the market now and in 2012 (although possibly different vessels) that could either be purchased or chartered and then converted for use on the Dover–Calais route. They gave a number of examples where they said that ships had been converted with minimal time and cost implications.

3.133 We received differing views on the costs to charter a vessel. The estimates we received suggested a bareboat charter range of €8,000–€10,000 per day (€2.9–€3.7 million a year) and a manned charter cost of around €15,000 per day (€5.5 million a year) (see Appendix C). Submissions provided on purchase costs were vessel specific and this made it extremely difficult to estimate the price an operator would pay.

3.134 The cost of modifying vessels for use on the short sea and the time that these modifications would take depend on the features of the specific vessel and the modifications required. The evidence we received showed that at a minimum vessels were likely to require modification of their linkspan arrangements (given Dover and Calais specific requirements). Whilst the submissions we received gave broadly similar estimates of the cost of the linkspan-type modifications (in the region of €1–€1.5 million), they differed in the costs of any additional modifications required as these depended on the existing configuration of the vessel to be modified. However, these figures were materially in excess of €1.5 million (see paragraph 3.136). Regarding the time that would be required for modification, the SCOP submitted that

DFDS had been able to convert the *Barfleur* in less than ten days.[127] DFDS and P&O submitted that if additional work was required, such as increasing capacity, it could take four to six months for design work and a further one to three months for the physical conversion.

3.135 However, the main obstacle appears to be availability of suitable vessels. Parimar told the French Court that existing ships of this type (*Berlioz* and *Rodin*) were rare.[128] Similarly, P&O and DFDS submitted that the special nature of the Dover–Calais route limited the number of vessels suitable (that is, able to operate on the route without modification) for purchase or charter. P&O believed that there were few vessels that could be economically converted due to the bespoke nature of the ships required.

3.136 DFDS believed that there were currently two potential vessels on the market that could operate on the short sea, once converted. It stated that these were currently on sale for €30 each.[129] However, each of these vessels had a capacity of around a half of either the *Rodin* or the *Berlioz* and would cost around €11–€12 million to convert with an added €5 million to be spent to ensure operational reliability.

3.137 An independent expert [✂]) provided details of a number of vessels currently available for purchase or charter: 17 configured for day services and 39 for night services. In comparison with the *SeaFrance Rodin* and *SeaFrance Berlioz*, the day ferries, which were likely to require fewer modifications, included only one vessel with a similar passenger and vehicle capacity. The vast majority of the others had significantly smaller capacities. The night ferries scheduled included four vessels with a similar or larger passenger and vehicle capacity, with two of these being sister ships. The majority of the remaining night ferries had passenger capacities close to the

[127] A description of the work undertaken by DFDS on the *Barfleur* is in Appendix C.
[128] Minutes of French Court, p31, report of Parimar.
[129] *Fortuny* and *Sorolla* were operated on Spanish routes by Acconia Transmediterranea.

SeaFrance Rodin and *SeaFrance Berlioz*, if berths are included in the calculation, but had less vehicle capacity.[130] All night ferries included a large number of cabins which would need to be removed. This would increase the modification costs.

3.138 GET provided a list of vessels which it believed could easily be operated on the short sea, the Western Channel or the North Sea (see Appendix C, Annex 1). We were not able to carry out a similar analysis of the vessel list provided by GET. Whilst GET stated that its list of 21 vessels was only indicative of those available at any one time which could be operated on the short sea, we noted that five of the seven vessels listed as being owned and operated by Brittany Ferries were still being used by that company, with one being scrapped and one being sold. The one sold was significantly smaller than the *Rodin* or the *Berlioz*.

3.139 P&O also pointed out that with chartering there was an added complexity in that converting a chartered ship was converting a vessel that was not your asset. This reduced the attractiveness of conversion and had a significant impact on a decision to charter and/or convert. An operator also ran the risk that the vessel would not perform as expected/required to justify it operating on the route. In addition, acquiring and modifying a vessel meant that the vessel would, in all probability, be suboptimal in size, passenger/car/freight configuration and manoeuvrability compared with a bespoke vessel. DFDS, for example, told us that it had chartered the *Barfleur/Deal Seaways* but this vessel proved unsuitable to the demands of the Dover–Calais route (despite extensive modifications) and had to be returned to its owners.[131]

3.140 In our view, while it may be possible to buy or charter a vessel that could be converted for use on the Dover–Calais route, there appears to be a limited number of

[130] Around 50 per cent of the vessels on the schedule had 50 per cent or less of the vehicle capacity of the *SeaFrance Rodin* and *SeaFrance Berlioz*.
[131] DFDS response to Remittal Notice, paragraphs 3.6–3.8.

suitable vessels. This is in line with our findings in the report that the cost and availability of suitable vessels were key considerations in our analysis of barriers to entry and expansion.[132] In addition, given that the *SeaFrance Berlioz* and *SeaFrance Rodin* are sister ships, which we consider provides economic benefits to the operator,[133] GET/SCOP would need to acquire two similar vessels for service (as well as a third) to be in a similar position as it was by acquiring the SeaFrance vessels. Whilst it might be possible to charter one vessel, two of a similar size would present additional challenges. The cost implications are difficult to estimate since they vary depending on the characteristics of the vessel that is converted, but are likely to be at least €1.5 million per vessel (similar to the amount spent by the SCOP to get both the *SeaFrance Berlioz* and *SeaFrance Rodin* operational again) and conversion might take considerably longer than the seven weeks it took the SCOP to have the *SeaFrance Berlioz* and *SeaFrance Rodin* operational again. We also note that the operating efficiency of such a vessel is likely to be suboptimal in terms of operating characteristics such as size, passenger/car/freight configuration and/or manoeuvrability compared with vessels that are bespoke to the route. In addition, not having bespoke vessels means that an operator runs the risk that the vessel will not perform as expected/required to justify it operating on the route, for example DFDS modified the *Barfleur* at a cost of around €1.5 million but ended up using the vessel for only eight months on the route.

3.141 In our view, the vessels acquired, specifically the *SeaFrance Rodin* and *SeaFrance Berlioz*, are modern, efficient vessels especially designed to operate on the route (which they have done since launch);[134] they are sufficient to operate a viable ferry service and of a size and configuration designed to permit scale economies in oper-

[132] The report, paragraphs 8.153 & 8.159*(b)*.
[133] There are complementarities in supply and demand in using two sister vessels. For example, crews can transfer easily between vessels, reducing costs. In addition, the operator has identical capacity for passengers, cars, etc on each sailing, thus allowing it to provide a uniform service to its customers on each trip.
[134] The *SeaFrance Rodin* was launched in 2001 and the *SeaFrance Berlioz* in 2005.

ation to be achieved. We consider the cost and time incurred by GET/SCOP to bring the *Rodin* and the *Berlioz* back into service following hot lay-up to be similar to the minimum modifications and time required if GET/SCOP had either chartered or purchased two vessels. Relative to the value of the assets concerned, we consider that this time and cost of bringing the vessels back into operation was modest. In our opinion, there is a lack of alternative vessels which could operate the route at any one point in time given the need for at least two vessels to be in service at any one time and the specific requirements of the route, in particular the port configurations.

3.142 Additionally, the use of the SeaFrance vessels reduced commercial risk for GET/SCOP compared with either chartering or buying given the known history of operation on the Dover–Calais route. We also considered that the commercial risk for GET/SCOP would have been lessened as a consequence of the retention of the vessel names which maintained a link between their past and future use on the route and the fact that these vessels were known to the ports.

Crew

3.143 We noted that on the date that MFL services launched, approximately [80–90] per cent of employees of the SCOP were ex-SeaFrance. At the date of the reference (29 October 2012), that figure was around [70–80] per cent (see paragraph 3.76 above).

3.144 The SCOP explained[135] that the crewing requirements for a passenger ferry were in two broad classes: operational and customer service.[136] It stated that operational staff required specialist training and experience in order to enable the safe operation of the vessels, whilst customer service staff had skills that were readily transferable

[135] SCOP response to Remittal Notice, paragraphs 4.49 & 4.50.
[136] Operational crew includes sailors required for safe operation of the vessel, navigation, mechanics, loading and unloading of vehicles, berthing, etc and customer service crew includes cleaners, chefs, waiters, bar staff, customer service staff and shop assistants.

from similar shore-bound activities. However, all staff must meet certain international standards to enable them to work on passenger vessels.[137]

3.145 The SCOP told us that for someone with no previous maritime experience this training could be completed in around a week and hence was little or no barrier to recruitment. Operational staff with prior maritime experience needed only to undertake a ship familiarization procedure, which lasted around 2 hours. The SCOP stated that operational staff had particular expertise according to their role; their expertise was not specific to a particular vessel, and as such staff could move easily between vessels, as evidenced by the existence of manning companies. The SCOP stated that the ease of transferring crews was shown by DFDS transferring crew between the *Deal Seaways* (ex *Barfleur*) and the *Dieppe Seaways* (ex *SeaFrance Molière*) when chartering new vessels for its Dover–Calais service.[138]

3.146 The SCOP submitted that crews could have been provided by manning companies such as V.Ships and Northern Marine Manning Services (NMM). Had GET chosen to operate MFL using V.Ships' crew, services could have commenced almost immediately once the vessels were operations-ready as the crew would have required only the 2-hour familiarization process.[139]

3.147 The SCOP also argued that there was compelling evidence that the SCOP was at a disadvantage compared with if it had used a manning company, which would have allowed it to commence operations immediately (were the vessels operational). By comparison, the SCOP took two months to recruit sufficient personnel for two

[137] These standards include: basic SOLAS (Safety of Life at Sea) training, basic levels of physical fitness and training in various safety procedures such as fire, abandon ship procedures, etc.
[138] SCOP response to Remittal Notice, paragraphs 4.51–4.52.
[139] ibid, paragraph 4.52.

vessels.[140] GET also told us that when engaging with the SCOP it had looked at alternative providers of ferry crew, including V.Ships.[141]

3.148 DFDS submitted that having a crew familiar with the vessel or a sister vessel facilitated commencement of operations. For this reason, DFDS had specifically sought crew who had experience of the *SeaFrance Molière/Dieppe Seaways* when that vessel was under charter by SeaFrance. DFDS submitted that without prior knowledge, even upon commencement of service it would be expected that optimum efficiency levels would take longer to be reached with a crew (still) relatively unfamiliar with the vessel.[142]

3.149 NMM told us that there would also be an expectation that the captain would obtain a pilotage exemption certificate (PEC) to negate the necessity (and avoid the associated cost) of using a harbour pilot for each port entry. This is normally granted after a certain number of port calls and is subject to the captain being tested on knowledge of the ports. The requirements vary from port to port but it is not unusual for three months to elapse before such exemptions are granted. In the meantime, the ship owner would incur additional costs of pilotage fees.

3.150 DFDS submitted that it was of considerable benefit to be able to use ex-SeaFrance employees on its Dover–Calais route. For example, the captains already had PECs for both Dover and Calais. According to DFDS, if ex-SeaFrance captains had not been available, it would have taken six weeks to train another captain to be ready for the Dover–Calais service. DFDS further submitted that there was not a 'huge glut of available crew on the market'.

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[140] ibid, paragraphs 4.52–4.53.
[141] GET response to Remittal Notice, Annex 2, p17.
[142] DFDS response to Remittal Notice, paragraphs 3.9–3.12.

3.151 The SCOP advised us that at 29 October 2012, it employed a total of [✂] officers on the vessels who held PECs for Calais and Dover on that date. Of those, [✂] ([70–80] per cent) previously worked for SeaFrance and were made redundant under PSE3.[143] However, all of the ex-SeaFrance officers' Dover PECs were obtained while they were working for the SCOP. [✂] of the ex-SeaFrance officers had obtained Calais PECs while they were working for SeaFrance and used these subsequently for the benefit of the SCOP.

3.152 We understand that not all officers require PECs. Broadly, it is only the captains, assistant captains and first mates (that is, those responsible for navigating the vessels into and out of the port). PECs for the Port of Dover are valid for a year, and those for the Port of Calais for two.

3.153 Dover Harbour Board (DHB) told us that the masters who transferred from SeaFrance to MFL had to make a new PEC application and were required to undergo an examination, but the process was shortened because they were not required to undergo the 20 supervised qualifying trips due to their years of familiarity with the port. The SCOP confirmed that [✂] of the [✂] officers previously employed by SeaFrance undertook a shortened process and two had to undertake the 20 supervised qualifying trips. They also all needed to pass an exam.[144] The Port of Calais has different rules and requires applicants to undertake 20 supervised qualifying trips and an exam before PECs can be obtained (ten supervised with a pilot). There is no procedure for a shortened process.

[143] There was an additional officer, not included in these figures as he is not an operational officer; he has shore-based tasks.
[144] [✂] of the [✂] had to undertake six supervised qualifying trips (at least one of which must be with a pilot) and [✂] had to undertake one supervised qualifying trip with a pilot (even though one of these had a valid PEC when he joined SCOP).

3.154 Evidence from V.Ships and NMM indicates that neither currently manages ferries on the short sea.[145] Based on its knowledge of similar routes, NMM believed it would take about two to three weeks in total to supply the crew to the vessel and ensure that the ship was manned sufficiently and safely. This included both sourcing the crew and familiarization, which it said could take 10 to 15 days.

3.155 NMM believed that there would be nothing particularly unique about putting together a crew to operate a ferry on the Dover–Calais route when compared with other short-sea ferry routes. NMM stated that on some routes, seafarers' unions could have a greater or lesser influence on the choice of nationality of the officers and crew, particularly where one vessel operator was replacing another on the same route.

3.156 We note that, as at 29 October 2012, [✂] of the officers that were involved in SeaFrance's operations were involved in the new ferry operation. Moreover, [70–80] per cent of employees of the SCOP were ex-SeaFrance. In our view, obtaining new operations and customer service staff for the vessels would not have been as simple as GET/SCOP anticipated; we appreciate that it did not seriously investigate the possibility of using a crewing company because it had committed to using ex-SeaFrance staff employed by the SCOP. The evidence indicated that one of the two crewing companies GET/ SCOP mentioned did not appear to provide the relevant services at all; the second did not currently provide these services and indicated that it would be able to provide crew but not customer service staff. That company mentioned that it would take two to three weeks to assemble the crew and it would take 10 to 15 days to train them (those periods running concurrently). In our view, having [70–80] per cent of employees, including [60–70] per cent of officers, who were

[145] V.Ships told us that it did not currently manage any ferries. It stated that it currently managed a fleet of 112 ships from its Glasgow Office consisting principally of tankers and bulk carriers trading worldwide and some ocean-going cruise vessels from our office in Southampton. NMM told us that it currently managed six ferries that traded regularly to UK ports employing around 290 crew through a crew management company, but not on the short sea. NMM stated that its crew managers provided the marine crew,that is captains, deck officers and engineering officers along with deck and engine room ratings. It did not provide customer services staff.

available, in possession of the relevant skills and training, and were familiar with the vessels and their operation on the Dover–Calais route, was a material advantage to GET/SCOP enabling it to restart operations quickly.

3.157 We noted that the harbour authorities indicated that having staff with PECs was helpful in order to allow a quick and efficient start-up. In this case [✂] officers held valid Port of Calais PECs and a total of [✂] had held Port of Dover and Port of Calais ones in the past (and in the case of the Port of Dover, were able to reacquire PECs with a shortened process). Even if SCOP had to incur some fees because not all of the relevant staff had PECs, in our view, the evidence suggests that it obtained a benefit from having officers familiar with the relevant ports who had previously held a PEC and/or still held one in relation to Calais.

3.158 We note that the SCOP had sufficient crew to man the *Berlioz* and the *Rodin*, which were operations-ready on 20 August 2012. We do not consider the fact that the SCOP did not have a crew for the *Nord Pas-de-Calais* relevant since it did not intend to operate this vessel at that time.[146] The parties stated that the vessels were not fully staffed initially; in our view, a full complement of staff is unlikely to have been required in the start-up period and the staff that were on the vessels must have been such as to allow the vessels' safe operation.

3.159 Finally, we note that one of GET's internal documents states that it considered that the cooperation with the SCOP was a key factor in the success of the company. A presentation to GET's board dated 11 April 2012 includes the following statements: [✂].[147]

[146] The *Nord Pas-de-Calais* was brought into service as a freight-only vessel in February 2013.
[147] Draft global offer for the acquisition of the operating assets of SeaFrance, Presentation to the GET SA Board meeting: 11 April 2012.

Berthing slots and booths

3.160 GET and the SCOP also stated that none of the essential berthing slots, booths and harbour agreements were in place and all needed to be negotiated afresh.[148]

Berthing slots

Dover

3.161 The SCOP told us that it was not straightforward for MFL to secure new berthing slots. GET stated that in relation to the Port of Dover, work undertaken to arrange for berthing slots to be available for MFL vessels included the provision of extensive financial and corporate information for both the SCOP and MFL.[149] It was also necessary to provide one month's fixed and variable dues (£[✂]) in advance of any MFL vessel entering the port pre-operation even simply for berthing trials, training or inspections. The SCOP stated that all of this was deemed necessary by the Port of Dover to enable MFL to obtain berthing slots and commence operations from the port.

3.162 The SCOP told us that it took about a month for DHB to confirm the grant of the requisite berthing slots. The initial berthing slots were granted a few days before the service was launched on 20 August 2012 with effect until the end of 2012. The SCOP then reapplied for berthing slots for 2013.

3.163 DHB informed us that berthing slots used for the SeaFrance vessels at Dover lapsed through non-use when SeaFrance ceased operations. Berths are allocated on an annual basis for a calendar year in accordance with the Port's berth policy statement. DHB told us that there was a set process for the approval of new scheduled operators who wished to operate from the Port of Dover. Following an initial briefing of

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[148] GET response to Remittal Notice, paragraph 14.4. GET had to arrange factors such as port slots, fuel supplies, onboard charts, insurance and crew.
[149] Including: *(a)* resumés for the members of the directoire of the SCOP; *(b)* corporate registration documents for the SCOP and MFL; *(c)* confirmation of funding up to the end of 2013 from GET; and *(d)* details of the funding of the SCOP.

what information the port required, the timescale was driven by the provision of the information by MFL to enable DHB to consider the application for the approval of the company as a new scheduled operator. It also included consultation with the existing ferry operators and cargo terminal operator.

3.164 DHB indicated that:

> A number of berth slots may be available as SeaFrance was previously operating 4 vessels on the Dover–Calais route until November of last year. Approved scheduled ferry operators use different slot durations and asymmetric daily and weekly patterns and not all of the SeaFrance ships fit all of the Dover berths so the availability of slots cannot be easily listed.[150]

3.165 In a letter from DHB to GET,[151] sent well in advance of the purchase of the vessels being made, DHB stated that its experience of the scheduled operator process suggested that GET should plan on requiring a minimum of seven to eight weeks. DHB told us that the process of establishing a new service was facilitated by the fact that the vessels were known to it. This meant that it knew which of the ferries fitted into which of the Dover berths. In addition, many of the ferry masters and fleet management staff transferred from SeaFrance to MFL and accordingly, they were already known to have the navigational and berthing experience of operating from the Port of Dover. DHB also explained that the SeaFrance vessels were suitable for berthing at Dover due to the manner of ship-to-shore connection and the use of centre line linkbridges at two levels.

[150] Letter from the Director of Corporate Operations to the Directeur des Affaires Publiques at GET, 27 January 2012.
[151] ibid.

Calais

3.166 The Chambre de Commerce et d'Industrie Côte d'Opale (CCICO) informed us that there was never a specific contract in place between it and SeaFrance governing the use of berthing slots at Calais by the SeaFrance vessels. Rather, once the original approval to operate the vessels on the Calais–Dover route had been granted to SeaFrance by the Port Authority for the Nord Pas-de-Calais region, CCICO was required to provide berthing slots for the vessels as part of its functions as the incumbent concessionaire for the Calais port. CCICO explained that representatives of MFL/SCOP held informal discussions with CCICO in early 2012 regarding the possibility of establishing a new Calais–Dover service using SeaFrance vessels. Around the middle of June 2012, a meeting was held between CCICO and the Chairman of the SCOP and the process and terms were agreed shortly thereafter. The Port Authority granted MFL approval to start operation using the vessels on 6 August 2012.

3.167 CCICO stated that quays at Calais port were not private and berthing slots could not be assigned by one ferry operator to another. CCICO told us that the process of establishing a new service was facilitated by the fact the vessels were known to it. As a result, no new tests had to be performed to assess the vessels' suitability for using the Port of Calais.

3.168 In our view, this suggests that to acquire specific slots in Calais, the characteristics of the vessels are more important than the company operating them. This is in line with our provisional finding above, that the *Berlioz* and the *Rodin* are particularly suited to the route.

Our views on berthing slots at Dover and Calais

3.169 The evidence indicates to us that GET/SCOP/MFL did not encounter material obstacles in obtaining berthing slots in Dover and Calais. Further, we are of the view that the fact that the vessels were known to the relevant authorities, together with the fact that the ex-SeaFrance officers were familiar with the port, materially facilitated the process of obtaining berthing slots. We also note that berthing slots cannot be assigned by one ferry operator to another, which suggests that even if SeaFrance's assets had been sold when SeaFrance was still a going concern, the acquirer of those assets would have needed to apply to the relevant authority to obtain permission to use the berths. Finally, we observe that our report notes: 'GET told us that MFL had experienced no problems in obtaining berthing slots at Dover and Calais'.[152]

Booths

3.170 The SCOP told us that the former SeaFrance booths in the port check-in area at Dover were surrendered by SeaFrance Ltd following the liquidation of its parent company, SeaFrance S.A. It submitted that by the time MFL came to launch its service, the more convenient ex-SeaFrance booths had been taken over and upgraded by DFDS, leaving MFL the less convenient booths that had previously been occupied by DFDS.

3.171 The SCOP also told us that SeaFrance had operated 4.5 passenger and three freight check-in booths. MFL currently operates 2.5 of the passenger and two of the freight check- in booths, with DFDS operating the remaining booths. [✂]

3.172 In our view, the parties encountered no material difficulties in obtaining the booths they required for their ferry operation. Further details about arrangements in respect of premises in Calais are set out below in paragraphs 3.220 to 3.225.

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[152] The report, Appendix H, paragraph 23.

Other acquired assets

3.173 The non-vessel assets acquired by GET/SCOP comprised both tangible and intangible assets, which were acquired for a total of €3.6 million, with further UK assets which were acquired for a total of €[✂], as well as a lease of premises at Whitfield Court, Dover (see paragraphs 3.33 to 3.37).

3.174 These assets included trademarks (including the SeaFrance brand), domain names, information systems, computer software and data files (including databases of freight and passenger customers), as well as furniture, fixtures and facilities, and computer equipment. Appendix B provides a detailed breakdown of all the assets that GET/SCOP acquired.

3.175 In the following paragraphs, we set out further details of the intangible assets acquired by GET/SCOP. We also set out parties' submissions on the extent to which the acquisition of these assets casts light on the remitted question. Appendix D details further evidence/submissions made to us regarding these non-vessel assets.

Trademarks/domain names

- *Parties' submissions*

3.176 GET said that it wished to purchase the SeaFrance brand as one of a collection of assets, in order to increase the attractiveness of its overall bid to the SeaFrance liquidator.[153] GET argued that an important reason for the preservation of the SeaFrance brand by GET after its acquisition was to protect any residual value in the eyes of a potential future purchaser. According to GET, any potential future purchaser would wish to ensure that GET had not allowed the brand to be used by a third party during GET's ownership. GET argued that this was an entirely separate

[153] GET response to DFDS submission, paragraph 3.12.1.

issue from the practical use of the brand for MFL's operations.[154] GET told us that, at the time MFL launched its operations, the SeaFrance brand had been out of circulation for nine months (including over the peak summer period), which GET said meant that any vestiges of goodwill which might feasibly be ascribed to the brand had been lost.[155] GET maintained that the SeaFrance brand had a negative reputation and it wished to distance itself from the SeaFrance brand.[156]

3.177 GET provided us with documents discussing the use of the SeaFrance brand. Some of these documents, produced by an outside agency for GET and circulated internally within GET for consideration between 2 July and 20 August 2012, show that variations on the SeaFrance brand were considered for the branding of the new ferry service, alongside a large number of alternative non-SeaFrance brand names.

3.178 At the CAT stage, the SCOP contended that we had not considered whether customers would regard the MFL business as continuing the SeaFrance business.

3.179 DFDS referred us to press statements up to 27 June 2012 showing that GET was still considering whether to use the SeaFrance brand, and submitted that these press statements were inconsistent with GET's contention that goodwill in the brand had evaporated before the acquisition took place.[157] DFDS told us that its own experience following its acquisition of Norfolkline in July 2010 demonstrated that brand and website value persisted for a considerable period post-acquisition and rebranding.[158]

3.180 GET said that DFDS's experiences with the acquisition of Norfolkline were of no relevance to GET's acquisition of the SeaFrance assets as DFDS acquired an ongoing

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[154] ibid, paragraph 3.12.2.
[155] ibid, paragraph 3.12.5.
[156] GET response to Remittal Notice, Section 10/Annex 1.
[157] DFDS response to Remittal Notice, paragraphs 3.24 & 3.25.
[158] ibid, paragraph 3.29 and Annex 5.

business and, as part of the acquisition, the vendor took a minority shareholding in DFDS and therefore had a significant interest in ensuring the effective transfer of the Norfolkline business and goodwill to DFDS. GET argued that, in contrast, GET acquired a collection of assets from a liquidator that had been out of operation for seven and a half months, where there was no continuing business or goodwill to be moved across to the purchaser.[159] GET argued that the data presented by DFDS in its submission about the ongoing value of the Norfolkline business was a clear contrast with the absence of such continuing goodwill from the SeaFrance business when GET acquired the vessels (manifested, for example, through the low levels of customer bookings initially, including minimal passenger bookings through the SeaFrance domain name).[160]

3.181 In respect of domain names, GET argued that it had only received limited business as a result of traffic redirected from the SeaFrance website.

3.182 P&O bid €[✂] for the SeaFrance domain names.[161] It had discussed with its marketing agencies the appropriate value for the SeaFrance assets for which it bid. P&O told us that, had it been successful in its bid for the SeaFrance domain names, it proposed to redirect these domain names to the appropriate P&O Ferries passenger websites, allowing customers who accessed them the ability to book with P&O.

- *Our views on trademarks/domain names*

3.183 The CC's Merger Assessment Guidelines provide[162] that an enterprise may comprise a number of assets and records needed to carry on the business, together with the benefit of existing contracts and/or goodwill. OFT guidelines note that when a business is no longer trading, the OFT will consider the extent to which customers would

[159] GET response to DFDS submission, paragraph 3.12.6.
[160] ibid, paragraph 3.12.7.
[161] GET bid €500,000 for the SeaFrance domain names. See Appendix B.
[162] *CC2*, paragraph 3.2.4.

regard the acquiring business as, in substance, continuing from the acquired business, and whether, despite the fact that the business is not trading, goodwill or other benefits beyond the physical assets and/or site themselves could be said to be attached to the business and part of the sale.

3.184 We note the SCOP's contention that we have not considered whether customers regard the MFL business as continuing the SeaFrance business. The SCOP did not submit any evidence to us in this regard. Further, due to the passage of time, it was not possible for us to carry out a customer survey regarding the extent to which customers perceived any such continuity between SeaFrance and MFL at the critical time (namely, the point at which MFL launched its services). We have, instead, reached a view on how the period of inactivity impacted on these assets based on other evidence.

3.185 Whilst we acknowledge that some of the goodwill associated with the brand and domain names is likely to have dissipated in the period of inactivity, nevertheless, GET's offer to the French liquidator included €1 million attributable to the trademarks and domain names of SeaFrance. We find it significant that P&O bid separately for the domain names, indicating that it attached value to them despite the period of inactivity. We note also that GET did not withdraw the SeaFrance web page immediately and gained some business as a result of redirected traffic (see further Appendix D).

3.186 Ordinarily, the acquisition of intangible assets such as brand and domain names, together with tangible assets and employees, would point in the direction of the acquisition of an enterprise. That would be the case regardless of whether or not the acquirer actually decided to use the acquired brands and domain names. We consider that despite the period of inactivity, there remained some value in these in-

tangible assets that would be of benefit to GET and the SCOP in the context of their use of the other acquired assets.

Information systems and software

- *Parties' submissions*

3.187 The information systems and software included a passenger and information management system, 'SeaPax' and a freight customer management system, 'SeaFret'. According to the judgment of the French Court of 11June 2012,[163] SeaPax enabled the management of yield, customers, reservations and automatic ticket sales ('multi-channel: web, CC, GDS, Unicorn'), docks and parking lines, boardings and invoicing. SeaFret enabled the management of customers and agents, rates, reservations, loading and unloading, invoicing and extranet for customers and agents.

3.188 GET told us that it decided to bid for the SeaFrance systems because, if it were successful in acquiring the SeaFrance vessels, it would need to launch the new business as soon as possible, the systems were available from the liquidator at the right time and GET's own business model and IT systems were less adapted to a maritime business. In addition, GET noted that the judge in the SeaFrance liquidation had made it clear during the sales process that he would favour bids which covered as many of the ex-SeaFrance assets as possible, as this would enable the liquidator to maximize returns to SeaFrance's creditors.

3.189 GET said that it did not look in any detail into acquiring alternative IT systems, given that SeaFrance's systems were offered for sale at the relevant time. GET told us that its objective when it was bidding for the vessels was to acquire as many of the necessary assets as possible to facilitate start-up of the new MFL business. GET argued that this was not the same as GET wishing to replicate the SeaFrance

[163] Appendix to the Sales Agreement.

business—in particular, according to GET, MFL's internal systems needed to be radically different in order to ensure the levels of customer service and of control which had been lacking within SeaFrance.

3.190 GET submitted that the data files were of such little use to MFL as to be effectively worthless. GET said that it also had to take out a new licence with the manufacturer to use this software (ie essentially it inherited a blank piece of software without former SeaFrance data). It considered that this was a further piece of evidence that MFL started its commercial freight operations from scratch. GET said that neither MFL nor Eurotunnel was currently using any of the data files acquired from SeaFrance. It argued that the fact that only [✂] freight units were carried by MFL in the period 20 to 31 August 2012 was further evidence that MFL was a start-up and in no way a continuation of a pre-existing business.

3.191 GET submitted that the SeaPax and SeaFret systems were now used by MFL as part of the sales and billing process but only after considerable time and work, which had to be spent to make the systems operable. According to GET, this demonstrated the limited role the systems played in the process as a whole.

3.192 DFDS told us that there was considerable value in the bespoke SeaFrance systems, SeaPax and SeaFret, in terms of commencing operations and capturing as much of the SeaFrance business as possible. DFDS said that there was no 'off-the-shelf' software that could have been used and it would have taken time and money to develop a new system from scratch.[164]

3.193 However, GET told us that it understood that the passenger and freight customer management systems were standard and also used by others in the industry outside

[164] DFDS response to Remittal Notice, paragraphs 3.30–3.32.

of the short sea. GET queried the extent to which DFDS could give evidence on the topic of the SeaFrance IT systems, given that GET had bid for and acquired the IT systems 'sight unseen' and therefore, according to GET, it seemed unlikely that DFDS was granted access to these systems.[165] GET told us that the IT systems it acquired needed a great amount of work (which was still ongoing) to integrate them into a new environment with far better controls.

3.194 Appendix D sets out in greater detail submissions and evidence regarding information systems and software.

- *Our views on information systems/software*

3.195 In our view, having an IT system that allows automated management of sales, reservations and freight is one of the requirements for running a ferry service, and we note that this is one of the reasons why GET bid for it at the same time as it bid for the vessels. We note GET's statement that work was still ongoing to integrate the IT systems into a new environment with far better controls than those that existed when the systems were operated by SeaFrance. In our view, this is not strictly relevant to the asset/enterprise question. The focus here is on the extent to which the asset in question was affected by the period of inactivity.

3.196 We recognize that since the systems were 'blank', work would have been required to repopulate them with parameters and data. We note, however, that all of the IT staff ([✂] in total) employed by the SCOP are ex-SeaFrance employees and this is likely to have been useful in overcoming any difficulties associated with use of the system and the fact that it was 'blank'.[166]

[165] GET response to DFDS submission, paragraph 3.11.
[166] This figure reflects the situation as at 29 October 2012; we expect that the percentage it is not materially different in the period prior to commencement of MFL operations.

3.197 In our view, IT systems suitable for use on the short sea are likely to have special requirements over and above IT systems suitable for operating ferry services more generally, given the high frequency of services and multiple daily departures that are a feature of the short sea, as well as the requirement for accurate manifests. We contacted the third parties that we were told would be in a position to supply an off-the-shelf system that would be suitable. The responses we received indicated that one provider was able to offer a web-based reservation system. It appeared to us that this lacked much of the functionality of SeaFret and SeaPax. We consider that GET's acquisition of the SeaFrance IT systems gave it access to systems that were proven in practice to be effective in managing passenger and freight operations on the short sea, reducing the risk (and cost) associated with having to introduce new unproven IT systems which may not have all the required functionality. Together with MFL's employment of ex-SeaFrance IT staff, this places MFL at a material advantage compared with the situation where GET did not purchase the SeaFrance IT systems.

Data files including customer databases

- *Parties' submissions*

3.198 The acquired customer databases consist of details of approximately 2,000 freight customers, 1,100 coach customers and at least 217,497 individual passengers.

3.199 DFDS submitted that acquisition of the customer databases allowed targeted marketing to 'legacy' customers and enabled a seamless continuation of communication with and marketing to the former SeaFrance customer base.[167]

3.200 GET, however, submitted that the customer lists were of negligible value and had ceased to be relevant as a result of the nine-month hiatus.[168] It said that the passenger customer database was historical, and largely seemed to consist of prospects

[167] DFDS response to Remittal Notice, paragraphs 3.30–3.32.
[168] GET response to Remittal Notice.

only. It said that the passenger customer database was used only once by MFL. GET said that the freight customer information was so incomplete as to be considered useless by MFL.

3.201 GET told us that, shortly after MFL launched its activities, MFL sent a number of former SeaFrance customers an email newsletter, which offered them the chance to travel free on MFL vessels. According to GET, the results of the campaign were little different from what would have been obtained by 'cold calling'. It noted that it was possible for recipients to opt out of receiving communications from MFL.

3.202 P&O bid €[✂] for the SeaFrance passenger customer database.[169] P&O told us that, had it been successful in its bid, the databases would have been used to generate leads for new customers to grow its own customer contact list so promotional offers could be sent out to a wider group of people, potentially gaining new customers for P&O.

- *Our views on customer databases*

3.203 In relation to the customer databases, the OFT's jurisdictional and procedural guidance[170] provides that the OFT is likely to consider the transfer of customer records as important in assessing whether an enterprise has been transferred. As noted above, the records here consisted of details of approximately 2,000 freight customers, 1,100 coach customers and at least 217,497 individual passengers.

3.204 We note GET's view that the customer databases had ceased to be relevant as a result of the hiatus in trading. We note, however, that P&O also bid for the passenger

[169] Whilst not directly comparable, we note that GET bid €1,800,000 for a package consisting of information systems, software and data files (including customer records). See Appendix B.
[170] OFT 527, *Mergers: Jurisdictional and procedural guidance*, June 2009.

customer database, despite the hiatus, indicating that it believed there to be some value in it.[171]

3.205 Ordinarily, the acquisition of intangible assets such as customer lists, together with tangible assets and employees, would point in the direction of the acquisition of an enterprise. That would be the case regardless of whether or not the acquirer actually used the customer lists. We consider that despite the period of inactivity, there remained some value in these intangible assets that would be of benefit to GET and the SCOP in the context of their use of the other acquired assets. In our view, it is plausible—and consistent with P&O's intended use of the passenger database—that having a list of fairly recent contact details will be of some assistance in contacting passengers for marketing purposes. We also think it is likely to be of some assistance in putting in place new agreements with freight customers where the entity purchasing the data has little relevant previous knowledge of such customers.

Assets not acquired from SeaFrance

3.206 Some SeaFrance assets had been excluded from the transfer, notably customer and supplier contracts; these had been terminated on liquidation.[172] Premises used by SeaFrance were not included in the sale by the French liquidator, although the SCOP acquired some assets previously owned by SeaFrance Ltd, and obtained a lease (previously held by SeaFrance Ltd) for the office building in the UK that had been used by SeaFrance Ltd (see paragraphs 3.34 to 3.37 above).[173]

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[171] We noted that P&O did not bid for the freight customer database and considered that this was likely to have been because most freight customers multi-source ferry services (see paragraph 3.213) and there would therefore be little value in an existing ferry operator on the short sea acquiring such data.

[172] In addition, it appears that there were some other minor excluded assets which are set out in the Court Minutes, namely: the library, maps, company forms, company documents and procedures, bonded goods, company advertising materials, works of art, models, the commander's officers' and crew's personal effects and personal property belonging to others and exchange automaton for the SeaFrance *Rodin* and SeaFrance *Berlioz*. The judgment also refers to excluding: food and beverages, alcohol, tobacco and perfumes and tangible assets specifically excluded from the scope of the takeover, such as a few computers, and the assets considered for auction by the liquidator.

[173] We also note that not all of the SeaFrance employees were subsequently employed by MFL/GET and the SCOP.

3.207 In our view, the main category of excluded assets is the customer and supplier contracts. We therefore consider the significance of the exclusion of these assets in relation to the asset/enterprise question below. For completeness, we also briefly consider the SeaFrance buildings not acquired by GET/SCOP.

SeaFrance customer and supplier contracts

- *Parties' submissions*

3.208 GET told us that it did not acquire any existing customer contracts and had to re-negotiate essential supply contracts.[174] It considered that the fact that customer and supplier contracts (which, according to GET, were vital to the operation of the business by providing the essential 'inputs' and 'outputs' which characterize a business) were excluded from the package of assets it acquired from the liquidator clearly indicated that the package acquired could in no way be seen as an enterprise.

3.209 GET said that it presumed that the reason these customer and supplier contracts were not included in the sale of assets by the liquidator was that they had been terminated. It noted that SeaFrance's operations had ended abruptly and that there was no ongoing activity to sell to customers or for which suppliers were required. In GET's view, this went to the heart of the jurisdiction question that had been remitted to us.

3.210 The SCOP told us that it had to negotiate and enter into each contract that was necessary before operations could commence, including for uniforms, for food for the onboard shops and restaurants, for drinks, for entertainments, for utilities for its premises and for insurance.

[174] GET response to Remittal Notice, sections 12 & 13.

- *Our views on customer and supplier contracts*

3.211 We considered the nature of customer contracts in this sector, their importance to the running of the MFL business and what would be required in order to negotiate replacement contracts.

3.212 In relation to freight traffic, GET told us that customers typically entered into framework purchase arrangements on an annual basis, with negotiations usually taking place in winter for services in the following calendar year. It appears that, in principle, such contracts may be important for the successful running of a ferry business: GET told us that about [✂] per cent of the turnover generated by SeaFrance from the acquired vessels had been attributable to freight customers.[175]

3.213 Typically, freight contracts are not exclusive, and it is common for customers to have contracts with several providers. A contract does not commit a customer to a particular level of usage and it is not necessary for the customer to have a contract in place in order to use a particular service. The arrangements may, however, specify price and credit terms on the basis of certain volume levels. GET submitted that as a result of volume commitments and rebates in these contracts, MFL faced material difficulties in persuading freight customers to use the MFL service prior to the winter 2012 negotiations (for 2013 services).[176]

3.214 At the time of our initial inquiry into the merger, GET had not suggested that it faced any particular difficulties securing contracts for the 2013 period.[177]

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[175] GET initial submission, paragraph 7.23.
[176] ibid, paragraph 10.8. In its response to the provisional findings, SCOP similarly noted that freight customers were slow to book with MFL, which it attributed to them waiting to see whether MFL would be able to offer sufficient frequency of service, and whether MFL was committed to the route (paragraphs 2.5 & 2.6).
[177] GET referred to possible advantages enjoyed by ferry operators with more extensive route services.

3.215 This suggests to us that, while GET did not receive the benefit of any existing freight contracts on acquisition, the opportunity to negotiate contracts arose relatively quickly (within five months of commencing operations), and MFL was at that stage able to compete for those contracts on a normal commercial basis, taking into account also that this would have given it an opportunity to demonstrate the reliability of its services.[178] In addition, GET/SCOP acquired the freight customer database, which we consider will have been of some assistance in contacting freight customers (though we note that GET would itself have a database of freight customers using the Channel Tunnel).

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

3.217 In relation to supply contracts, the benefit of which was not transferred to GET/SCOP (for example, contracts for the supply of fuel, insurance, food and beverages, uniforms, etc), we observe that supplies which can be readily obtained from third parties, or which are commonly provided centrally by parent companies, are less likely to be essential to the transfer of an 'enterprise', even if they are necessary to the running of the business. We note that the required supplies were secured in time

[178] This is in line with GET's submission at the time of our report: GET told us that it would take time to build freight traffic as freight customers would delay entering into a contract with a new operator until they were convinced that the operator would provide a reliable service (the report, Appendix H, paragraph 7).

for the commencement of MFL's operations one and a half months after the date of acquisition.[179]

SeaFrance buildings not acquired

- *Parties' submissions*

3.218 We have considered the assignment of SeaFrance's lease of premises in Whitfield, Dover, to the SCOP in paragraphs 3.33 to 3.38 above.

3.219 With respect to buildings in Calais, the liquidator told us that SeaFrance had a rented head office in Paris for accounting, legal, marketing, and senior management functions and that SeaFrance rented buildings at the Port of Calais for the operational staff.

3.220 The SCOP told us that SeaFrance had occupied two buildings on the Calais site. The Calais passenger terminal was shared on a 50/50 basis with P&O and the Gare Maritime was used for dockside operational offices. Following the liquidation, the SCOP took a new lease for the Gare Maritime, which became its headquarters. The passenger terminal has been renovated and reconfigured for three operators: P&O, DFDS and MFL.

3.221 The SCOP noted that SeaFrance's head office had been located in Paris. The SCOP said that its head office was located in premises in Calais leased from the Port of Calais. It told us that this was an entirely new lease, in a different building space (albeit using part of the Calais passenger terminal, whereas SeaFrance had leased the entire building) and under different terms from SeaFrance's arrangements.

[179] The precise period is 2 July to 20 August 2012. Indeed in relation to insurance, we understand that policies were required to be, and were, in place within 72 hours of the acquisition. Some negotiation with potential suppliers will have occurred prior to the date of the acquisition, but the short period between acquisition and commencement of operations nevertheless suggests that these supplies are readily obtainable.

3.222 GET told us that there was no continuity of location from which the businesses were managed.[180] It said that it understood that SeaFrance leased a portside site in France from the Port of Calais, and that the substantial head office activities of SeaFrance were carried out from Paris offices by Paris-based staff, neither of which GET acquired.

3.223 CCICO told us that premises previously used by SeaFrance within Calais port comprised: *(a)* offices; *(b)* storage facilities (the Paul Devot warehouse); *(c)* buildings used to house personnel working on port ticket desks; and *(d)* 'control booths' used to manage tourist passengers and freight traffic prior to boarding. SeaFrance's use of the premises ended in mid-November 2011 upon the company's entry into liquidation. The premises were then under the use and control of the French liquidator.

3.224 CCICO explained that the premises were returned to CCICO at different stages of the liquidation, with effect from 1 June 2012, 29 June 2012, 9 July 2012, 1 December 2012 and 12 February 2013. The majority of the premises ceded to CCICO were subsequently occupied by the SCOP pursuant to an 'Autorisation d'Occupation Temporaire' (AOT, a framework agreement for the occupation of public buildings) between CCICO and the SCOP. Some of the SeaFrance premises (certain offices, ticket desks and control booths) were let to DFDS/LD lines. The AOT was signed on 3 July 2012 and took effect on 1 August 2012; premises relinquished by SeaFrance's liquidator were added to the framework agreement as they became available.

- *Our views on buildings not acquired*

3.225 We observe, first, that at the time that the SCOP was looking to acquire SeaFrance as a going concern, its offer did not include the Paris headquarters. Secondly, as noted above, assets which can be readily obtained from third parties, or which are

[180] GET response to Remittal Notice, sections 8 & 9.

commonly provided centrally by parent companies, are less likely to be essential to the transfer of an enterprise, even if they are necessary to the running of the business. In respect of premises at Calais port, these were available to the SCOP as they were returned to CCICO by the French liquidator. In this case, it appears that both GET and the SCOP were able to lease appropriate premises without much difficulty.

4. Provisional conclusions

Assessment of jurisdictional issue applying the approach in the judgment

4.1 This section summarizes our provisional conclusions applying the approach in the judgment, setting out our overall assessment of the remitted question, namely whether GET/SCOP acquired an enterprise within the meaning of section 129 of the Act.

4.2 As invited to by the CAT, we have focused in particular on whether what was acquired was something more than 'bare assets'. This involved two steps, namely *(a)* defining or describing exactly what, over and above 'bare assets', the acquiring entity obtained; and *(b)* asking whether—and if so how—this placed the acquiring entity in a different position than if it had simply gone out into the market and acquired the assets. We regard the following matters as being important to the analysis of the remitted question.

4.3 We note that the decisional practice of the CC and OFT, their Guidelines, as well as the judgment of the CAT,[181] all recognize that in the context of 'enterprises ceasing to be distinct', it is not necessary—for the purpose of establishing that an enterprise rather than an asset is acquired—that the activities of the acquired business continue up to the date of completion of the transaction. Were it otherwise, it would be very easy for businesses to evade UK merger control law.

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[181] Judgment of the CAT, paragraph 106(a).

4.4 SeaFrance operated ferries on the Dover–Calais route, using two bespoke Ropax vessels that it owned outright, the *SeaFrance Rodin* and the *SeaFrance Berlioz*, as well as a third Ropax which it leased, the *SeaFrance Molière*, and a freight ship, the *SeaFrance Nord Pas-de-Calais*. SeaFrance experienced significant financial difficulties and was ultimately liquidated. Following a period of inactivity, certain liquidated assets were purchased by GET/SCOP, and they started ferry operations on the Dover–Calais route using three of the SeaFrance vessels and employing ex-SeaFrance employees. The question before us is whether or not transactions resulted in enterprises ceasing to be distinct with the meaning of the Act.

4.5 A review of the background to the transaction shows that there is considerable, and deliberate, continuity and momentum as between the time of SeaFrance's operation of the Dover–Calais ferry service and MFL's resumption of operation of the same ferries on that route involving ex-SeaFrance employees. We also note that a considerable portion of the period of inactivity (at least from 9 January 2012 until 2 July 2012) was due—directly or indirectly—to the requirements of the liquidator's sale process which followed on from the failure of the SCOP's two attempts to purchase the SeaFrance business as a going concern; both of these explicitly intended to continue SeaFrance's activities and to provide employment to SeaFrance employees.

4.6 In our opinion, there is little doubt that Dover and Calais ports have very specific requirements for ferries operating from their terminals and that the two sister vessels that the parties acquired, the *SeaFrance Rodin* and *SeaFrance Berlioz*, are particularly suited to this Dover–Calais route by virtue of having been designed specifically for it. The three acquired vessels are sufficient to operate a viable ferry service and of a size and configuration designed to permit scale economies in operation to be achieved. While the SCOP and GET would have been able to commission similar new builds, this would have been very significantly more expensive and more time-

consuming. While it may have been possible to buy or charter a vessel that could be converted for use on the Dover–Calais route, there appear to be a limited number of vessels potentially suitable in size and configuration for operation on this route.

4.7 In addition, given that the *SeaFrance Berlioz* and *SeaFrance Rodin* are sister ships, GET/SCOP would need to acquire two similar vessels for service (as well as a third) to be in a similar position to acquiring the SeaFrance assets. Whilst it might be possible to charter or buy one vessel, acquiring two of a similar size would present additional challenges. The cost implications of converting a vessel so that it is suitable for operation on the Dover–Calais route are difficult to estimate since they vary depending on the characteristics of the vessel that is converted, but are likely to be at least €1.5 million per vessel (similar to the amount spent by the SCOP to get both the *SeaFrance Berlioz* and *SeaFrance Rodin* operational again) and conversion may take around six months (longer than the seven weeks it took the SCOP to have the *SeaFrance Berlioz* and *SeaFrance Rodin* operational again). We also note that the operating efficiency of such converted vessels is likely to be suboptimal compared with vessels that are bespoke to the route.

4.8 The use of the SeaFrance vessels reduced commercial risk for GET/SCOP compared with either chartering or buying, given their known history of operation on the route. We also considered that the commercial risk for GET/SCOP would have been lessened as a consequence of the retention of the vessel names which maintained a link between their past and future use on the route and the fact that these vessels were known to the port authorities.

4.9 The fact that the vessels were maintained in hot lay-up had the consequence that they could be put into service within a shorter time frame (and probably more cheaply) than if they had been laid up cold, but less quickly than if they had been fully

operational. The latter, however, was not an option in view of the cost implications. We acknowledge that a significant amount of work was carried out on the vessels before MFL's operations commenced on 20 August 2012. But both the time and cost were small relative to the value of the vessels. The time taken to do the work was seven weeks; the cost was [€1–€3] million. This cost was factored into the purchase price.

4.10 Turning to consider staff, we note first that the SCOP was established for the purpose of providing employment for ex-SeaFrance staff; it had attempted to acquire SeaFrance's assets for the purpose of providing employment for those employees on the SeaFrance vessels operating on the Dover–Calais route, just as SeaFrance had done.

4.11 The €25,000 indemnity that SNCF agreed to pay created a strong incentive for ex-SeaFrance employees to be employed on the *SeaFrance Berlioz*, *SeaFrance Rodin* and *SeaFrance Nord Pas de Calais* in similar operations to those of SeaFrance. It forged a link between the vessels and the employees and it ensured that—to the greatest extent possible—ex-SeaFrance employees transferred from SeaFrance to GET/SCOP. The indemnity reinforces our provisional view that it is not the case that contracts of employment were terminated 'with no thought as to how they might be reemployed in future'.[182] Our provisional conclusion is that these employees transferred from SeaFrance to GET/SCOP. As a result, around [70–80] per cent of the SCOP workforce comprises ex-SeaFrance employees.

4.12 We are also of the view that acquiring crew for the vessels other than via the route actually used by MFL would not have been as easy as GET/SCOP anticipated. The evidence indicated that GET/SCOP had not actually investigated this option and that

[182] Citation from paragraph 115 of the judgment of the CAT.

one of the two crewing companies that they mentioned did not provide the relevant services. The second company they mentioned indicated that it would take two to three weeks to assemble the staff and train them. While the parties submitted that a 2-hour familiarization process would be sufficient, the crewing company told us that it would take 10 to 15 days to train staff to work on the vessels.

4.13 Overall, we are persuaded that the steps taken in relation to staff were similar in nature to the steps taken in relation to the vessels. They were designed to ensure that there would be continuity to the maximum extent possible in the circumstances of the liquidation. In the result, those steps substantially achieved their aim.

4.14 In relation to other activities that GET/SCOP needed to undertake to commence operations, such as obtaining berthing slots at Calais and Dover and booths at the ferry terminals, we do not consider that the time and/or cost implications of these were significant. Moreover, we are of the view that the combination of the vessels being known to the port authorities, together with the fact that the ex-SeaFrance officers were familiar with the port, materially facilitated the process of obtaining berthing slots with DHB. Having some staff who still had valid pilotage exemption certificates, or had previously held them, was helpful in order to allow a quick and efficient start-up.

4.15 Our overall conclusion is that a variety of steps were undertaken, as noted above, that had the effect of preserving to the maximum extent possible in the circumstances the key assets (both physical and employees) of the former SeaFrance business. That was understandably and deliberately done in order to make it as easy as possible for that business, or something closely resembling it, to be resumed. There were perceived to be real advantages in taking those steps—not the least of which was that the easier the resumption, the more valuable the business assets

would be; and the more likely it would be that a greater number of former employees would be able to resume employment. The intended and achieved effect of those steps was that, once the acquisition of the liquidated assets completed on 2 July 2012, operations were recommenced very swiftly—by 20 August 2012, that is a period of only seven weeks. Those operations were on the same Dover–Calais route using the former SeaFrance vessels operated by a significant number of the same former SeaFrance employees.

4.16 Three other categories of assets were acquired: *(a)* brand and domain names and customer lists; *(b)* ferry management software SeaPax and SeaFret; and *(c)* UK assets (including a lease of premises at Whitfield, Dover). We consider that the acquisition of all of these conferred a material benefit on GET/SCOP in the context of their ability to start the new ferry operation more quickly and/or with less risk than they could have done otherwise.

4.17 There are two main categories of assets that were not acquired: customer contracts and supply contracts. We considered the implications of this in the context of the ferry industry and concluded that the nature of the contracts was not such that it placed GET/SCOP in a materially different position than if these had been acquired. In this industry passenger contracts are ad hoc and freight contracts consist of annual framework agreements. It would have been of some advantage to have the latter in place from the start, but having the list of customers is likely to have been helpful in this context. In relation to the supply contracts, we observe that supplies which can be readily obtained from third parties, or which are commonly provided centrally by parent companies, are less likely to be essential to the transfer of an ‘enterprise’, even if they are necessary to the running of the business.

4.18 By way of provisional conclusion therefore:

(a) We consider that the combination of acquired assets (in particular, but not limited to, the vessels and employees) means that what was acquired was more than a 'bare asset' in that it enabled the acquirer to establish ferry operations, more quickly, more easily, more cheaply and with less risk than if the relevant assets had been otherwise acquired in the market.

(b) Although, in light of the period of inactivity, GET/SCOP did not acquire the SeaFrance assets 'as a going concern', in reality they obtained much of the benefit of so acquiring them. That is because, in our view, the commercial operability and coherence of the assets used by SeaFrance for the Dover–Calais ferry service was not materially impaired by the period of inactivity.

(c) The combination of steps taken in relation to the vessels and the staff was that substantially the same business activities as had previously been undertaken by SeaFrance were able to be, and were in fact, resumed within a very short period of time following the acquisition. The intention, for good and understandable commercial and employment reasons, was to seek to preserve the former business or something as closely approximating to it as possible. That intention was achieved.

(d) Moreover, GET was significantly motivated to acquire the assets that it did by the advantages of continuity (and the consequent ability to resume substantially the same operations as had previously been undertaken by SeaFrance) that those steps had preserved.

4.19 We are thus provisionally of the view that the collection of tangible and intangible assets (including the transferred ex-SeaFrance employees) that GET/SCOP acquired meets the legal definition of an enterprise in that together they constitute the activities or part of the activities of a business.

4.20 We are satisfied that the acquired assets (including the transferred ex-SeaFrance employees) are under the control of the associated persons, GET and the SCOP.

4.21 In its judgment, the CAT remitted to the CC the question of whether GET/SCOP had acquired an 'asset' or an 'enterprise' and to that extent, our decision was quashed. As a result, the only matter on which we are required to make a new decision is this narrow jurisdictional point. If after having considered the representations of the parties we decide to confirm our provisional findings on the remitted question, the effect of our decision will be to reinstate the report on all other matters.

Broader observations on the jurisdictional test

4.22 Having reached the provisional conclusion above, we set out below some general observations on the jurisdictional test. We emphasize that these observations seem to us to lead to conclusions that are entirely consistent with the approach as we understand it to be described in the judgment.

4.23 In our view, when considering what constitutes an enterprise for the purpose of deciding whether enterprises have ceased to be distinct and establishing that there is a relevant merger situation, it is important to have regard to the purpose of the legislation. The purpose of the legislation is to enable the UK competition authorities to review transactions which might have significant impacts on competition in a particular market. In this context, and having regard to the overall nature of the UK merger control regime under which notification of transactions is voluntary, we consider that it is appropriate that provisions enabling authorities to review transactions are interpreted widely and purposively. To do otherwise would invite gaming of the system and the structuring of transactions and arrangements in such a way as to avoid merger control. A number of provisions of the Act are specifically aimed at anti-

avoidance, for example the provisions relating to aggregation of transactions under section 27 and the share of supply test under section 23.

4.24 The statutory test requires us to examine the result of a business transaction or series of transactions. The route that has led to that result is of secondary importance. If the route is complicated or intricate, factually or legally, that should not detract from the focus on the substance of what was achieved.

4.25 Whether a transaction (or series of transactions) provides the acquirer with the necessary resources to enable it to carry out the activities previously carried out depends on the combination of assets acquired, considered in the context of the industry concerned and against the background of the acquirer's pre-existing business activities.

4.26 Some business activities may be almost entirely based on physical assets; some may be almost entirely based on people. In the former case, the transfer or acquisition of the 'bare' physical asset (as the key operating tool of the business) may well be the critical feature in the consideration of whether or not enterprises have ceased to be distinct and result in a finding that enterprises have ceased to be distinct. We do not consider that it was the intention of the legislator in setting the statutory test to draw a sharp distinction between enterprises that are almost entirely based on physical assets and other types of businesses.

4.27 Given the disparate nature of businesses, and the fact that some businesses are 'asset driven', it is clear that the concept of business activity is a relative one and whether or not enterprises have ceased to be distinct is a matter of fact and degree, to be assessed in the context of the industry concerned. Moreover, the extent to which an asset may be affected by a period of inactivity also depends on the charac-

teristics of the asset. Some assets can be maintained in a state of readiness with only minimal cost implications and some assets are hardly affected by a prolonged period of inactivity, requiring only minimal cost and effort in order to be used to supply goods or services. Other assets may deteriorate rapidly if they are not used.

4.28 The acquirer's intentions and expectations in acquiring the relevant assets can also be relevant in establishing whether or not enterprises have ceased to be distinct.[183] In the present case, in our view those intentions and expectations lend considerable support to our conclusion that the assets acquired in this case were the key assets needed to be able to carry out the activities previously carried on by SeaFrance on the Dover–Calais route and were not ones that could readily be acquired, if at all, from other sources.

[183] In this case, GET considered that acquiring SeaFrance's liquidated assets would prevent these from being acquired by another ferry operator, thereby avoiding price competition (the report, paragraph 8.127).