

Eurotunnel/SeaFrance merger inquiry remittal

Final decision on the question remitted to the
Competition and Markets Authority by the
Competition Appeal Tribunal on 4 December
2013 and consideration of possible material
change of circumstances under section 41(3)

Notified: 27 June 2014

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 Some numbers have been replaced by a range.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

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Glossary

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 sea¹ 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. (the SCOP),² the Competition Appeal Tribunal (CAT) found in its judgment dated 4 December 2013 (the judgment of the CAT)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 report sets out our decision on the remitted question and our decision on whether there has been a material change of circumstances since the date of our original report in June 2013.
4. As regards the remitted question, we found that the CC⁴ has jurisdiction on the basis that this is a case of two enterprises ceasing to be distinct within the meaning of section 26(1) of the Act; and, in particular, that the associated persons, GET and the SCOP, acquired an ‘enterprise’.
5. 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

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 a company registered in France as a ‘société coopérative à forme anonyme’ under the name SCOP SeaFrance. 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.

⁴ From 1 April 2014 the Competition and Markets Authority (CMA) took over the functions of the CC and the competition and certain consumer functions of the Office of Fair Trading (OFT), as amended by the Enterprise and Regulatory Reform Act 2013. The original merger report and the provisional findings on jurisdiction were published by the CC; subsequent publications were under the name of the CMA. CC and CMA are used interchangeably in this report.

in the course of which goods or services are supplied otherwise than free of charge’.

6. In making a judgement as to whether 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 have based our conclusion on the totality of the evidence before us, taking into account in particular the nature of the industry and the particular characteristics of the assets that were acquired in that context.
7. 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 have taken all of those submissions and all of that information carefully into account. We have also reviewed and taken into account evidence from our original inquiry into the merger. We focused mainly on issues that the CAT had highlighted in the judgment, and in particular on whether what was acquired was something more than ‘bare assets’. This involved two main analytical steps: (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 noted that the decisional practice of the CC and the OFT, the CMA Guidelines, as well as the judgment of the CAT,⁵ all recognise 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 the scope of the Act could be unduly restricted.
9. The following matters were of particular importance to our analysis.
10. The basic facts are that 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 and they started ferry operations on the Dover–Calais route under the MyFerryLink brand, using three of the SeaFrance vessels and employing ex-SeaFrance employees via

⁵ *ibid*, paragraph 106(a).

the SCOP, which had been established for the purpose of providing employment for ex-SeaFrance employees.

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 three of the four ex-SeaFrance ferries on that route and 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 from the failure of the SCOP's two attempts to purchase the SeaFrance business as a going concern; both of these two failed attempts had the explicit intention of continuing SeaFrance's activities and providing employment to SeaFrance employees.
12. Dover and Calais ports have specific requirements for ferries operating from their terminals. The two sister vessels that were acquired, the *SeaFrance Rodin* and *SeaFrance Berlioz*, are particularly suited to this Dover–Calais route, 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.
13. GET would no doubt have been able to commission similar new builds. However, this would have been significantly more expensive and more time-consuming. It might also have been possible to buy or charter a vessel that could be converted for use on the Dover–Calais route. However, there appear to be a limited number of vessels potentially suitable in size and configuration for operation on this route (and this was also the case at the time that the vessels were acquired).
14. Given that the *SeaFrance Berlioz* and *SeaFrance Rodin* are sister ships, GET would have needed to acquire two similar vessels for service (as well as a third vessel) to be in a similar position to acquiring the SeaFrance vessels. Whilst it is likely to have been difficult to charter or buy one suitable 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 just to modify the linkspan arrangements (similar to the amount spent by the SCOP to get both the *SeaFrance Berlioz* and *SeaFrance Rodin* operational again), and conversion might 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 noted that the operating

efficiency of such converted vessels is likely to be suboptimal compared with vessels that are bespoke to the route.

15. We considered that the acquisition of the SeaFrance vessels is likely to have reduced the commercial risk for GET/SCOP compared with either chartering and converting vessels or buying two new vessels, given that the *Rodin* and *Berlioz* were specifically designed and built for the Dover–Calais route and operated on it for a number of years. We also considered that the commercial risk for GET/SCOP⁶ would have been lessened as a consequence of: (a) the retention of the vessel names which maintained a link between their past and future use on the Dover–Calais route; and (b) the fact that these vessels were known to the port authorities.
16. 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. We note that maintaining them in a fully operational state was not an option in view of the cost implications.
17. 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.
18. As regards staff, we noted first that the SCOP was established for the purpose of providing employment for ex-SeaFrance staff. It had attempted, on two occasions, 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.
19. 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 the SCOP. The indemnity reinforced our view that contracts of employment were not terminated 'with no thought as to how they might be re-employed in future'.⁷ Our conclusion was that in effect many employees transferred from

⁶ We refer to GET/SCOP together as the acquirer/transferee unless we consider that the context requires a distinction between the two entities (see paragraph 3.3).

⁷ Citation from paragraph 115 of the [judgment of the CAT](#).

SeaFrance to the SCOP. As a result, around [70–80]% of the SCOP workforce comprised ex-SeaFrance employees that were made redundant as a consequence of SeaFrance’s liquidation.

20. We have concluded that acquiring crew for the vessels other than via the route actually used by the SCOP would not have been as easy as GET/SCOP submitted. The evidence indicated that GET/SCOP had not actually investigated this option. One of the two crewing companies that they mentioned did not provide the relevant services. The second indicated that it would take two to three weeks to assemble the staff and train them. While the parties submitted that a 2-hour familiarisation 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.
21. Overall, we were 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 of SeaFrance’s activities to the maximum extent possible in the circumstances of the liquidation. In the result, those steps substantially achieved their aim.
22. 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 did not find that the time and/or cost implications of these were significant. Moreover, we were 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, is likely to have facilitated the process of obtaining berthing slots with Dover Harbour Board. 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.
23. Our overall conclusion was 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 deliberately⁸ 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

⁸ The description of GET’s bid for the vessels indicates that it is the French Court’s understanding that the intention of the bid is to revive SeaFrance’s activities using SeaFrance employees; it is in this context that the bid was deemed acceptable by the Court (Court Minutes of 11 June 2012, as set out in paragraph 3.30 below).

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 within a period of only seven weeks (20 August 2012). Those operations were on the same Dover–Calais route using former SeaFrance vessels operated by a significant number of the same former SeaFrance employees.

24. 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 considered that the acquisition of this package of assets 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.
25. There were 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. In relation to the supply contracts, we observed 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.
26. We therefore concluded that:
 - (a) The combination of acquired assets (in particular, but not limited to, the vessels and employees) meant 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 (including employees) ‘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 actively maintained, and thus impairment minimised, during the period of inactivity.
 - (c) The result of 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 on the Dover–Calais route) that those steps had preserved.
27. We were thus of the view that the collection of tangible and intangible assets (including the transferred ex-SeaFrance employees) that GET/SCOP acquired met the legal definition of an enterprise in that together they constituted the activities or part of the activities of a business.
28. 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 specific jurisdictional point. We have decided that GET/SCOP has acquired an enterprise and therefore that a relevant merger situation has arisen. In our view, the effect of this is to reinstate the Report on all other matters.
29. Given that more than nine months had elapsed since the publication of the Report when we published our provisional findings on the remitted issue, we invited comments on whether there had been a material change of circumstances or special reason within the meaning of section 41(3) of the Act (MCC) since the publication of the Report. We received submissions from a number of parties that there had been such changes. In light of these submissions, we extended the timetable to carry out an assessment of whether or not it would still be appropriate to remedy the effects of the merger as envisaged in our original report.
30. The Act provides little guidance on our obligations in the context of a remittal. Such cases are exceptional and must be considered on their particular facts. Our starting point is that we are bound by our previous findings where these have not been challenged, or where they have been unsuccessfully challenged. Accordingly, we took the view that because the CAT did not uphold the challenges to our decision on the SLC or remedy as set out in the original report, those decisions stand. This is, however, subject to the constraints of public law, in particular the obligation to take into account all relevant circumstances, as well as section 41(3) of the Act.

31. Section 41(3) requires us to ensure that our decision on remedies shall be consistent with the Report unless there has been an MCC since the preparation of the Report or we otherwise have a special reason for deciding differently.
32. We considered the submissions that we received from GET, the SCOP and third parties.
33. GET, the SCOP and the Mayor and other representatives of Calais submitted that demand on the short sea had grown more than envisaged by us, particularly on the Dover–Calais ferry route. They submitted that this, together with projections of growth for 2014 and 2015, constituted a change of circumstances sufficiently material to alter our SLC finding and hence impact on the remedies set out in the Report.
34. In relation to the finding in the Report that DFDS would be likely to exit, GET, the SCOP and the Mayor and other representatives of Calais submitted that an MCC had occurred as a result of the improved financial performance of DFDS. GET submitted that the improved performance of DFDS now placed DFDS in a strong competitive position, undermining DFDS’s assertion that it would exit the Dover–Calais route if MFL continued operating. The SCOP submitted that there was no credible evidence to suggest that DFDS would exit the Dover–Calais route. DFDS disagreed, submitting that it was still a long way from break-even on its Dover–Calais operation and reiterating that it would exit if MFL did not.
35. We assessed the impact of the demand growth that had taken place in 2013 and the impact of possible further growth to 2015. We did not find that this growth materially changed our analysis that DFDS would exit the Dover–Calais route and there was therefore no reason to amend our calculation of internalisation effects.
36. We considered the financial performance of DFDS but found no evidence that would change our original conclusion that DFDS would exit the Dover–Calais route if the MFL service continued in its current form and ownership.
37. We therefore concluded that there had not been an MCC in this respect.
38. We considered whether there had been an MCC or other special reason that had arisen since the publication of the Report that would have led us to reach a different view on remedies. In this context, we believe that the change of circumstances or special reason must not only be material in its nature, but also should be relevant to the decisions that we are required to take when assessing whether a remedy is as comprehensive a solution to the SLC, or resulting customer detriment, as is reasonable and practicable. Accordingly,

we have had regard to all relevant considerations, including alleged relevant changes in the market and material changes in the factors that were relevant to our original remedies decision.

39. In their submissions to us about the MCC, GET, the SCOP and DFDS put forward proposals for alternative remedies, or changes to the remedy set out in the Report on the basis that there had been MCCs.
40. We found that the GET remedy proposals were unchanged in substance from those in the original investigation and would not be effective in addressing the SLC. The SCOP submitted a remedy to us that it had not proposed at the time of the Report. Although the proposal was in draft form it was similar to a remedy concerning the sale of the MFL business that was considered in the Report, which at the time of the Report was rejected on the basis that the only likely purchaser was DFDS, who was not interested in a divestiture that involved taking over the commercialisation contract with the SCOP.
41. At that time the SCOP was not considered as a potential acquirer of that business, nor did it put itself forward as a potential purchaser. However, the SCOP has indicated that its improved financial position and establishment on the market as a reliable provider meant that it may be able to obtain the funding to enable it to take on the commercial risk associated with the operation of the MFL business. Accordingly we have considered whether the SCOP's changed circumstances are such as to lead us to believe that the remedy proposal put forward by the SCOP would be a viable effective remedy that would represent as comprehensive a solution to the SLC as is reasonable and practicable.
42. We found that the SCOP remedy would not provide a timely solution to the SLC. We noted that there were significant risks associated with the SCOP proposal. It had not been discussed in detail with GET; there were substantial doubts over the ability of SCOP to finance the proposal; and the three-year implementation period created significant uncertainty of outcome for both the funder and the transaction parties. We also had concerns over whether the SCOP would be wholly independent from GET under these arrangements, and any lack of independence would result in a failure of the proposed remedy to address the SLC. The SCOP remedy would also have required monitoring for the three-year implementation period. The proposed remedy also raised issues about charter length and the risk of circumvention.
43. The concerns over the SCOP remedy were such as to lead us to conclude that in its current form there was not the requisite degree of timeliness and certainty that this proposal would produce an effective solution to address the SLC identified in the Report.

44. DFDS raised a number of points that in its view amounted to an MCC such that it would be appropriate to reduce the implementation period set out in the Report from six months to three months. We disagreed that circumstances had changed to such an extent that such a reduction would now be appropriate.
45. We concluded that there had been no MCC (including special reason) within the meaning of section 41(3). The remedies remain consistent with the conclusion in the Report, namely a ten-year prohibition on GET operating ferry services at the Port of Dover with the *Berlioz* and the *Rodin* (with an alternative of divesting the *Berlioz* and the *Rodin* to a purchaser approved by us within six months from the date of the CMA order to implement the remedy, provided that anti-avoidance provisions detailed in paragraphs 10.116 to 10.121 of the Report also applied – see paragraphs 10.181 to 10.187 of the Report) and a two-year prohibition on GET operating ferry services at the Port of Dover with any vessel from the date the prohibition comes into effect.

Decision

1. Introduction

- 1.1 On 6 June 2013, the CC published the Report. 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 SCOP⁹ 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 of the CAT),¹⁰ 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 whether Eurotunnel/SCOP acquired an 'asset' or an 'enterprise'. To this extent, and for that reason alone, we unanimously quash the Decision.¹¹

- 1.4 This report sets out our assessment of and decision 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/ SCOP¹² acquired an 'asset' or an 'enterprise'. It also sets out assessment and conclusions in respect of the question, pursuant to section 41(3) of the Act, whether it is still appropriate to remedy the effects of the merger as envisaged in our original report.

⁹ The SCOP is a workers' cooperative founded on 7 October 2011 by a group of 14 former SeaFrance employees.

¹⁰ [Groupe Eurotunnel S.A v Competition Commission \[2013\] CAT 30](#); no remittal order was issued.

¹¹ *ibid*, paragraph 432.

¹² We refer to GET/SCOP together as the acquirer/transferee unless we consider that the context requires a distinction between the two entities (see paragraph 3.3).

1.5 In outline, this report is structured as follows:

- Section 2 sets out the process we followed for the remittal; it outlines the statutory context and summarises the conclusions of the CAT on the asset/ enterprise question that was remitted to us. It also includes a brief reference to the decision of the French Competition Authority (FCA).
- Section 3 comprises our assessment of the remitted issue.
- Section 4 outlines our conclusions on the remitted issue and sets out some broader observations on the jurisdictional test.
- Section 5 contains our assessment and conclusions on MCC.
- Section 6 considers remedies.

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.¹³ We received submissions on the jurisdictional question and held hearings following receipt of submissions on our provisional findings.
- 2.2 We were not required to reconsider the competitive assessment as part of the remittal. We noted in our Remittal Notice, however, that if we were to conclude that a 'relevant merger situation' had been created, since the 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 the Report unless there has been an MCC since preparation of the Report or we have a special reason for deciding differently.
- 2.3 Given that we had provisionally found that a relevant merger situation had arisen, we invited submissions and evidence on whether there had been an MCC by means of a Notice published on 21 March 2014 alongside our provisional findings on the remitted question. We received submissions from GET, the SCOP and DFDS that there had been MCCs. We held hearings with GET, the SCOP and DFDS in the first half of April focused mainly on the MCC question. After the hearings we received further submissions from GET and

¹³ [Remittal Notice](#).

the SCOP on how the MCCs that both had said had occurred affected the SLC findings in the Report.

- 2.4 On 20 May 2014, we published our provisional consideration of possible material changes of circumstances under section 41(3) (provisional consideration of possible MCC), inviting comments by 3 June 2014 which we subsequently considered. On 3 June 2014 we held a hearing with the Mayor of Calais, other representatives of Calais and a representative of the SCOP employees.

The statutory framework and Guidelines¹⁴

- 2.5 Under section 35 of the Act and pursuant to the terms of reference,¹⁵ 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 the 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’.¹⁶
- 2.7 The Merger Assessment Guidelines¹⁷ 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

¹⁴ From 1 April 2014, see [Mergers: Guidance on the CMA’s jurisdiction and procedure, CMA2](#), paragraphs 4.6–4.11.

¹⁵ [Terms of reference](#).

¹⁶ [Section 129\(1\)](#) of the Act.

¹⁷ [Merger Assessment Guidelines \(Adopted\), 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 CMA Board on 12 March 2014.

activities should be profitable, or generate a dividend for shareholders, and the definition may include transferred activities conducted on a not-for-profit basis.

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

- 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 CMA's guidance on jurisdiction and procedure contains more detail on the principles that it will apply in situations where the business being acquired is no longer actively trading:

The fact that a target business may no longer be actively trading does not in itself prevent it from being an enterprise for the purposes of the Act. In such cases, while the relevant criteria may vary according to the particular circumstances of a case, the CMA will consider, for example:

- 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
- 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

None of these factors, individually, is likely to be conclusive. The CMA will assess all relevant circumstances (including whether there is evidence that the closure of the business was designed to avoid merger control), with a view to determining whether the target business constitutes an enterprise under the Act.¹⁸

- 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 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/SCOP 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 our conclusion; instead we based this on the totality of all the relevant considerations,¹⁹ 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

¹⁸ [Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2](#), January 2014, paragraphs 4.10–4.11 (see also [OFT 527 Mergers: Jurisdictional and Procedural Guidance](#), June 2009, paragraphs 3.11–3.12).

¹⁹ [Mergers: Guidance on the CMA's jurisdiction and procedure, CMA2](#), January 2014, paragraphs 4.10–4.11 (see also [OFT 527, Mergers: Jurisdictional and procedural guidance](#), June 2009, paragraph 3.9).

address. However, we set out some broader observations on the jurisdictional test at the end of this report (see paragraphs 4.23 to 4.30 below).

The judgment of the CAT and basic approach to the remitted question

The judgment of the CAT

- 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 NV²⁰ (the MMC report) was helpful in this context:

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

²⁰ [AAH Holdings plc and Medicopharma NV: a report on the merger situation.](#)

- (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 summarise 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 MyFerryLink²¹ service; and (c) the acquisition of the brand and goodwill of SeaFrance, carrying some, but limited, positive value.

Hot lay-up of the vessels

- 2.19 The CAT noted in paragraph 114 that the vessels acquired by GET were 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 the 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

²¹ Having prepared the vessels for service and acquired berthing slots at the ports of Calais and Dover, ferry services between Calais and Dover were launched on 20 August 2012 under the MyFerryLink brand. The SCOP's subsidiary, Dover Calais Ferries Limited (DCFL), is responsible for marketing and sales of passenger services (on behalf of MFL) while freight services are sold direct by MFL SAS, a subsidiary of GET previously known as Eurotunnel Transmanche 2 SAS.

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 the 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.²² 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.

²² Further details regarding the origin of this indemnity and the conditions under which it became payable are contained in paragraphs 3.95–3.110.

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:

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 held hearings with the parties in the context of the remittal. We 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 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 is made and that they did so not more than four months before that day.²³ The four-month time limit is relevant only to determining whether or not a reference to the CMA 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 CMA 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.²⁴ 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:

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.²⁵

- 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

²³ Following amendment of the Act by the Enterprise and Regulatory Reform Act 2013, section 22(1) provides for references to be made to the Chair of the CMA for the constitution of a Group.

²⁴ 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’.

²⁵ [Judgment of the CAT](#), paragraph 66.

relevant time frame.²⁶ 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.²⁷
- 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)²⁸ predate this period by some five months, they cannot be taken into account.²⁹ 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 period.³⁰ 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.³¹ 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).³²
- 2.34 The SCOP is not a party to the PSE3, had no role in the negotiation of the €25,000 special indemnity³³ and the payment it received is not a SeaFrance asset. The PSE3 is a statutory arrangement, in this case negotiated between

²⁶ *ibid*, paragraphs 67–68.

²⁷ 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 decision on the basis of employee contracts in existence on 29 October 2012.

²⁸ An explanation of the Plan de sauvegarde de l'emploi is set out in paragraphs 3.82 & 3.83.

²⁹ [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 authorised 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).

³⁰ [SCOP response to Remittal Notice](#), paragraph 4.32.

³¹ *ibid*, paragraph 4.9.

³² [Judgment of the CAT](#), paragraphs 69–71.

³³ A member of the SeaFrance works council was also a founding member of the SCOP.

the liquidator and the SeaFrance comité d'entreprise (the works council, made up of employee representatives).^{34,35} PSE3 provides that Groupe SNCF (SNCF) will fund certain payments in order to incentivise 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 in paragraphs 3.95 to 3.110.

- 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.
- 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.³⁶ 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 not 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 notwithstanding that they arose more than four months prior to the date of the reference on 29 October 2012, for the reasons set out in paragraph 2.27 above.
- 2.37 In response to our provisional findings, the SCOP submitted that the CAT did not suggest that the CMA could look at events subsequent to the relevant transactions in order to reinterpret the nature of the transaction on that basis. The SCOP therefore considered that we are not entitled to consider PSE3 in the way that we do, and in particular we could not attach decisive weight to a payment which was made in January 2013, outside the relevant period and following the issue of legal proceedings.³⁷ We note, however, the Tribunal's observation in paragraph 54(e) of the judgment that 'factors occurring after the relevant merger situation is said to have arisen may be relevant to understanding what, exactly, the merger arrangement or transactions are ...'.

³⁴ <http://vosdroits.service-public.fr/particuliers/F2811.xhtml#N10143>.

³⁵ This accords with the SCOP's own views that PSE3 was a consequent legal step taken by the liquidator imposing obligations on SNCF ([SCOP response to Remittal Notice](#), paragraphs 4.20–4.23).

³⁶ [Judgment of the CAT](#), paragraph 66.

³⁷ [The SCOP's response to provisional findings](#), paragraphs 3.5–3.6.

We have taken subsequent factors into account in the manner suggested by the CAT.

- 2.38 In addition, we observe that the CAT stated in paragraph 72 of the judgment: ‘... We find that these employees were “acquired” by the SCOP during the relevant time period’. Moreover, in our view it is likely that the recruitment decisions of the SCOP were influenced by the probability that the PSE3 payments would be made, even if the payments were not actually made until January 2013; those recruitment decisions took place within the relevant time period.

FCA decision

- 2.39 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 FCA. We set out in Appendix E further details regarding how the FCA viewed this transaction.
- 2.40 The FCA applies a different legal test from that used in the UK. 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 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).
- 2.41 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 FCA and did not suggest that the FCA lacked jurisdiction over the transaction. However, given that the legal frameworks are not identical and in light of the relatively high-level consideration given to this issue in the FCA’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. A chronology of main events is included 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 2012³⁸ and the Excerpt of the Minutes of the French Court dated 11 June 2012³⁹ (French Court Minutes). We refer to the English language translations of these documents, which we consider to be relevant in their entirety to the background to the transaction.⁴⁰
- 3.3 For ease, and in light of our finding – upheld by the CAT – that GET and the SCOP are associated persons for the purpose of section 127(4)(d) of the Act,⁴¹ we refer to GET/SCOP together as the acquirer/transferee unless we consider that the context requires a distinction between the two entities. However, we recognise that GET acquired the liquidated assets, ex SeaFrance staff were employed mainly by the SCOP and the SCOP was the direct beneficiary of the €25,000 special indemnity.

Safeguard procedure (April 2010 to June 2011)

- 3.4 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.
- 3.5 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

³⁸ Available on Greffe du Tribunal De Commerce de Paris website, reference 2011070241 for the 16 November 2011 judgement, and 2011087689 for the 9 January 2012 judgement.

³⁹ Extrait des Minutes Du Greffe du Tribunal De Commerce de Paris (publicly available).

⁴⁰ 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.

⁴¹ [Judgment of the CAT](#), paragraph 57.

informed the administrators in February 2011 that it had suspended its sales process.

- 3.6 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

- 3.7 In February 2011, the French authorities notified the European Commission of restructuring aid in favour of SeaFrance amounting to €223 million, accompanied by a restructuring plan.⁴² 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.⁴³
- 3.8 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%, instead of the 50% required by European rules. The European Commission also decided that the earlier rescue package, in the form of a loan from SNCF (see paragraph 3.5 above), constituted aid that was incompatible with the common market and that this aid had to be repaid within four months.⁴⁴ 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 3.18 below).

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

- 3.9 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

⁴² 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.

⁴³ Ranges in this paragraph are from the European Commission's decision referred to in the preceding footnote.

⁴⁴ We note that there are a number of other European Commission decisions relating to state aid to SeaFrance.

from a Danish company, DFDS, and Louis Dreyfus Armateurs (referred to as DFDS-LDA).⁴⁵

3.10 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 and was 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,⁴⁶ leading to a negative sale price and the complete impossibility of compensating creditors. Finally, the bid was subject to the authorisation of the competition authority.⁴⁷

3.11 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.

3.12 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*).⁴⁸

⁴⁵ A third bid was also received but this was subsequently withdrawn.

⁴⁶ We understand this to mean that these company liabilities would be paid from the funds available to the liquidator.

⁴⁷ Judgment of the French Court, 16 November 2011.

⁴⁸ Following the acquisition by GET, the vessels were renamed *Berlioz*, *Rodin* and *Nord Pas-de-Calais*.

3.13 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;
- 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.

- 3.14 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 TUPE⁴⁹ 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.
- 3.15 The sale price was €1, to which might be added in due course 25% 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.⁵⁰
- 3.16 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.⁵¹ 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.⁵²
- 3.17 Ultimately the French Court decided that it could not accept the SCOP's offer given the lack of financing.⁵³

Liquidation of SeaFrance (November 2011)

- 3.18 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.
- 3.19 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.

⁴⁹ [Transfer of undertakings \(protection of employment\) Regulations 2006](#).

⁵⁰ Judgment of French Court, 16 November 2011.

⁵¹ *ibid*, p18.

⁵² *ibid*, p19.

⁵³ *ibid*, p23.

Invitation of further bids (December 2011)

- 3.20 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 the SCOP's previous bid, was outlined in a document dated 12 December 2011 (and the SCOP later submitted a business plan dated 12 January 2012). 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.
- 3.21 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 jeopardising the goal of ensuring continued employment and in providing funds to pay the company's creditors. For example, the 'Juge Commissaire'⁵⁴ 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 utilising 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.⁵⁵
- 3.22 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.⁵⁶
- 3.23 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

⁵⁴ We understand that this is an officer comparable to the official receiver.

⁵⁵ Judgment of the French Court, 9 January 2012.

⁵⁶ *ibid.*

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.⁵⁷

- 3.24 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.

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

- 3.25 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:

⁵⁷ *ibid.*

- 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.^{58,59}

- 3.26 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 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 3.80 to 3.88).
- 3.27 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 by the liquidator to lay up the vessels during the sales process.
- 3.28 The three vessels and the firm's other assets (trade marks, 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

⁵⁸ *ibid.*

⁵⁹ In response to the phrase in the 9 January 2012 judgement 'Obviously there must be a compromise between the value of the assets, essentially the vessels, and the continuation of employment contracts'. (A l'évidence, il devra y avoir compromis entre la valeur des actifs, essentiellement les navires, et le maintien des contrats de travail), the liquidator said. 'This last sentence has no meaning in relation to French law on insolvency procedure. It responds only to a political concern'. (Cette dernière phrase n'a aucun sens au regard de la loi française régissant les procédures d'insolvabilité. Elle répond seulement à un souci politique). Article L 640-1 which defines the liquidation procedure specifies in paragraph 2: 'The liquidation procedure is intended to end the business activity or to sell the debtor's assets through a general or separate assignment of its interests and property.'

the vessels and one for the non-vessel assets.⁶⁰ The vessels could be bought outright or procured by way of a bareboat charter of between 18 and 60 months' duration.⁶¹

- 3.29 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 €[X] million for the *SeaFrance Rodin*. P&O bid for the customer lists and domain names (see paragraphs 3.192 to 3.212). Ultimately, these three bids were all rejected. 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:

⁶⁰ In response to our provisional findings, the liquidator wished to clarify that Article 642-19 of the French Commercial Code specifies that the bankruptcy judge shall either order the sale at public auction or allow a private sale of the debtor's assets at the price and under the conditions he determines. The bankruptcy judge made the choice not to sell at public auction because he had had the assets valued in advance by experts.

⁶¹ 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.

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.

- 3.30 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'.⁶²
- 3.31 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 3.92 below), enabled it to fund its €10 million contribution.
- 3.32 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 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 realisation 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 authorised. The acquisition completed on 2 July 2012. Operations on the Dover–Calais route recommenced on 20 August 2012 under the MyFerryLink brand. In the sections below, we have described in further detail the main steps that GET/SCOP undertook in the period between completion of the transaction and the recommencement of the Dover–Calais ferry service.
- 3.33 We have included at Appendix B a more detailed list of the assets obtained and the prices offered by GET.

⁶² GET noted that the original French 'faire renaître' literally translates as 'to cause to be reborn'.

SeaFrance assets in the UK

- 3.34 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'.
- 3.35 GET said that it realised 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 €[REDACTED]. MFL's offer for SeaFrance's UK assets was accepted by the Finance Director of SeaFrance Ltd.
- 3.36 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.⁶³
- 3.37 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 €[REDACTED]. On 1 August 2012, these assets were sold to Dover Calais Ferries Limited (DCFL, a wholly-owned subsidiary of the SCOP) for €[REDACTED]. The 'Portakabin' was subsequently sold to a third party.
- 3.38 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

⁶³ [GET response to DFDS submission](#), paragraph 4.3.

assets acquired from the French liquidator. DCFL had to pay the landlord a rent deposit of £[REDACTED] in order to secure the site as a new tenant. This was confirmed by the SCOP.

- 3.39 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. SeaFrance Ltd assigned the lease of Whitfield Court premises to DCFL with the consent of the landlord at a cost of £[REDACTED].⁶⁴ 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 no material difference to our analysis if these assets had instead been acquired separately from a third party.
- 3.40 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

- 3.41 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.⁶⁵
- 3.42 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 passenger and freight travel times. In its first three months of trading, MFL carried [REDACTED] freight vehicles and [REDACTED] passenger

⁶⁴ 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.

⁶⁵ [GET response to Remittal Notice](#), section 5, paragraph 5.1.

vehicles.⁶⁶ 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.⁶⁷

- 3.43 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’.⁶⁸
- 3.44 The SCOP argued that the duration of the period of inactivity was highly relevant and this was recognised 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.⁶⁹

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

- 3.45 We recognise 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 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.
- 3.46 We note, first, that the decisional practice of the CC and OFT, the CMA guidelines (which, in material respects, are similar to those of the OFT and CC), as well as the judgment of the CAT,⁷⁰ all recognise that in the context of ‘enterprises ceasing to be distinct’, it is not necessary for the purpose of

⁶⁶ GET submitted that in the same period in 2013, MFL carried [X] freight vehicles and [X] passenger vehicles (excluding coaches of which it carried [X]).

⁶⁷ *ibid*, section 5, paragraphs 5.4–5.7.

⁶⁸ *ibid*, section 4.

⁶⁹ [SCOP response to Remittal Notice](#), section 3.

⁷⁰ [Judgment of the CAT](#), paragraph 106(a).

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.

- 3.47 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.
- 3.48 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 realise the assets at the best price in order to ensure that payments to the company's creditors would be maximised. 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.⁷¹
- 3.49 Fourth, while various transactions involving one or both of the parties were considered, they all had the aim of continuing SeaFrance's activities in some form and providing employment to SeaFrance employees.⁷² 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 substantially 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.
- 3.50 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

⁷¹ [X] of these staff were subsequently employed by the SCOP.

⁷² It is also relevant that, at the time that the French Court ordered the cessation of activities, the bankruptcy judge did not preclude the possibility that the business might be sold (see paragraph 3.25 above).

acquired assets to provide employment for SeaFrance employees, its proposal to do so was not credible.

- 3.51 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 continuation of the SeaFrance operation involving all employees under their existing terms and conditions.
- 3.52 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.
- 3.53 At the point the decision was taken that SeaFrance activities should cease, the French Court recognised that the aim of achieving some form of business continuity remained unchanged. This is clear from statements made by the French Court 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’.⁷³ 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.
- 3.54 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 originally used. For reasons set out above, the circumstances of this case are fundamentally different.

⁷³ Judgment of the French Court, 9 January 2012.

- 3.55 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. This also meant that any buyer of the liquidated assets would not have to assume any employee obligations – a fact that 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.
- 3.56 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.⁷⁴ We recognise 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

- 3.57 In this section, we consider the position with regard to employees. In particular, we consider whether employees transferred to (or were 'acquired by') the SCOP from SeaFrance.

Judgment of the CAT

- 3.58 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.⁷⁵
- 3.59 The history of the SCOP is summarised 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

⁷⁴ 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.

⁷⁵ [Judgment of the CAT](#), paragraphs 59 & 61–65.

had 256 employees on the ships and a further 126 operating at the ports of Dover and Calais (382 in total).⁷⁶

- 3.60 We understand that in January 2012, when SeaFrance was liquidated, it employed around 820 individuals who were subsequently made redundant under PSE3. At the time of its registration on 29 December 2011, the SCOP had 827 subscribers. Of these, [X] were SeaFrance employees who were subsequently made redundant under PSE3. A further [X] subscribers were described by the SCOP as ‘drawn from interested and sympathetic third parties unconnected to SeaFrance’.⁷⁷ As noted in paragraph 3.11 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).

- 3.61 In paragraph 72, the CAT concluded that, on the assumption that the former SeaFrance employees constituted a part of the SeaFrance Assets,⁷⁸ it found that the 382 employees referred to in paragraph 3.59 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).⁷⁹ In paragraph 73, the CAT reiterated its conclusion that GET/SCOP had in fact acquired SeaFrance assets, including the former SeaFrance employees.
- 3.62 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.
- 3.63 The CAT expressed the view that, on the face of the Report, it was difficult to see how the relevant employees were ‘acquired’ from SeaFrance:

⁷⁶ These figures derive from the CAT judgment. Different figures have subsequently been provided by the SCOP.

⁷⁷ [The SCOP's response to provisional findings](#).

⁷⁸ SeaFrance Assets are defined in paragraph 38 of the [judgment of the CAT](#), by reference to our decision in, for example, paragraphs 4.3, 4.15, 4.68 & 4.69.

⁷⁹ [Judgment of the CAT](#), paragraph 68.

- 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 3.81 below).
- The formation of the SCOP, and the subscription of a number of ex-SeaFrance employees to this organisation, and the subsequent employment of some of them by it, constituted the creation of a new legal relationship, with no element of transfer from SeaFrance to the SCOP.⁸⁰

3.64 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.

3.65 This section therefore considers the arrangements relating to ex-SeaFrance employees including the employee indemnity.⁸¹

Arrangements relating to SeaFrance employees

3.66 The 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.

3.67 SeaFrance employed around 820 individuals when it went into liquidation. According to the liquidator, French law required that SeaFrance’s employees

⁸⁰ *ibid*, paragraph 115.

⁸¹ 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 création 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)’.

be made redundant 15 days after the date of liquidation – on 24 January 2012.⁸² The liquidator informed us that 190 SeaFrance staff had their redundancy delayed for periods varying from 2.2 months to 10.2 months.⁸³ These employees kept their SeaFrance employment terms but received a bonus and were paid by the liquidator.

- 3.68 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*.⁸⁴ 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 3.125 to 3.129.
- 3.69 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.
- 3.70 [REDACTED]
- 3.71 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 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 3.94 below.

⁸² The liquidator informed us that Article L 1233-58 of the French Employment Code provides that employment contracts binding employees to the employer are to be terminated within 15 days of the judgment pronouncing the liquidation or following expiry of the authorisation to continue trading. In the case of SeaFrance's liquidation, AGC (the body guaranteeing payment of salaries) exceptionally agreed to extend the time frame for implementation of dismissals in order to best realise the assets of the company ([liquidator's response to provisional findings](#)).

⁸³ Of the total number of SeaFrance employees, [REDACTED] were then employed by the SCOP.

⁸⁴ Of the 94 staff involved in the lay-up of the vessels, 47 (50%) subsequently obtained employment with the SCOP and around half of these were not previously members of the SCOP.

TABLE 1 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)	[X]	[X]	[90–100]	[X]
2 July 2012 (completion of the transaction)	[X]	[X]	[90–100]	[X]
20 August 2012 (MFL commences services)	[X]	[X]	[80–90]	[X]
29 October 2012 (date of reference to CC)	[X]	[X]	[X] ([70–80] of total SCOP employees)	[X] ([60–70] of total employees)†

Source: The SCOP.

*The SCOP had [X] 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 [X] 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.

3.72 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	[X]	[X]	[70–80]
On-shore	[X]	[X]	[60–70]
On-board vessels	[X]	[X]	[80–90]
Officers	[X]	[X]	[60–70]
Crew	[X]	[X]	[80–90]
IT	[X]	[X]	[90–100]
Maintenance	[X]	[X]	[90–100]
Operations	[X]	[X]	[60–70]
Procurement	[X]	[X]	[90–100]
Management	[X]	[X]	[60–70]
Other	[X]		

Source: The SCOP.

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.

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

3.74 The SCOP submitted that at least [X] 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.⁸⁵

3.75 GET told us that it currently employed [X] people on its Dover–Calais business; they were recruited via traditional recruitment channels. [X] Further information is set out in Table 3 below. We have included in the table an

⁸⁵ SCOP response to Remittal Notice.

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 3.82 to 3.88 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)	[REDACTED]	[REDACTED]	[REDACTED]
2 July 2012 (completion of the transaction)	[REDACTED]	[REDACTED]	[REDACTED]
20 August 2012 (MFL commences services)	[REDACTED]	[REDACTED]	[REDACTED]
29 October 2012 (date of reference to CC)	[REDACTED]	[REDACTED]	[REDACTED]

Source: GET.

*Pursuant to clause 3.4 of PSE3.

3.76 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% owned by the SCOP on 10 September 2012. From 3 July 2012, DCFL advertised externally for staff. The first [REDACTED] employed in the UK on 1 July 2012 were executive directors who were ex-SeaFrance employees. The first UK employees entered into contracts on [REDACTED] and, of those who were employed as at 3 January 2014, the last entered into a contract of employment on [REDACTED].

Our views

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

3.78 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). Some staff gained employment elsewhere, for example with DFDS. 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 action, 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 3.52 above).

- 3.79 The SCOP stated that of the [X] former SeaFrance employees who were assigned to a specific vessel during their time with SeaFrance, [X]% were assigned to the same vessel by the SCOP. As at 3 January 2014, there were a total of [X] employees who are engaged in different jobs with different responsibilities from those they had at SeaFrance ([X]% 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, as well as the *Nord Pas-de-Calais*, operate on the same route, it is not surprising that staff can work on a different ship.⁸⁶ 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 this context.⁸⁷
- 3.80 In the following section, we consider the employee indemnity arrangements in more detail.

The employee indemnity

- 3.81 The CAT indicated that it would be appropriate for us to consider the fact 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.
- 3.82 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.
- 3.83 We understand from the liquidator and the SCOP that such 'plans to safeguard employment' are required under French law in certain circumstances,⁸⁸ although the content and terms of the statutory arrangement will be specific to the particular situation in which the general legal obligation arises.

⁸⁶ In response to the provisional findings, the SCOP pointed out that there were also a number of employees who switched.

⁸⁷ 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.

⁸⁸ 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](#).

- 3.84 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).
- 3.85 The €25,000 indemnity was not included in the initial version of the PSE3.⁸⁹ 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. In response to our provisional findings, the liquidator stated that he wished to clarify that this indemnity was negotiated with a view to the employees themselves buying back the vessels. This type of situation is not unusual in France and there have been other company takeovers by employees.⁹⁰
- 3.86 As noted above (paragraph 3.60), at the time of its registration on 29 December 2011, the SCOP had 827 subscribers. Of these, [X] were SeaFrance employees who were subsequently made redundant under PSE3. A further [X] subscribers were described by the SCOP as ‘drawn from interested and sympathetic third parties unconnected to SeaFrance’.⁹¹ This indicates that a significant majority of (ex-)SeaFrance employees were also members of the SCOP. 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.⁹²
- 3.87 PSE3 also provided that indemnities – of a lower value – would be payable in other circumstances, namely:
- €10,000 for each ex-SeaFrance employee, payable to anyone who set up or purchased at least a 50% stake in a company or is self-employed. This amount could be increased to €15,000 if these activities took place in the Calais area.
 - Approximately €3,600 for each ex-SeaFrance employee, payable to any company hiring such an employee on an indefinite contract. The relevant amount would be one and a half times the gross monthly minimum wage and two and a half times the same if these activities took place in the Calais area.

⁸⁹ It was not in a version dated 13 January 2012.

⁹⁰ [Liquidator response to provisional findings](#).

⁹¹ [SCOP response to provisional findings](#).

⁹² [SCOP response to Remittal Notice](#).

- 3.88 These indemnities had to be claimed within 12 months of 23 January 2012. 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.
- 3.89 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 Giguët⁹³ told us that these indemnity payments were expected and were absolutely necessary for SCOP/SeaFrance to be able to run the company:
- Yes, it [the redundancy payment] is expected. Normally, it has been decided during negotiation made last year, the 23rd January, and the final decision has to be taken before the next 23rd of January. So we are actually dealing with the liquidator to get the money which was – previously, in the formal negotiation – which was absolutely necessary to the capital liquid of the SCOP to run the company.⁹⁴
- 3.90 At the same hearing, when asked if he was confident that that payment from the liquidator was going to come through by 23 January, Mr Giguët replied:
- Yes, during when I was waiting in the room, discussing with the liquidator, there is an official meeting next Wednesday, with the liquidator, the judge of the tribunal and us, and for us there is no alternative. It has been negotiated from that time and there is no reason not to get that money. And I feel very strong and very confident on the fact that we will get it.
- 3.91 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.
- 3.92 A total indemnity of €[~~25~~] was paid by the liquidator of SeaFrance out of funds provided by SNCF to the SCOP as follows:

⁹³ CEO of the SCOP; M Giguët appeared at the GET hearing.

⁹⁴ Hearing with GET on 17 January 2013.

- €[X] on 24 January 2013
 - €[X] on 7 March 2013
 - €[X] on 7 June 2013
 - €[X] on 2 January 2014
- 3.93 Separately, and under a different clause of the PSE3, MFL received an indemnity of €[X] for [X] ex-SeaFrance employees (see second bullet point in paragraph 3.87 above).
- 3.94 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 point in paragraph 3.87 above). DFDS received a total indemnity payment of €[X], equating to €[X] per eligible employee.

Parties' submissions on indemnity and staff continuity

Indemnity

- 3.95 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.⁹⁵
- 3.96 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.⁹⁶ It was the SCOP which was responsible for hiring employees and which might benefit from any payment.
- 3.97 As noted above, the PSE3 was negotiated between the liquidator and the SeaFrance works council and entered into on 23 January 2012. The SCOP

⁹⁵ [GET response to Remittal Notice](#), Section 7.

⁹⁶ 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 expect derives from the PSE3 payments.

argued that PSE3 was a consequent legal step taken by the liquidator imposing obligations on SNCF. It had no connection to the transaction.⁹⁷

3.98 The SCOP argued that the language in PSE3 regarding the €25,000 indemnity, ‘a similar operation of the vessels belonging to SeaFrance’, recognised that there would be no transfer of the activities of SeaFrance.⁹⁸

3.99 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 2013.⁹⁹ 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 PSE3.¹⁰⁰ 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 that they reconstructed certain aspects of the way in which SeaFrance operated.¹⁰¹ Further, GET had committed to the transaction without confirmation that funds from the SCOP would be received.¹⁰²

Staff continuity

3.100 The SCOP submitted that the fact that there was no TUPE transfer was indicative of a lack of continuity in the economic entity. The CMA’s guidance on jurisdiction and procedure states that an application of the TUPE Regulations is a strong indication that the business transferred constitutes an enterprise.¹⁰³ The SCOP submitted that the 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.¹⁰⁴

3.101 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

⁹⁷ [SCOP response to Remittal Notice](#), paragraphs 4.19 & 4.20.

⁹⁸ *ibid*, paragraphs 4.25–4.27.

⁹⁹ *ibid*, paragraph 4.32.

¹⁰⁰ *ibid*, paragraphs 4.32 & 4.41.

¹⁰¹ *ibid*, paragraph 4.34.

¹⁰² *ibid*, paragraph 4.31.

¹⁰³ [CMA2](#), paragraph 4.8.

¹⁰⁴ *ibid*, paragraphs 4.15–4.18.

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.¹⁰⁵ 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.¹⁰⁶ GET also considered other suppliers such as V.Ships UK Ltd (V.Ships)¹⁰⁷ and stated that ferry jobs were not so 'specific or specialised to such an extent that they relate to a particular ferry'.¹⁰⁸

- 3.102 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.¹⁰⁹ 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 [X].¹¹⁰

Our views on the indemnity and staff continuity

- 3.103 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 negotiated. While there were lower indemnity payments that would accrue to other employers of ex-SeaFrance employees in a variety of circumstances, a very much higher level of indemnity (€25,000 per employee) was negotiated for the benefit of the SCOP and with 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 for the benefit of the SCOP project, or any other company (of any form) in which the employees have a direct interest (shareholding) and indirect interest (permanent employment contract)'.
- 3.104 In response to our provisional findings, the SCOP submitted that the €25,000 indemnity payments were available to *any* SCOP or any other company fulfilling the relevant conditions. The payments were not limited to the SCOP that existed at the date of PSE3. In our view, while it may be technically correct that another 'SCOP' (or another company) could have benefited from the payments, it is in fact extremely unlikely in practice that there would be

¹⁰⁵ GET response to Remittal Notice, Section 6.

¹⁰⁶ *ibid*, Section 6, paragraph 6.4.

¹⁰⁷ *ibid*, Annex 2, p17.

¹⁰⁸ *ibid*, Section 6, paragraph 6.2.

¹⁰⁹ SCOP response to Remittal Notice, paragraph 4.33.

¹¹⁰ *ibid*, paragraphs 4.37 & 4.47.

another SCOP SeaFrance, and in fact only one such ‘SCOP’ was set up. The available evidence shows that it was expected that SCOP SeaFrance rather than another organisation would benefit from this payment.

3.105 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).¹¹¹ 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.¹¹² The French Court noted that:

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.¹¹³

3.106 The total indemnity payable to the SCOP was €[€], which was very near to the €10 million working capital it required for the MFL activities (see also paragraph 3.29 above) and a significant sum 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.

3.107 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’.¹¹⁴ 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 3.77 above, that a significant number of employees transferred from SeaFrance to the operator of the vessels. We consider that this shows that a large proportion of the SeaFrance workforce effectively transferred from SeaFrance to the SCOP.

3.108 We do not consider that the fact that indemnity payments were available to other parties if they offered employment to ex-SeaFrance employees detracts

¹¹¹ Judgments of French Court of 16 November 2011 & 9 January 2012.

¹¹² [The Report](#), paragraph 3.49.

¹¹³ Minutes of the French Court.

¹¹⁴ [Judgment of the CAT](#), paragraph 115.

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.¹¹⁵ 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 conclusions on employees. If anything, we consider that it demonstrates the strong incentives for GET/SCOP to employ ex-SeaFrance staff.

- 3.109 In response to our provisional findings and in the hearing on 15 April 2014, the SCOP reiterated that in recruiting staff it had not been motivated by the indemnity payment. We take the view that at the time of its recruitment of staff, the SCOP had a large pool of ex SeaFrance employees made redundant under PSE3 from which it could recruit; it is not surprising that in selecting staff from this pool it was not motivated by the indemnity payment because it would be payable regardless of who was selected from this pool. Moreover, we do not find it credible that an organisation that had few other sources of revenue would not be influenced in its decisions by the prospect of such payments.
- 3.110 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 overmanned 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 3.64 above.

¹¹⁵ We note that the available evidence indicates that any uncertainty that did arise occurred at a point in time when the SCOP had already recruited the ex-SeaFrance employees in respect of which the indemnity would be ultimately be paid. At the date of our hearing with GET on 17 January 2013, it appeared that the payment was expected.

Acquired SeaFrance assets

3.111 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 (in other words, for MFL to commence operations on the Dover–Calais route).¹¹⁶ 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.¹¹⁷ 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 workforce that takes this case over the line from an asset acquisition to the acquisition of an enterprise.¹¹⁸

3.112 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 trade mark 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.

3.113 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 ‘sister’ ships. It did not acquire the *Molière*, which had been chartered and was returned to its owner 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 it. GET confirmed that three ships (including two passenger ships, the *SeaFrance Rodin* and *SeaFrance Berlioz*, with the *SeaFrance Nord Pas-de-*

¹¹⁶ [CMA2](#), paragraph 4.10, second bullet point.

¹¹⁷ 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 of the CAT](#)).

¹¹⁸ [Judgment of the CAT](#), paragraph 120.

Calais on standby) were sufficient to allow it to offer a competitive service on the Dover–Calais route.^{119,120}

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

Suitability of the acquired vessels for the Dover–Calais route

3.115 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.

3.116 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;¹²¹ (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.

3.117 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. Parimar¹²² considered the vessels to be ‘hyper-specializ[ed]’¹²³ 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’.¹²⁴ 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.’¹²⁵

3.118 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 parties acquired, specifically the *SeaFrance Rodin* and

¹¹⁹ This allows for two vessels to be operational while the third is in dry dock, for example undergoing routine maintenance.

¹²⁰ 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).

¹²¹ 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).

¹²² 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.

¹²³ Minutes of the French Court, report of Parimar.

¹²⁴ *ibid.*

¹²⁵ *ibid.*

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);¹²⁶ 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 submitted¹²⁷ – these vessels could also be used on other routes does not alter this since it would still be less efficient and more difficult for other vessels to be used on the Dover–Calais route. In the next section, we compare the cost and any benefits to the parties of acquiring these vessels with the cost of alternatives.

3.119 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).¹²⁸ We are of the view that there is a link between the vessel names and the route, and that GET/SCOP is likely to have acquired some advantage through goodwill inherent in the vessel names. We recognise that this advantage may be quite small and is likely to apply more in respect of passengers than freight customers since the decisions of the latter are more likely to be influenced by matters such as frequency and reliability of service.¹²⁹

3.120 We also note GET’s comment that the *Rodin* and *Berlioz* were sister ships, so on each departure (except, as GET pointed out in its response to our provisional findings, freight customers using the *Nord Pas-de-Calais*) they are offering a similar service. Mr Giguët explained this in the following terms:¹³⁰

What we are also referring is a constant quality of service, and I will explain why. We have two sister ships they are exactly the same, so we – on each departure we are offering the same service. So when you book a crossing with MyFerryLink you will get the same service even if you cross on the *Berlioz* or the *Rodin*. If you book a crossing with P&O, sometimes it will be on their new ships, sometimes it will be on their old ships, and the quality of the service is not exactly the same.

¹²⁶ The *Rodin* was launched in 2001 and the *Berlioz* in 2005.

¹²⁷ [GET response to Remittal Notice](#), paragraph 11.

¹²⁸ Judgment of French Court, 11 June 2012.

¹²⁹ [GET response to provisional findings](#), Section 5.

¹³⁰ At a hearing on 17 January 2013.

3.121 In our view, GET/SCOP are likely to have benefited from having acquired sister ships (see further paragraph 3.149 below).

Acquired vessels and availability of alternatives

3.122 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

3.123 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.

3.124 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.¹³¹

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

3.125 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.¹³² The liquidator decided to place all of the vessels 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 recommissioning time. The liquidator extended the employment contracts of 190

¹³¹ Minutes of the French Court. 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).

¹³² Appendix C, paragraph 147.

individuals in the context of the hot lay-up, 94 of whom were involved in maintaining the vessels.¹³³

3.126 The rationale for placing the vessels in hot lay-up is set out in the French Court Minutes dated 11 June 2012:¹³⁴

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.

3.127 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.¹³⁵

3.128 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.¹³⁶ 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.¹³⁷

3.129 The French Court Minutes of 11 June 2012 stated:

¹³³ 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.

¹³⁴ References are to the English version of this document. The translation uses the term 'hot lay-by'; the correct term is 'hot lay-up'.

¹³⁵ [DFDS response to Remittal Notice](#), paragraphs 3.4–3.8.

¹³⁶ [SCOP](#) and [GET](#) responses to Remittal Notice.

¹³⁷ [SCOP response to Remittal Notice](#), paragraphs 4.4–4.11.

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.¹³⁸

- 3.130 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.¹³⁹ In their view, this undermined the proposition that there was a continuation of the SeaFrance business.
- 3.131 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-docking. See Appendix C for more information on the vessel conditions, work and certification required.
- 3.132 The SCOP told us that GET spent in excess of [€1–€3] million on necessary work for both vessels,¹⁴⁰ 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.¹⁴¹ It further noted that around 85% of this work was essential and had to be carried out before the necessary (provisional) certificates could be obtained; these were valid for six months to February 2013 for the *SeaFrance Berlioz* and to November 2012 for the *SeaFrance Rodin*. The SCOP submitted that significant additional works were identified as requiring completion in order for the certificates to be made permanent. Further information on the work undertaken on the vessels prior to operations commencing is set out in Appendix C.
- 3.133 The SCOP said that GET spent over [€10–€20] million on refurbishment and necessary works by the time the five-year certificates were granted for the *SeaFrance Rodin*, the *SeaFrance Berlioz* and the *SeaFrance Nord Pas-de-*

¹³⁸ Minutes of French Court.

¹³⁹ 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.

¹⁴⁰ €[3].

¹⁴¹ 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.

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.¹⁴²

- 3.134 Parimar told the French Court¹⁴³ 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.
- 3.135 We asked the SCOP whether they were able to specify what proportion of the [€10–€20] million ultimately spent on the three vessels was attributable to work carried out in direct consequence of the period of hot lay-up (rather than, for example, to making good collision damage sustained while *SeaFrance* was operating the vessels, carrying out rebranding and upgrading and the vessels' normal maintenance cycle, as referred to in the preceding paragraph). In response, the SCOP confirmed that the [€10–€20] million figure did not include rebranding, upgrading or repair of collision damage. However, the SCOP was unable to clarify the proportion attributable to the period of hot lay-up and the proportion attributable to the normal maintenance cycle.
- 3.136 It appears to us that the decision of the liquidator 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 losses. The requirements of the Port of Calais are likely also to have played a role in the liquidator's decision. 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.
- 3.137 Based on the SCOP's 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 [€10–€20] million was eventually spent on the vessels is not relevant since what we are concerned with here is the effect of the period of inactivity.

¹⁴² Minutes of French Court.

¹⁴³ *ibid.*

3.138 We consider that the SCOP's estimate of [€1–€3] million for both vessels is the best available information on which to base our assessment of this matter since this is the amount that was spent before the vessels started operating on the Dover–Calais route after the period of lay-up. Secondly, in light of the fact that the vessels were coming up to important classification milestones it appears reasonable to assume that significant further expenditure would be required in this context, but this is not expenditure that resulted from the period of hot lay-up; it would have been required in any event.

Alternative vessels available for operation on the Dover–Calais route

3.139 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.

- *New build*

3.140 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.¹⁴⁴ Evidence from P&O, the SCOP, an independent expert ([§]) and DFDS was broadly in line with this. 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*

3.141 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.

3.142 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

¹⁴⁴ *ibid.*

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.

- 3.143 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 3.145). 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.¹⁴⁵ 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.
- 3.144 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.¹⁴⁶ 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 particular specification of the ships required.
- 3.145 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 million each.¹⁴⁷ 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.
- 3.146 An independent expert ([redacted]) 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

¹⁴⁵ A description of the work undertaken by DFDS on the *Barfleur* is in Appendix C.

¹⁴⁶ Minutes of French Court, report of Parimar.

¹⁴⁷ *Fortuny* and *Sorolla* were operated on Spanish routes by Acconia Transmediterranea.

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 *SeaFrance Rodin* and *SeaFrance Berlioz*, if berths are included in the calculation, but had less vehicle capacity.¹⁴⁸ All night ferries included a large number of cabins which would need to be removed. This would increase the modification costs.

3.147 GET provided a list of 21 vessels that it believed could easily be operated on the short sea, the Western Channel or the North Sea (see Appendix C, Annex 1). Whilst GET stated that its list was only indicative of those available at any one time which could be operated on the short sea, our analysis showed that only three vessels were potentially available. Of these, one was chartered by DFDS (the *Molière*), one was a freighter and the other was over 30 years old. The vast majority of the vessels were in active service with either the owner or a charterer at the time of the acquisition by GET (July 2012). In addition, the SCOP provided details of two further vessels which it stated were available in 2012. We note that only one of these was available for charter at the time of the merger. However, its owner was not able to charter it to a third party and it was sold for scrap in late 2012.

3.148 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 owner.¹⁴⁹

3.149 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 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.¹⁵⁰ In addition, given that the

¹⁴⁸ Around 50% of the vessels on the schedule had 50% or less of the vehicle capacity of the *SeaFrance Rodin* and *SeaFrance Berlioz*.

¹⁴⁹ [DFDS response to Remittal Notice](#), paragraphs 3.6–3.8.

¹⁵⁰ [The Report](#), paragraphs 8.153 & 8.159(b).

SeaFrance Berlioz and *SeaFrance Rodin* are sister ships, which we consider provides GET/SCOP with the right type of assets to operate a Dover–Calais ferry service and confers economic benefits to the operator,¹⁵¹ 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.

- 3.150 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);¹⁵² 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. We consider that the cost and time incurred by GET/SCOP to bring the *Rodin* and the *Berlioz* back into service following hot lay-up may be similar to the minimum modifications and time required if GET/SCOP had either chartered or purchased two vessels (however, as noted above, we expect that suitable vessels would not have been available, and having such vessels is a key requirement for the operation of a Dover–Calais ferry service). 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 particular time given the need for at least two vessels to be in service at any time and the specific requirements of the route, in particular the port configurations.

¹⁵¹ 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. See also paragraph 3.152.

¹⁵² The *SeaFrance Rodin* was launched in 2001 and the *SeaFrance Berlioz* in 2005.

- 3.151 In its response to our provisional findings, GET stated that our analysis of the potential benefits of the *SeaFrance Berlioz* and *SeaFrance Rodin* being sister ships was incorrect. Contrary to the view expressed by us, it said that the experience of MFL and DFDS indicated that operating sister ships did not confer a material benefit on MFL. It said that we should have considered the potential alternative of incremental expansion of the type undertaken by DFDS on the Dover–Calais route, starting with one vessel and then procuring another.¹⁵³ We have two observations in relation to this. First, in our view we are not required in this context to consider a range of hypothetical scenarios, comprising different ways in which operation on the route might be possible by different operators with different business models. Second, GET’s evidence at the hearing on 17 January 2013 was clear that it considered that with two vessels it could mount a competitive frequency of service but not with one, and having sister ships (see paragraph 3.120) was advantageous.
- 3.152 In our view, the acquisition of the *SeaFrance* vessels is likely to have reduced the commercial risk for GET/SCOP compared with either buying/chartering and converting vessels (where the vessels’ suitability for the route would depend on the characteristics of the acquired vessels and the nature and cost of the conversion (paragraph 3.149)) or buying two new vessels (requiring the recovery of significantly greater investment than that associated with the cost of acquiring the *SeaFrance Rodin* and the *SeaFrance Berlioz* (paragraph 3.140)), bearing in mind that the *Rodin* and *Berlioz* were specifically designed and built for the route and operated on it for a number of years. We also considered that the commercial risk for GET/SCOP would have been lessened somewhat as a consequence of the fact that the *Rodin* and *Berlioz* are sister ships (as indicated by the evidence of Mr Giguet), 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 (as suggested by Parimar and the port authorities). We were not persuaded by GET’s argument in response to our provisional findings that if there was a material benefit in the *Berlioz* and *Rodin* being sister ships then higher bids would have been submitted for both vessels (in fact Stena only bid for the *Rodin* and its bid was higher than DFDS’s bid for the *Rodin* and the *Berlioz*). In our view, the bids submitted by other operators would have reflected those operators’ specific requirements rather than the inherent value to GET of acquiring vessels for operation on the Dover–Calais route.

¹⁵³ [GET response to provisional findings](#), Section 5.

Crew

- 3.153 We noted that on the date that MFL services launched, approximately [80–90]% of employees of the SCOP were ex-SeaFrance. At the date of the reference (29 October 2012), that figure was around [70–80]% (see paragraph 3.77 above).
- 3.154 The SCOP explained¹⁵⁴ that the crewing requirements for a passenger ferry were in two broad classes: operational and customer service.¹⁵⁵ 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 from similar shore-bound activities. However, all staff must meet certain international standards to enable them to work on passenger vessels.¹⁵⁶
- 3.155 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 familiarisation procedure, which lasted around 2 hours. The SCOP stated that operational staff had particular expertise according to their role but their expertise was not specific to a particular type of vessel and staff could move easily between vessels. The SCOP said this was evidenced by the existence of manning companies such as V-Ships and Northern Marine Manning Services which specialise in supplying and training crew to effectively man ships. The SCOP said that for someone with no previous maritime experience (for example, bar staff applying to work on a vessel) the relevant training could be completed in around a week. 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.¹⁵⁷
- 3.156 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

¹⁵⁴ [SCOP response to Remittal Notice](#), paragraphs 4.49 & 4.50.

¹⁵⁵ 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.

¹⁵⁶ 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.

¹⁵⁷ [SCOP response to Remittal Notice](#), paragraphs 4.51–4.52.

commenced almost immediately once the vessels were operations-ready as the crew would have required only the 2-hour familiarisation process.¹⁵⁸

- 3.157 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 vessels.¹⁵⁹ GET also told us that when engaging with the SCOP it had looked at alternative providers of ferry crew, including V.Ships.¹⁶⁰
- 3.158 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.¹⁶¹
- 3.159 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.¹⁶²
- 3.160 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’.
- 3.161 The SCOP advised us that at 29 October 2012, it employed a total of [X] officers on the vessels who held PECs for Calais and Dover on that date. Of those, [X] ([70–80]%) previously worked for SeaFrance and were made

¹⁵⁸ *ibid*, paragraph 4.52.

¹⁵⁹ *ibid*, paragraphs 4.52–4.53.

¹⁶⁰ [GET response to Remittal Notice](#), Annex 2, p17.

¹⁶¹ [DFDS response to Remittal Notice](#), paragraphs 3.9–3.12.

¹⁶² For Dover, for a ship the size of the *Rodin*, these costs are £486.16 per act of pilotage, with a charge of £384.41 for boarding or landing.

redundant under PSE3.¹⁶³ However, all of the ex-SeaFrance officers' Dover PECs were obtained while they were working for the SCOP. [X] 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.

3.162 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.

3.163 Dover Harbour Board (DHB) told us that the masters who transferred from SeaFrance to the SCOP 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 [X] of the [X] 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.¹⁶⁴ 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.

3.164 Evidence from V.Ships and NMM indicates that neither currently manages ferries on the short sea.¹⁶⁵ 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 familiarisation, which it said could take 10 to 15 days.

3.165 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

¹⁶³ There was an additional officer, not included in these figures as he is not an operational officer; he has shore-based tasks.

¹⁶⁴ [X] of the [X] had to undertake six supervised qualifying trips (at least one of which must be with a pilot) and [X] had to undertake one supervised qualifying trip with a pilot (even though one of these had a valid PEC when he joined SCOP).

¹⁶⁵ 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 its 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.

the officers and crew, particularly where one vessel operator was replacing another on the same route.

- 3.166 We note that, as at 29 October 2012, [REDACTED] of the officers that were involved in SeaFrance's operations were involved in the new ferry operation. Moreover, [70–80]% 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 submitted; 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. The second (NMM) said 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]% of employees, including [60–70]% of officers, who were 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.
- 3.167 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 [REDACTED] officers held valid Port of Calais PECs and a total of [REDACTED] 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.
- 3.168 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.¹⁶⁶ 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.

¹⁶⁶ The *Nord Pas-de-Calais* was brought into service as a freight-only vessel in February 2013.

3.169 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:

- Eurotunnel notes the existence of the cooperative structure [the SCOP] which had proposed taking on the activities of SeaFrance.
- Eurotunnel and the local government bodies consider that this initiative on the part of an element of the ex-SeaFrance workforce is a key factor in ensuring the success of the future company.

Berthing slots and booths

3.170 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.¹⁶⁷

Berthing slots

Dover

3.171 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.¹⁶⁸ 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.

3.172 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.

3.173 DHB informed us that berthing slots used for the SeaFrance vessels at Dover lapsed through non-use when SeaFrance ceased operations. Berths are

¹⁶⁷ [GET response to Remittal Notice](#), paragraph 14.4. GET had to arrange factors such as port slots, fuel supplies, on-board charts, insurance and crew.

¹⁶⁸ 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.

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 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.

3.174 In a letter from DHB to GET¹⁶⁹ 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.

3.175 In the letter from DHB to GET, 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 the SCOP 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 link-bridges at two levels.

Calais

3.176 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

¹⁶⁹ From the Director of Corporate Operations to the Directeur des Affaires Publiques at GET, dated 27 January 2012.

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.

3.177 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.

3.178 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

3.179 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 the Report notes: 'GET told us that MFL had experienced no problems in obtaining berthing slots at Dover and Calais'.¹⁷⁰

Booths

3.180 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.

¹⁷⁰ [The Report, Appendix H](#), paragraph 23.

3.181 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. CCICO noted that space for the SCOP was reserved in the terminal for ticket sales.

3.182 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 3.232 to 3.237.

Other acquired assets

3.183 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 €[REDACTED], as well as a lease of premises at Whitfield Court, Dover (see paragraphs 3.34 to 3.40).

3.184 These assets included trade marks (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.

3.185 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.

Trade marks/domain names

- *Parties' submissions*

3.186 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.¹⁷¹ 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

¹⁷¹ [GET response to DFDS submission](#), paragraph 3.12.1.

that this was an entirely separate issue from the practical use of the brand for MFL's operations.¹⁷² 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.¹⁷³ GET maintained that the SeaFrance brand had a negative reputation and it wished to distance itself from the SeaFrance brand.¹⁷⁴

3.187 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.

3.188 The SCOP contended before the CAT that we had not considered whether customers would regard the MFL business as continuing the SeaFrance business.

3.189 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.¹⁷⁵ 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.¹⁷⁶

3.190 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 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.¹⁷⁷ GET argued that the data presented by DFDS in its submission about the ongoing value of the Norfolkline business was a clear contrast to the absence

¹⁷² *ibid*, paragraph 3.12.2.

¹⁷³ *ibid*, paragraph 3.12.5.

¹⁷⁴ [GET response to Remittal Notice](#), Section 10/Annex 1.

¹⁷⁵ [DFDS response to Remittal Notice](#), paragraphs 3.24 & 3.25.

¹⁷⁶ *ibid*, paragraph 3.29 & Annex 5.

¹⁷⁷ [GET response to DFDS submission](#), paragraph 3.12.6.

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).¹⁷⁸

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

3.192 P&O bid €[X] for the SeaFrance domain names.¹⁷⁹ 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 trade marks/domain names*

3.193 The CMA's Merger Assessment Guidelines provide¹⁸⁰ 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. The CMA's guidance on jurisdiction and procedure notes that when a business is no longer trading, the CMA will consider 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.

3.194 We note the submission of both the SCOP and GET that we have not considered whether customers regard the MFL business as continuing the SeaFrance business. Neither party submitted 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. We also note the views of the SCOP on this point with respect to freight customers, which are cited in paragraph 3.225 below; these suggest that MFL was affected by its association with the SeaFrance business.

¹⁷⁸ *ibid*, paragraph 3.12.7.

¹⁷⁹ GET bid €500,000 for the SeaFrance domain names. See Appendix B.

¹⁸⁰ CC2, paragraph 3.2.4.

- 3.195 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 trade marks 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).
- 3.196 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 intangible assets that would be of benefit to GET and the SCOP in the context of their use of the other acquired assets (noting, however, that for some freight customers the brand may have had negative associations (see paragraph 3.224 below).

Information systems and software

- *Parties' submissions*

- 3.197 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 11 June 2012,¹⁸¹ SeaPax enabled the management of yield, customers, reservations and automatic ticket sales ('multichannel: 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.
- 3.198 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 maximise returns to SeaFrance's creditors.

¹⁸¹ Appendix to the Sales Agreement.

- 3.199 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 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.
- 3.200 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 [X] 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.
- 3.201 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.
- 3.202 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.¹⁸²
- 3.203 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 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.¹⁸³ GET told us that the IT systems it acquired needed a great

¹⁸² DFDS response to Remittal Notice, paragraphs 3.30–3.32.

¹⁸³ GET response to DFDS submission, paragraph 3.11.

amount of work (which was still ongoing) to integrate them into a new environment with far better controls.

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

◦ *Our views on information systems/software*

3.205 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.

3.206 We recognise 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 (100] 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'.¹⁸⁴

3.207 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.

¹⁸⁴ 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.

Data files including customer databases

- *Parties' submissions*

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

3.209 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.¹⁸⁵

3.210 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.¹⁸⁶ It said that the passenger customer database was historical, and largely seemed to consist of prospects 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.

3.211 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.

3.212 P&O bid €[X] for the SeaFrance passenger customer database.¹⁸⁷ 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*

3.213 In relation to the customer databases, the CMA's guidance on jurisdiction and procedure¹⁸⁸ provides that the CMA 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

¹⁸⁵ [DFDS response to Remittal Notice](#), paragraphs 3.30–3.32.

¹⁸⁶ [GET response to Remittal Notice](#).

¹⁸⁷ 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.

¹⁸⁸ [CMA2](#), paragraph 4.8.

approximately 2,000 freight customers, 1,100 coach customers and at least 217,497 individual passengers.

- 3.214 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 customer database, despite the hiatus, indicating that it believed there to be some value in it.¹⁸⁹
- 3.215 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.

Assets not acquired from SeaFrance

- 3.216 Some SeaFrance assets had been excluded from the transfer, notably customer and supplier contracts; these had been terminated on liquidation.¹⁹⁰ 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 3.40 above).¹⁹¹
- 3.217 In our view, the main category of excluded assets is the customer and supplier contracts. We therefore consider the significance of the exclusion of

¹⁸⁹ 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 3.223) and there would therefore be little value in an existing ferry operator on the short sea acquiring such data.

¹⁹⁰ 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.

¹⁹¹ We also note that not all of the SeaFrance employees were subsequently employed by MFL/GET and the SCOP.

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*

3.218 GET told us that it did not acquire any existing customer contracts and had to renegotiate essential supply contracts.¹⁹² 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 characterise 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.

3.219 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.

3.220 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 on-board shops and restaurants, for drinks, for entertainments, for utilities for its premises and for insurance.

- *Our views on customer and supplier contracts*

3.221 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.

3.222 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 [X]% of the turnover

¹⁹² [GET response to Remittal Notice](#), sections 12 & 13.

generated by SeaFrance from the acquired vessels had been attributable to freight customers.¹⁹³

3.223 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).¹⁹⁴

3.224 GET told us that for freight customers, negotiations revolved around price, frequency, variability and capacity. GET noted that following a difficult period of negotiation, there was a realisation that prices needed to be reduced and that the confidence of freight customers who had moved their business to other operators needed to be regained. Despite these difficulties, GET indicated that it had been able to demonstrate that it was a credible operator with a good service; as a result it was more successful with those customers than during the previous two years.¹⁹⁵ GET indicated that it had some confidence in the freight market share that it would achieve in 2013, although it also noted that growth was initially not in line with its original plan.

3.225 At the time of our original inquiry, the SCOP made the following statement in respect of freight commercial activity:¹⁹⁶

We are suffering and we are appearing as a company in the continuation of ex-SeaFrance and we are not, but it has been very difficult to explain to the freight customers that we have nothing to [do] with what happened on the SeaFrance time. When SeaFrance decided to stop their activity mid-November, they had to move to one before another day to other companies, and to get the confidence of those customers, it has been very, very, very difficult. Now, step by step, as the figures are demonstrating today, we are growing: we have signed more than [X] contracts with what I call key freight customers, the biggest ones in Europe. We have more than [X] accounts open; [X] of them are very

¹⁹³ GET initial submission, paragraph 7.28.

¹⁹⁴ In its [response to the conduct of the remittal](#), 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 (footnote 24 to paragraph 3.4).

¹⁹⁵ We understand that 'the previous two years' refers to a period when SeaFrance operated the ferries.

¹⁹⁶ At a hearing on 28 February 2013.

active and that is why we are progressing but we are still far to be at the breakeven

- 3.226 In response to our provisional findings on the remitted question, the SCOP noted that in the period following the respective entries on to the Dover–Calais route, the freight market shares of DFDS and MFL were substantially lower than those of SeaFrance when it was still operating. The SCOP also noted that DFDS grew at a much more significant rate than MFL. It submitted that this was not consistent with any suggestion of business continuity.¹⁹⁷ We considered this and observed that MFL’s growth in the first months of its operation are likely to have been affected by the fact that its operations commenced at the end of the holiday season when demand is low, as well as by the factors outlined in paragraphs 3.224 and 3.225. We also note – more generally – that the acquisition of ‘an enterprise’ is not in itself any guarantee that a business will be successful or that its market share will increase at a particular rate.
- 3.227 Our view is that, while GET did not receive the benefit of any existing freight contracts on acquisition of the assets, 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.¹⁹⁸ We note that some of the difficulties the company had in negotiating freight contracts are likely to have been due partly to the fact that MFL’s prices were initially too high, as well as the competitive advantages of other operators with more extensive networks of services. There also appears to have been a negative effect from a perceived continuation of the SeaFrance business which abruptly ceased to provide services in November 2011.
- 3.228 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.

¹⁹⁷ [SCOP response to provisional findings](#), paragraphs 4.17–4.19.

¹⁹⁸ 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).

3.229 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 for the commencement of MFL's operations one and a half months after the date of acquisition.¹⁹⁹

SeaFrance buildings not acquired

- *Parties' submissions*

3.230 We have considered the assignment of SeaFrance's lease of premises in Whitfield, Dover, to the SCOP in paragraphs 3.34 to 3.39 above.

3.231 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.

3.232 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.

3.233 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.

3.234 GET told us that there was no continuity of location from which the businesses were managed.²⁰⁰ It said that it understood that SeaFrance leased a portside site in France from the Port of Calais, and that the substantial head

¹⁹⁹ 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.

²⁰⁰ [GET response to Remittal Notice](#), sections 8 & 9.

office activities of SeaFrance were carried out from Paris offices by Paris-based staff, neither of which GET acquired.

3.235 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.

3.236 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-LDA 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*

3.237 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 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. Conclusions on the remitted question

Assessment of jurisdictional issue applying the approach in the judgment

4.1 This section summarises our 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 We have focused particularly on issues that the CAT has highlighted in the judgment and specifically on whether what was acquired was something more than ‘bare assets’. This involved two main analytical steps: (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, the CMA guidelines (which, in material respects, are similar to those of the OFT and CC), as well as the judgment of the CAT,²⁰¹ all recognise 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, the scope of the law could be unduly restricted.
- 4.4 SeaFrance operated ferries on the Dover–Calais route, using two specialised Ropax vessels that it owned outright, the *SeaFrance Rodin* and the *SeaFrance Berlioz*, as well as a third Ropax which it chartered, 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, and GET/SCOP started ferry operations on the Dover–Calais route using three of the SeaFrance vessels and employing ex-SeaFrance employees.
- 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 three of the four ex-SeaFrance ferries on that route and 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 two failed attempts had the explicit intention of continuing SeaFrance’s activities and providing employment to SeaFrance employees.
- 4.6 The Dover and Calais ports have very specific requirements for ferries operating from their terminals. The two sister vessels that were acquired, the

²⁰¹ [Judgment of the CAT](#), paragraph 106(a).

SeaFrance Rodin and *SeaFrance Berlioz*, are particularly suited to the Dover–Calais route, 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. The SCOP and GET would no doubt have been able to commission similar new builds. However, this would have been very significantly more expensive (entailing financial risk) and more time-consuming (delaying operation on the route). While it might 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 (and this was also the case at the time that the vessels were acquired).

- 4.7 Given that the *SeaFrance Berlioz* and *SeaFrance Rodin* are sister ships, GET/SCOP would have needed 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 is likely to have been difficult to charter or buy one suitable 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 around €1.5 million per vessel just to modify the linkspan arrangements (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 built especially for the route.
- 4.8 In our view, the acquisition of the *SeaFrance* vessels is likely to have reduced commercial risk for GET/SCOP compared with either buying/chartering and converting vessels or buying two new vessels, given that the *SeaFrance Rodin* and *SeaFrance Berlioz* were specifically designed and built for the route and operated on it for a number of years. 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. We note that maintaining them in a fully operational state was not an option in view of the cost implications. 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 view that contracts of employment were not terminated 'with no thought as to how they might be reemployed in future'.²⁰² Our conclusion is that in effect these employees transferred from SeaFrance to GET/SCOP. As a result, around [70–80]% of the SCOP workforce comprises ex-SeaFrance employees who were made redundant as a consequence of SeaFrance's liquidation.
- 4.12 We also consider that there is a direct relationship between the total indemnity payable to the SCOP and the €10 million working capital required by the SCOP for MFL.
- 4.13 We have concluded that acquiring crew for the vessels other than via the route actually used by the SCOP would not have been as easy as GET/SCOP submitted. The evidence indicated that GET/SCOP had not actually investigated this option. 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 familiarisation 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.
- 4.14 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

²⁰² Citation from paragraph 115 of the [judgment of the CAT](#).

ensure that there would be continuity of SeaFrance's activities to the maximum extent possible in the circumstances of the liquidation. In the result, those steps substantially achieved their aim.

- 4.15 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, is likely to have 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.
- 4.16 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 deliberately²⁰³ done in order to make it as easy as possible for that business, or something comprising at least part of its activities, 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 after 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.
- 4.17 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.
- 4.18 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

²⁰³ The description of GET's bid for the vessels indicates that it is the Court's understanding that the intention of the bid is to revive SeaFrance's activities using SeaFrance employees, and it is in this context that the bid was deemed acceptable by the Court (Court Minutes of 11 June 2012, as set out in paragraph 3.29 above).

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.

4.19 We therefore conclude 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.
- 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 actively maintained, and thus impairment was minimised, during the period of inactivity.
- The result of 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.
- 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 on the Dover–Calais route) that those steps had preserved.

4.20 We conclude 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.

- 4.21 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.
- 4.22 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 specific jurisdictional point. We have decided that GET/SCOP have acquired an enterprise, and therefore that a relevant merger situation has arisen. In our view the effect of this is to reinstate the Report on all other matters.²⁰⁴

Broader observations on the jurisdictional test

- 4.23 Having reached the conclusion above, we set out below some general observations on the jurisdictional test. We emphasise that these observations lead us to conclusions that are entirely consistent with the approach in the judgment.
- 4.24 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.²⁰⁵ The purpose of the legislation is to enable the UK competition authorities to review transactions which might substantially lessen 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.
- 4.25 This approach is most clearly demonstrated by the jurisdictional provisions relating to the share of supply test that give the CMA wide discretion in determining what the appropriate description of goods or services is and what criteria should be used to measure that share of supply. Similarly, the concept

²⁰⁴ The CAT also took issue with the finding in our report that GET was able to exercise material influence over the policy of SCOP within the meaning of section 26(3) of the Act (see paragraphs 81 & 91 of [the judgment of the CAT](#)). We note the view that the CAT expressed in paragraph 92 of its judgment that we did not need to rely on section 26 in this case. We have, therefore, not considered this matter further in the context of the remittal, other than to note that our decision on remedies (in paragraph 10.181 of [the Report](#)) involved a prohibition on GET (and any interconnected body corporate of GET) operating ferry services directly or indirectly through arrangements with any associated person or other body over which it has control within the meaning of 26 of the Act (emphasis added). In our view, the falling away of the finding of control under section 26 has no material effect on the remedy or the basis on which it was put in place since the SCOP is also an associated person.

²⁰⁵ See, for example, [Akzo Nobel NV and Competition Commission and Others \[2014\] EWCA Civ 482 \[24\]](#).

of control under the Act is a broad one that encompasses material influence over policy through to outright legal ownership. Moreover, 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.

- 4.26 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. Whilst we accept that there was no intention to avoid merger control in this case, we nevertheless consider that the considerations referred to above all reinforce the fact that we should adopt a purposive approach to the concept of an enterprise.
- 4.27 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.
- 4.28 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.
- 4.29 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 characteristics 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.
- 4.30 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.²⁰⁶ 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.

5. MCC consideration

- 5.1 Given that more than nine months had elapsed since the publication of the Report, when we published our provisional decision on the jurisdictional question we invited comments on whether or not there had been an MCC since the publication of the Report. We received submissions from a number of parties that there had been such changes. In light of these submissions we considered whether or not it would still be appropriate to remedy the effects of the merger as envisaged in our original report (as provided by section 41(3) of the Act).
- 5.2 The Act provides little guidance on our obligations in the context of a remittal. Such cases are exceptional and must be considered on their particular facts. Our starting point is that we are bound by our previous findings where these have not been challenged, or where they have been unsuccessfully challenged. Accordingly, we took the view that because the CAT did not uphold the challenge to our decision on the SLC or remedy as set out in the original report, those decisions stand. This is, however, subject to the constraints of public law, and in particular the obligation to take into account all relevant circumstances.
- 5.3 We took the view that section 41(3) requires us to consider: (a) whether or not there had been a change of circumstances; (b) if so, how this impacted on the analysis; and (c) if the change of circumstance is material, whether it remained appropriate to take remedial action consistent with the decision in the Report.
- 5.4 This section sets out the possible MCCs put forward by GET, the SCOP and third parties and our provisional assessment of whether we need to amend any element of the remedies in light of any MCCs. It first summarises the submissions we received relating to possible MCCs; we then set out our consideration of these submissions. We conclude that it remains appropriate to remedy the effects of the merger as envisaged in our original report. The CMA's discretion to depart from those conclusions arises only where it can

²⁰⁶ 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).

point to a 'material change of circumstances' or other 'special reason' for deciding differently.

- 5.5 In response to our provisional consideration of possible material changes of circumstances (20 May 2014), GET submitted that in considering whether there is a 'special reason' for us to depart from our analysis, we are not bound by points which were unsuccessfully challenged before the CAT. The challenges were brought on judicial review principles and not on the merits. In GET's view, it is possible that a point made by GET or SCOP on the application to the CAT was correct on the merits but dismissed as not satisfying judicial review principles. GET submits that if the CMA considers on reflection that any of the points raised on the applications are correct, this would provide a 'special reason' to adopt a different approach at this stage. For example, GET had argued before the CAT that remedies should be limited to the Dover–Calais and Dover–Dunkirk routes, rather than all routes from Dover. This challenge failed, *inter alia*, on the basis that GET had not provided evidence that it wished to sail on other routes. In GET's view we should now correct this error, either in the original report or by applying the 'special reason' provision.²⁰⁷
- 5.6 We observe that when we invited comments on whether or not there had been an MCC (including a 'special reason'), the parties had the opportunity to make submissions in relation to points that had been unsuccessful on application to the CAT. In relation to the example above, GET could have provided us with information that showed that serious consideration had been given to operating the acquired vessels on a different route from Dover. If it had done so we would have considered this in the context of section 41(3). However, in our view, a 'special reason' does not arise solely by virtue of a point having been raised unsuccessfully on appeal.
- 5.7 Finally, in the remedies section, we consider a remedy that was put forward by the SCOP in the context of the remittal that it had not proposed at the time of the Report. At that time the SCOP was not considered as a potential acquirer of the MFL business, nor did it put itself forward as a potential purchaser. However, the SCOP indicated that its improved financial position and establishment on the market as a reliable provider meant that it may be able to obtain the funding to enable it to take on the commercial risk associated with the operation of the MFL business. Accordingly, we have considered whether the SCOP's changed circumstances are such as to lead us to believe that the remedy proposal put forward by the SCOP would be a

²⁰⁷ Paragraph 1.6 of [GET response to provisional consideration of possible material change of circumstances](#).

viable effective remedy that would represent as comprehensive a solution to the SLC as is reasonable and practicable.

Summary of the MCCs put forward by GET, the SCOP and the Mayor and other representatives of Calais

- 5.8 There were two MCCs put forward by GET, the SCOP and the Mayor and other representatives of Calais. The first concerned Dover–Calais demand growth and the second concerned arguments made in the Report about the exit of DFDS from the Dover–Calais route.

Demand growth

- 5.9 GET/MFL submitted that an MCC had occurred since demand had risen faster on the short sea and on the Dover–Calais ferry route than had been anticipated by the Report. According to GET, this meant that:
- the market would very soon be large enough to support profitably three ferry operators
 - our SLC finding and the remedies in the Report were based on the assumption that DFDS would exit the market, and, this no longer being the case, we should reconsider both our SLC and our remedies
- 5.10 GET argued that the demand increase in 2013 and the higher projected demand increases meant that current capacity could operate on the short sea at sufficiently high utilisation rates to be profitable. In the Report, we argued that the ferry segment of the market last appeared sustainable in 2007, when utilisation rates were 54% on the entire short sea. GET argued that these utilisation rates were close to being achieved, and would be achieved soon with demand growth. It argued that capacity reduction would therefore not be necessary on the route.
- 5.11 GET said that new environmental legislation that had been introduced (the International Convention for the Prevention of Pollution from Ships (MARPOL)) that would require ships operating within the North Sea and English Channel to reduce the sulphur content of their fuel from 1% to 0.1% by 1 January 2015, or to install equipment which would reduce pollution by at least the same amount as by using the lower-sulphur fuel. Since fuel with a lower sulphur content is more expensive, GET said that this would impact on the economics of ferry routes and increase demand on short-sea routes such

as Dover–Calais since ferries would use less fuel on these routes compared with longer routes.²⁰⁸

- 5.12 GET noted that P&O's short-sea freight share had decreased to 28.7% in 2013 from 36% in Q4 2012 and said that the decline was linked to the improvement in performance of DFDS and MFL in the same period. GET said that this indicated strongly that, of all the ferry operators, P&O should rationalise its capacity on the short sea. GET also noted that Eurotunnel's freight share had reduced, from 42.9% in 2012 to 38.2% in 2013. GET argued that MFL and DFDS appeared to be gaining market share at the expense of P&O and Eurotunnel, rather than from each other. GET also said that the MFL growth had not occurred as a result of MFL charging aggressively low prices only made possible through subsidisation by Eurotunnel.
- 5.13 The SCOP made similar submissions to GET, with data showing that the capacity utilisation of MFL's ships was [X], which the Report had identified as being necessary for sustainable operation.
- 5.14 In response to our provisional consideration of a possible MCC, the SCOP argued that 2014 MFL demand growth rates of around 58% combined with a [X]% price increase would take MFL to positive net profit margins. The SCOP estimated that demand growth for DFDS of around 19% would take it close to break-even during 2014 (with a net profit margin of –5%). The SCOP argued that from this point, a small volume growth for DFDS would then make the route incrementally profitable. With MFL profitable and DFDS close to being incrementally profitable, the SCOP argued that there would be no need for either MFL or DFDS to exit from the route.
- 5.15 The Mayor and other representatives of Calais²⁰⁹ said that there were two projects under development in Calais which would affect cross-Channel demand: a logistics centre and a theme park. The logistics centre was scheduled to be complete by 2015 and the theme park by 2018. The Mayor also said that it was important for Calais to have a ferry service under a French flag. The Mayor said that cross-Channel traffic could grow by 40% by 2030.
- 5.16 GET and the SCOP submitted to us that a DFDS exit was now unlikely and that we therefore ought to reconsider the internalisation and competition-weakening analyses that led to our SLC decision.

²⁰⁸ MARPOL is described in more detail in Appendix F.

²⁰⁹ [At a hearing with the Mayor, other representatives of Calais, and a representative of the SCOP personnel.](#)

MCC arguments in relation to the exit of DFDS

5.17 GET and the SCOP both argued that an MCC had also occurred as a result of:

- the improved financial performance of DFDS
- DFDS's continuing operation on the Dover–Calais route using the *Molière*

5.18 GET argued that DFDS was 'objectively stronger, certainly not weaker than was the case at the time of the June 2013 Report'. It believed that the results published in its 2013 annual report indicated that DFDS's financial performance on the short sea had improved.²¹⁰ GET also believed that this position would continue to improve, given that Dover–Calais was the biggest UK route, was most likely to benefit from the introduction of MARPOL and had experienced a materially greater increase in volume than was envisaged at the time of the Report.

5.19 GET said that DFDS's recent comments in the financial press and in relation to its accounts were at odds with any intention to exit the Dover–Calais route. It submitted that DFDS's key message regarding its future as noted in the press release for its annual report was that 'DFDS is strongly positioned, both financially and strategically' for 2014, that it 'will continue to work on creating synergies by expanding [its] European network through acquisitions' and that 'streamlining will continue at full strength'.²¹¹ In addition, GET highlighted a number of recent press articles that discussed DFDS's intentions for the Dover–Calais route and which GET argued showed that DFDS did not intend to exit the route.²¹² These are further detailed in Appendix G.

5.20 GET also argued that Dover–Calais was at the heart of the DFDS route network for Europe. It believed that this was shown by a map of DFDS's routes in its annual report,²¹³ as well as press articles (paragraph 5.19). GET said that it was inconceivable that DFDS would remove itself from the biggest

²¹⁰ GET noted that DFDS's 2013 annual report quantified its improvement on the short sea as a market share increase of 5% in the short-sea freight market, up from 19% in 2012 to 24% in 2013. In addition, the most recent market share figures (for February 2014) record DFDS with a 22.1% share of this market.

²¹¹ [GET response to invitation to comment on MCC](#), paragraph 6.1.

²¹² These included an article in *le Journal de la Cote d'Opal, Edition Nord Littoral*, on 25 April 2014 in which John-Claude Charlo (Managing Director, DFDS Seaways in France) said, 'If the question is: "Would DFDS leave Calais in the event of an unfavourable decision from the Competition Commission for our company?", the answer is no. The Calais–Dover line is a line in which the group believes. But we cannot forget that its chronic overcapacity brought about the demise of SeaFrance. What we say, is what the market says. DFDS is not against competition. Our company was born out of competition, but today the economic situation does not justify the commissioning of that many ships.'

²¹³ [DFDS annual report 2013](#), p6.

route that was going to benefit most from the increase in MARPOL regulations and that had already increased in size.

- 5.21 GET argued that the extension of the charter by DFDS of the *Molière* until November 2014 showed both DFDS's commitment to the short sea in seeking this extension, and its overstatement of the urgency and likelihood of its exit during the initial merger inquiry. In addition, GET said that as DFDS had not made any claims during the remittal process relating to any plans to exit the short sea in general, or the Dover–Calais route in particular, DFDS presumably anticipates being able to procure a ready replacement for the *Molière*. This, it argued, undermined the CMA's claims in the provisional findings on the remitted question that 'there is a lack of alternative vessels which could operate the route at any one point in time'.²¹⁴
- 5.22 GET also said that there was a possibility that DFDS may not be operating as an efficient competitor on the short sea and that the CMA should scrutinise DFDS's avoidable costs or consider whether it could have adapted its business strategy to operate in a more profitable manner.
- 5.23 The SCOP submitted that the exit of DFDS from Dover–Calais was a fundamental link in the chain of causation that was the substance of the CC's theory of harm. It argued that as DFDS was still operating and showing a strong performance on the route and in light of DFDS's growth on the short sea, there was no credible evidence to suggest that DFDS would exit the Dover–Calais route either in the short term or otherwise.²¹⁵
- 5.24 In its response to the provisional consideration of possible MCC, the SCOP presented a model of DFDS profitability on the Dover–Calais route based on cost structure assumptions derived from SCOP/MFL's own costs. This model suggested that 27% growth in volume above what had been achieved in 2013 would be needed for DFDS to break even. The SCOP argued that 19% could be expected in 2014, after which DFDS would have a loss of around 5% net profit margin.
- 5.25 The SCOP argued that despite DFDS telling the CC that its charter of the *Molière* would expire in October 2013 and that the charter did not have an option for extension,²¹⁶ the *Molière* was still being used by DFDS on the Dover–Calais route, and the charter had been extended to November 2014.²¹⁷ It also argued that the *Sirena Seaways* would be available for redeployment

²¹⁴ [GET response to invitation to comment on MCC](#), paragraph 7.3.

²¹⁵ [SCOP response to invitation to comment on MCC](#), paragraph 1.2.

²¹⁶ [The Report](#), paragraph 8.68.

²¹⁷ [SCOP response to invitation to comment on MCC](#), paragraph 4.14.

from autumn 2014.²¹⁸ It also said that there were vessels within DFDS's fleet which were well suited for use on the Dover–Calais such as the former *Stena Fantasia*, which operated on Dover–Calais for 20 years.

5.26 The SCOP also argued in its response to the provisional consideration of a possible MCC that DFDS's discount pricing 'runs contrary to rational economic behaviour', and noted that DFDS had an interest in understating its profitability in order to influence the outcome of this remittal.

5.27 The Mayor and other representatives of Calais said that it was possible for all three ferry companies (DFDS, MFL and P&O) to remain on the Channel. She said that P&O had invested in two new vessels to replace the oldest ones. The Mayor said that she had been advised that DFDS planned to bring the *Sirena Seaways* on to the Channel from the Harwich–Esbjerg route because of its increased volumes, indicating that DFDS was performing well. DFDS, however, said that it had no plans to transfer the *Sirena Seaways* to the Dover–Calais route. It said that the vessel was not suited to the route due to its type, and a conversion would be prohibitively expensive.

5.28 The Mayor and other representatives of Calais said that there was around 20% unemployment in the Calais region. If the CMA provisional decision was confirmed, the Mayor said that 600 jobs could be destroyed directly and 1,000 jobs lost indirectly on the Cote d'Opale.

Assessment of the MCCs proposed by GET and the SCOP

5.29 In this section we consider:

- the arguments put forward by GET and the SCOP that the demand growth seen on the short sea in 2013, and particularly on the Dover–Calais ferry route, together with projections of growth for 2014 and 2015 constitute a change of circumstances sufficiently material to alter our SLC finding (paragraphs 5.31 to 5.86)
- the arguments put forward by GET and the SCOP about the improvement in DFDS's financial performance (paragraphs 5.87 to 5.114) and whether any changes that GET and the SCOP submit have occurred materially affect our assessment in the Report of the likelihood that DFDS will exit the Dover–Calais route

²¹⁸ The *Sirena Seaways* operated on Harwich–Esbjerg route. DFDS will cease operating this service in September 2014.

- 5.30 We note at the outset that we have exercised caution in drawing conclusions from 2013 given the strategic uncertainties caused by the present inquiry.

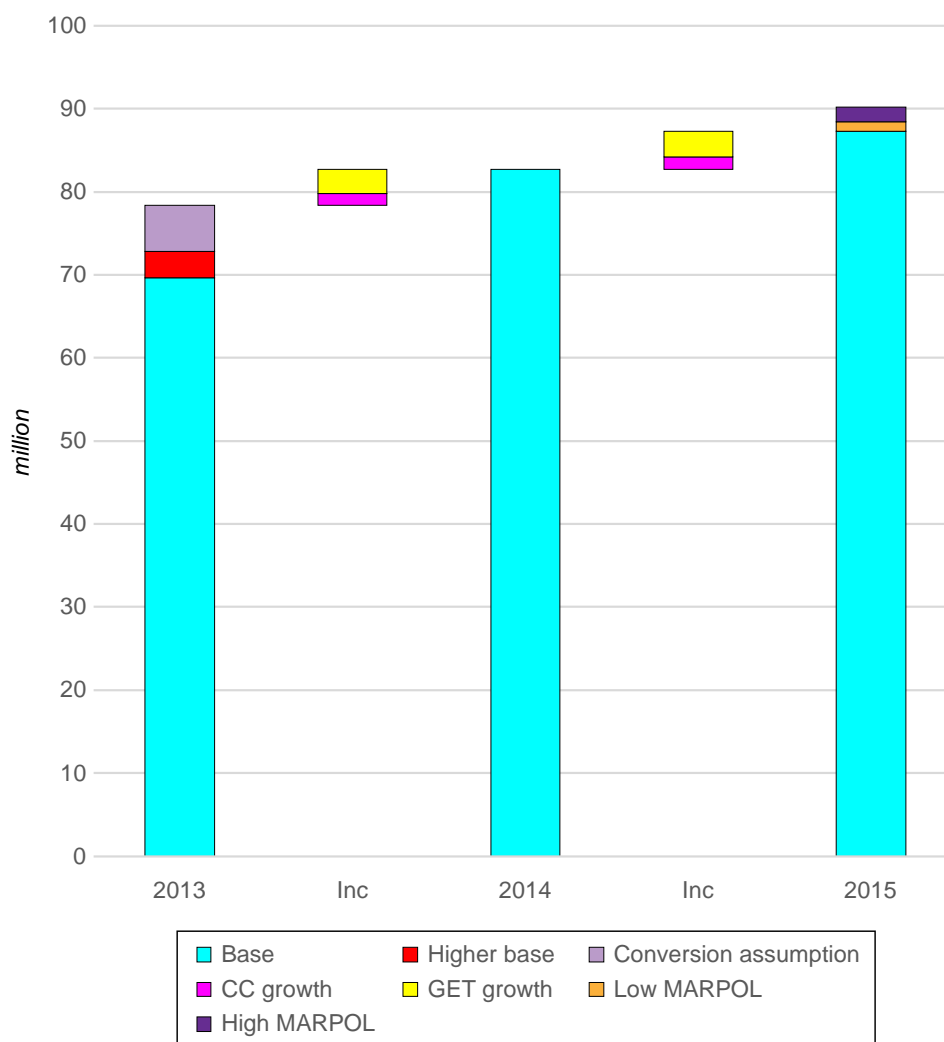
Comparison of the CC's June 2013 and GET's current demand projections

Overall short-sea demand

- 5.31 GET offered updated 2013 demand figures and a demand projection for the short-sea and Dover–Calais routes for 2014/15. Appendix H provides a detailed account of the differences between the CC's June 2013 demand assumptions and GET's figures. Figures 1 and 2 provide summaries of the differences for the short sea as a whole and for the Dover–Calais ferry route respectively.
- 5.32 A substantial portion of the difference between the GET and original CC figures comes from different 2013 numbers, and this difference in turn can be traced to two factors: (a) demand growth has been higher than anticipated by the CC; and (b) GET has used a different conversion factor to get from numbers of cars, trucks and coaches to lane metres than did the CC.
- 5.33 Although we do not necessarily accept the GET calculations, for the purpose of assessing the materiality of GET's proposed demand figures, our method is to assess the impact of GET's assumptions rather than critically to examine those assumptions. We agree that demand has grown faster than anticipated in 2013 (see Appendix H). When it comes to lane metre conversion rates and projections of growth into 2014 and 2015, we do not examine the likelihood that GET's assumptions are or will prove accurate. We take GET's numbers as if they were correct and assess the overall impact of GET's proposed projections.
- 5.34 Figure 1 shows the different effects leading to the difference between the CC's June 2013 starting point and the highest 2015 projections from GET.

FIGURE 1

A comparison of the CC June 2013 demand projections and GET's demand projections for the short sea



Source: CMA calculation.

Note: We have excluded Ramsgate–Ostend demand.

- 5.35 The first element is a higher starting point for 2013. Growth on the whole short sea was approximately 4% in 2013, taking a weighted average of growth in freight, passengers and coaches, whereas the Report had assumed 2% (the difference is shown as 'Higher base'). The next element added by GET to the CC's numbers is an adjustment made for the different assumptions made about lane metres per vehicle (shown as 'Conversion assumption'). The CC had assumed 2.4 metres per car and 7.2 metres per coach. GET assumed 3.3 metres per car and 12 metres per coach. Both assume 16.5 metres per truck. The original data for actual volumes comes from industry sources – Ferrystat and Freightstat – and these measurements are in actual numbers of cars, coaches and trucks. In order to make comparisons with capacity levels, both GET and the Report convert the vehicle numbers into lane metres using

conversion rate assumptions. The GET assumption has the effect of increasing lane-metre demand compared with the CC assumption. As will be seen in paragraph 5.43 below, GET and the CC's estimation of capacity on the short sea is very similar. The effect of the different conversion rate assumptions is to make the GET capacity utilisation rates higher than the CC's figures in the Report.

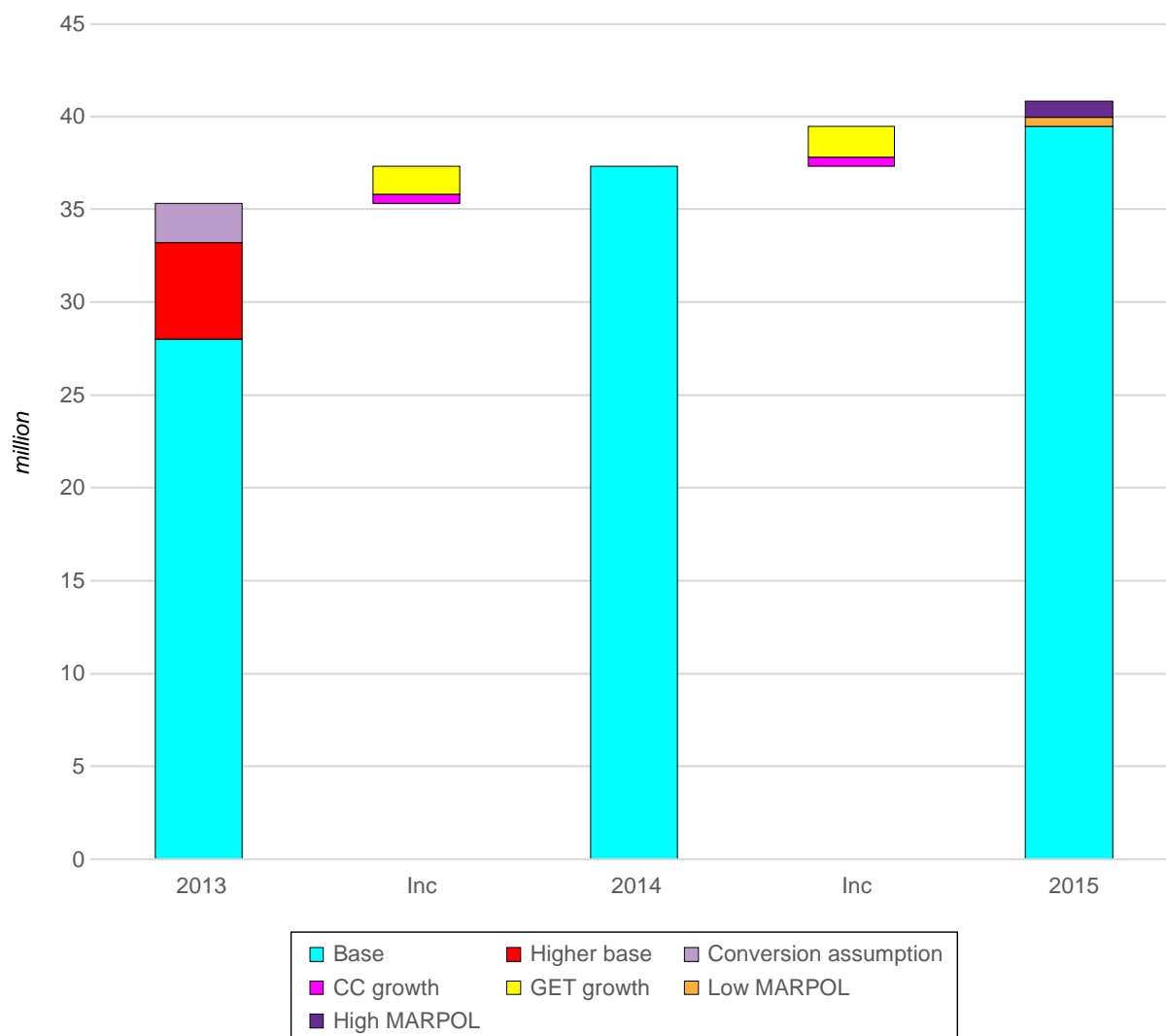
- 5.36 The CC assumed 2% growth for 2014 in the market in its report, while GET proposed to extend the stronger 4% weighted average growth rate into 2014 and 2015. The 2014 element of CC growth is shown in the stack chart (Figure 1), followed by the incremental GET growth. This is repeated for 2015.
- 5.37 Finally, two different scenarios of the impact of MARPOL are added to the baseline 2015 number – GET's assessment of a low and a high effect. These are shown as the last two additions to the stack chart. GET's assumptions suggest that MARPOL might add up to 3.5% to total demand. See Appendix F for further background information on MARPOL.

Demand projections for the Dover–Calais ferry segment

- 5.38 In Figure 2, we repeat the comparison for the Dover–Calais ferry route.

FIGURE 2

**Comparison of the differences between the GET and CC (June 2013)
demand figures for the Dover–Calais ferry segment**



Source: CMA calculation.

5.39 The same elements are present in Figure 2 as for Figure 1. A much larger portion of the difference between the GET and CC numbers is made up of a higher actual level of demand in 2013. The GET analysis shows that the Dover–Calais ferry market grew 18% in 2013. The other elements of the chart are in line with those in Figure 1.

5.40 According to Ferrystat and Ferryfreight, growth in 2013 was 18%, as it is for the GET projections. This has come about from growth in the overall short-sea market and a shift away from Eurotunnel and Dover–Dunkirk. We have identified two contributing causes to this growth in the Dover–Calais route: increased frequency of crossings on the Dover–Calais ferry route because of MFL’s and DFDS’s presence; and reduced prices on the Dover–Calais ferry route. Within the Dover–Calais route, P&O has lost volume, while DFDS and

MFL have increased (see paragraph 5.74). Figure 5 (paragraph 5.52) shows that P&O's weighted average price has been higher than DFDS's or MFL's, while the frequency of DFDS and MFL crossings have increased relative to P&O. We have not formally tried to separate out the effects of average price and frequency on demand, but we consider that it is reasonable to believe that price reductions for both freight and passengers will have been a significant contributor to the demand shift between routes and from P&O and Eurotunnel to DFDS and MFL. When we examine the sustainability of current prices and volumes (Figure 5 below), we do not need to rely on any causal account of the contribution of frequency and price to the volumes observed in 2013, and a separation was therefore not necessary.

CC and GET capacity estimates and capacity utilisation

- 5.41 In paragraph 5.10, we noted GET's arguments that the demand increase in 2013 and the higher projected demand meant that current capacity could operate profitably on the short sea. GET noted that in the Report we said that the ferry segment of the market last appeared sustainable in 2007, when utilisation rates were 54% on the entire short sea. GET argued that these utilisation rates would be achieved with projected demand growth and that capacity reduction would therefore not be necessary on the route.
- 5.42 The 2007 benchmark in the Report did not fix a level of utilisation that would be profitable irrespective of any other circumstances. Break-even is a function of average realised prices and costs as well as capacity utilisation. We do not believe that it is right to disregard the average revenue levels at which utilisation levels are achieved. We have evidence of substantial average revenue decreases in the short-sea ferry market in 2013, which suggests that the increased capacity utilisation level, achieved by volume growth in 2013 and possibly in 2014 and 2015, is not sustainable because of the impact of these falls in average revenue on profitability. In its response to the provisional consideration of a possible MCC, GET said that this approach was a significant departure from the analytical approach taken in the Report, which took no account of average revenue levels when deciding what was necessary for three ferry operators and GET to achieve break-even on the short sea. However, in the Report, we explicitly state our methodology: 'In the model, break-even is achieved when revenues on the route (from ticket sales and on-board sales) equal the operating costs on the route, not including any allocation of sales and marketing costs or central overheads).'²¹⁹ This methodology takes account of revenues achieved as well as of utilisation

²¹⁹ [The Report](#), footnote 172.

rates, so that an analysis of average revenues does not constitute a new analytical approach.

- 5.43 GET provided capacity estimates for MFL for 2013 and assumed that the capacity would stay constant in 2014 and 2015. Table 1 describes our and GET's daily capacity estimates in lane metres for all short-sea operators and Dover–Calais ferries. The difference in these estimates is small and can be explained by assumptions regarding the lane-metre conversion rate made by GET when estimating MFL's own capacity.²²⁰

TABLE 1 GET and CC estimates of capacity on the short sea and on the Dover–Calais ferry segment

	Capacity, lane metres	
	2012	2013
CC June 2013, short sea	349,569	388,214
GET MCC submission, short sea		389,583
GET/CC discrepancy (%)		0
CC June 2013, D–C ferries	168,601	198,208
GET MCC submission, D–C ferries		199,569
GET/CC discrepancy (%)		1

Source: GET, CC and CMA calculation.

- 5.44 These capacity figures are combined with demand projections to determine capacity utilisation rates. Table 2 shows and analyses the difference between the utilisation rates based on the Report and the utilisation rates derived by GET. The CC's estimate of 2007 utilisation rates is also presented.

TABLE 2 A comparison of CC/CMA and GET calculations of capacity utilisation rates on the short sea

	2007	2013	2014	No MARPOL 2015	Low MARPOL 2015	High MARPOL 2015
<i>Capacity</i>						
CC	126,833,485	141,698,110	141,698,110	141,698,110		
GET		142,197,770	143,115,333	144,478,075	144,478,075	144,478,075
<i>Demand</i>						
CC	68,951,439	69,636,390	71,058,179	72,508,997		
GET, GET conversion		78,351,162	82,695,849	87,299,898	88,375,189	90,167,341
GET, CC conversion		72,002,098	76,145,470	80,541,077	81,604,868	83,377,853
<i>Utilisation (%)</i>						
CC target utilisation (CC conversion)	54					
CC utilisation	54	49	50	51		
GET utilisation, GET conversion		55	58	60	61	62
GET utilisation, CC conversion		51	53	56	56	58

Source: CMA calculation.

Note: We have excluded demand and capacity for Ramsgate–Ostend.

²²⁰ In calculating MFL's own capacity, GET used a number of units of freight, passengers and coaches that the ships could load and converted this to lane metres.

- 5.45 In comparing utilisation rates, it is important to take care to use consistent conversion ratios from freight, coach and passenger units to lane metres. GET and the CC have used different conversion rates.
- 5.46 In the Report, we estimated capacity utilisation to be 54% in 2007.²²¹ This was derived on the basis of CC conversion rates for demand and CC estimates of capacity. On the basis of the CC's June 2013 projection of demand, utilisation by 2015 is 51%. In 2013, on the other hand, GET assumptions yield a utilisation rate of 55% based on its estimate of capacity (which is very close to ours) and its estimate of lane-metre demand. The 55% grows to 60% in 2015 before any MARPOL effects. However, those utilisation figures are not directly comparable with the CC's 2007 benchmark utilisation level of 54%. That is because the benchmark and the GET figures are based on different assumptions for the conversion of units to lane metres. We therefore recalculate the GET demand numbers based on the CC lane-metre conversion in order to derive comparable utilisation figures. These are given in the last row of Table 2. The GET utilisation forecast for ferries on the Dover–Calais route achieves 2007 levels in 2015, before any MARPOL effect.
- 5.47 We do not take the fact that utilisation in 2015 is higher than in 2007 necessarily to be an indication that three operators can be sustained in 2015 on the Dover–Calais ferry route. In order to assess the argument that the market can now profitably sustain three ferry operators, including DFDS, we examine in detail below the relationship between average revenues, volumes and capacity utilisation required for DFDS break-even.
- 5.48 In our analysis of GET's argument, we use GET's demand projections and then ask whether it is the case that three ferry operators are or soon will be profitable on the route.

The impact of market growth – will three ferry operators soon be profitable on the Dover–Calais route?

- *Total market*

- 5.49 Between Q1 2013 and Q1 2014, the entire short-sea market grew at 7% for freight and shrank by 2% for passengers.²²² For the Dover–Calais ferries only, freight growth was 10% and passenger volumes fell by 3.7%. Freight volumes rose across 2013 (there is a seasonal dip in December) and continued their

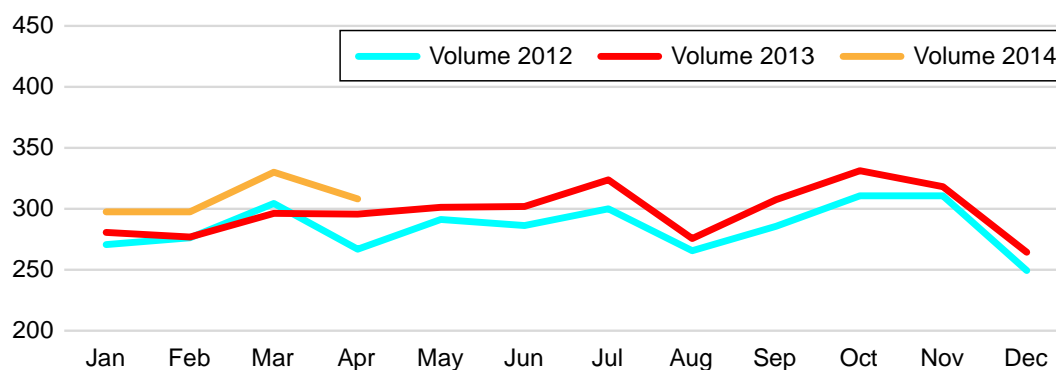
²²¹ [The Report](#), paragraphs 8.44–8.46, & [Appendix E](#), paragraph 31.

²²² We note that Easter was in Q1 2013 and Q2 2014 which would have affected the comparison for passengers in particular. The four-monthly growth comparison, January to April 2013 compared with the same period in 2014, shows passenger growth of 4.8%.

growth in 2014. The growth rate between the first four months of 2013 and the first four months of 2014 is 7%.

FIGURE 3

Total freight volumes on the short sea, '000 units

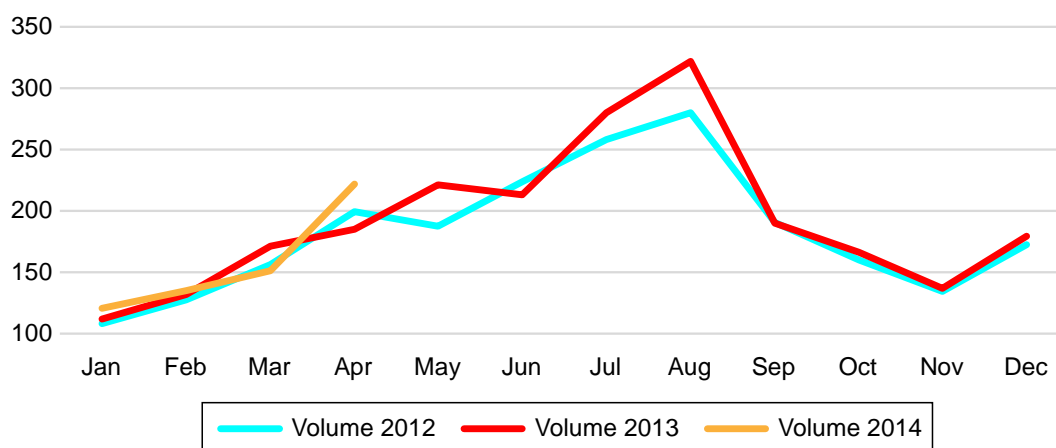


Source: FreightStat.

- 5.50 Passenger volumes do not appear to show strong growth between 2012 and 2014 except perhaps between the summer peaks of 2012 and 2013.

FIGURE 4

Total passenger volumes on the short sea, '000



Source: FerryStat.

- 5.51 We note that GET in its MCC submission projected overall 2014 growth of 6% for the Dover–Calais ferry operators.

- *DFDS break-even assessment*

- 5.52 We have updated our model of DFDS's break-even level of operation to take account of demand growth. The result is summarised in Figure 5, and our methodology described in detail in Appendix I.

FIGURE 5

DFDS break-even analysis and GET-based demand projections

[REDACTED]

Source: CMA calculation.

- 5.53 The line in Figure 5 represents combinations of average revenue and average monthly demand that allow DFDS to break even. This curve is based on an analysis of DFDS's costs. This analysis updates the analysis described in paragraph 8.34 of the Report and adopts the same methodology. The break-even analysis is conducted as far as possible on the basis of DFDS avoidable costs. We have therefore excluded depreciation charges from fixed vessel costs. This is a conservative assumption, in that if the vessel that DFDS owns were not on the Dover–Calais route, it would be likely to be employed elsewhere and likely to generate a contribution. We have sought to repeat the analysis that led to the conclusion in the Report that DFDS would exit the market (the Report, paragraph 8.98), but at different levels of prices and demand.
- 5.54 Figure 5 shows the average revenue (price)/volume point achieved by DFDS in 2012 and in 2013. The revenue includes on-board sales. As expected from the 2013 Dover–Calais ferry route demand growth, this represents a significant increase in volume served over 2012 – more than doubling (DFDS only started operations in March 2012). However, this volume growth has been accompanied by a steep decline in average revenue for DFDS – with average revenue per lane metre falling by [REDACTED]%.²²³
- 5.55 Figure 5 also shows the weighted average prices achieved by MFL in 2013, shown with and without the contribution to revenues of on-board sales. MFL has achieved out-turn prices slightly above DFDS. P&O's weighted average price during 2013 was substantially above MFL's and DFDS's. The weighted average price points have been reviewed and validated by the parties.
- 5.56 The finding of a fall in average revenues in 2013 relative to 2012 is consistent with our finding in the Report, where we write (paragraph 8.34, footnote 174) that:

As at 25 January 2013, DFDS estimated that, based on its forecast at that time for 2013, it would achieve a market share of [REDACTED] per cent of freight and [REDACTED] per cent of passenger, that an

²²³ This decline in average revenue is a combination of price falls for freight and passengers together with a shift of relative volumes towards freight, which has a lower average revenue per lane metre. [REDACTED] of the fall in DFDS's average revenues is due to the shift to freight, and [REDACTED] to price falls.

increase of [X] freight units ([X] per cent market share) and [X] passengers ([X] per cent market share) would be required to break even on Dover–Calais – or in terms only of freight, an additional [X] freight units ([X] per cent market share).

- 5.57 In 2013, DFDS outperformed these increases in volumes by a considerable amount – it had an increase of 221,000 freight units and 481,000 passengers. There has been no substantial change in unit costs, and losses on the route have continued to be substantial. Only a reduction in average revenues can account for these facts together.
- 5.58 The DFDS average revenue reduction between 2012 and 2013 means that break-even has remained elusive to DFDS despite the growth in demand. This is confirmed by an examination of DFDS’s financial statements (see paragraphs 5.89 to 5.93 below), which show that DFDS continued to make losses in 2013 on the Dover–Calais route. GET has argued that losses worsened in 2013 because costs increased as a result of DFDS having more lane-metre capacity on the route in total in 2013 compared with 2012 since DFDS started on the Dover–Calais route part way through the year (in February 2012) and only operated two vessels on the route from April 2012. While this is true, it does not detract from the fact that average revenues fell substantially between 2012 and 2013, so that demand growth has been insufficient to bring DFDS close to break-even.
- 5.59 The three vertical lines show the demand increase that DFDS can hope to enjoy by 2015 based on GET’s overall market demand projections and DFDS’s market shares between May 2013 and April 2014, with the lowest line representing the no-MARPOL case and the two other lines each representing one of the MARPOL scenarios. The assumption that DFDS can maintain its 2013 market shares is generous given (see the Report, paragraph 8.74) that we would expect P&O to cease to accommodate the increased DFDS and MFL shares. While this demand growth might have been sufficient to bring DFDS to break even at 2012 average revenues, it is far from sufficient at 2013 levels. This can be seen in the diagram from the fact that the 2012 average revenue level intersects the vertical demand lines above the break-even curve, while the 2013 price level intersects all three lines well below the break-even curve.
- 5.60 GET (paragraph 5.22) and the SCOP (paragraph 5.26) both said that DFDS had an interest in understating its profitability in order to influence the outcome of this remittal. However, in a situation of overcapacity in an industry with high fixed costs, there can be economic rationality in pricing to increase utilisation. DFDS is discounting relative to MFL and P&O in our analysis, but it continues to make a contribution to fixed vessel costs. We therefore reject the

argument that DFDS's pricing behaviour in the current environment 'runs contrary to rational economic behaviour'.²²⁴

- *SCOP assessment of DFDS and MFL break-even*

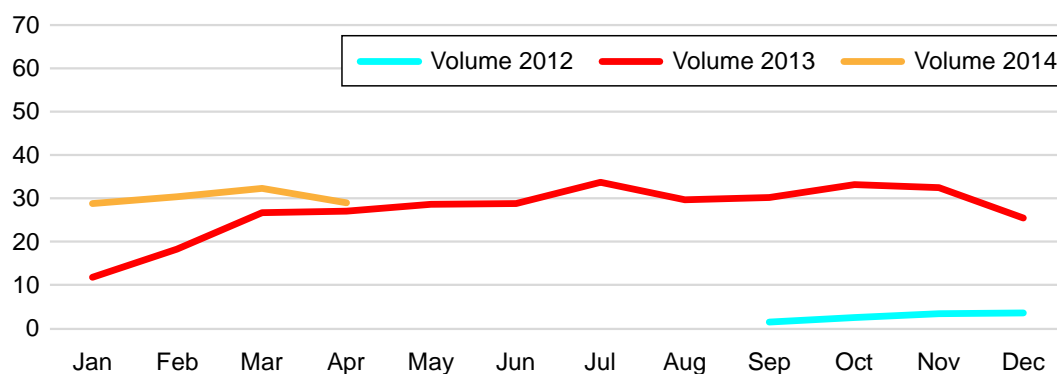
5.61 The SCOP, in its response to our consultation on MCC, submitted a model structurally very similar to the one described here for both MFL and DFDS (paragraph 5.24). It used this model to argue that 'the continued growth experienced in 2014 provides ... evidence that MFL (and likely DFDS ...) are rapidly approaching break-even ... break-even will shortly be passed at current growth rates'.

5.62 Central to its argument is that 2014 will see much higher growth rates for MFL and DFDS on the Dover–Calais route than assumed by GET in its MCC submission. The SCOP argued that DFDS could expect a sustained 18% growth in 2014 and MFL a 58% growth. The 58% growth figure is calculated comparing Q1 2013 and Q1 2014 demands for MFL. The 18% growth figure for DFDS is derived from an analysis of freight volume growth per crossing in Q1 2013 compared with Q1 2014.

5.63 MFL's freight and passenger volume growth is shown in Figures 6 and 7.

FIGURE 6

MFL freight volumes, '000 units



Source: Freightstat.

²²⁴ We also note that the 2013 DFDS EBITDA loss of €14.6 million and the 2014 budget EBITDA loss of €[X] million are substantially less negative than those of MFL (2013 EBITDA loss of €[X] million and 2014 budget loss of €[X] million) (paragraphs 5.104 & 5.105). This does not suggest that the DFDS profitability is understated compared with MFL. We also note that in Appendix I, paragraph 22 our analysis implied that for any given level of price MFL needs a higher volume of sales to break even than DFDS.

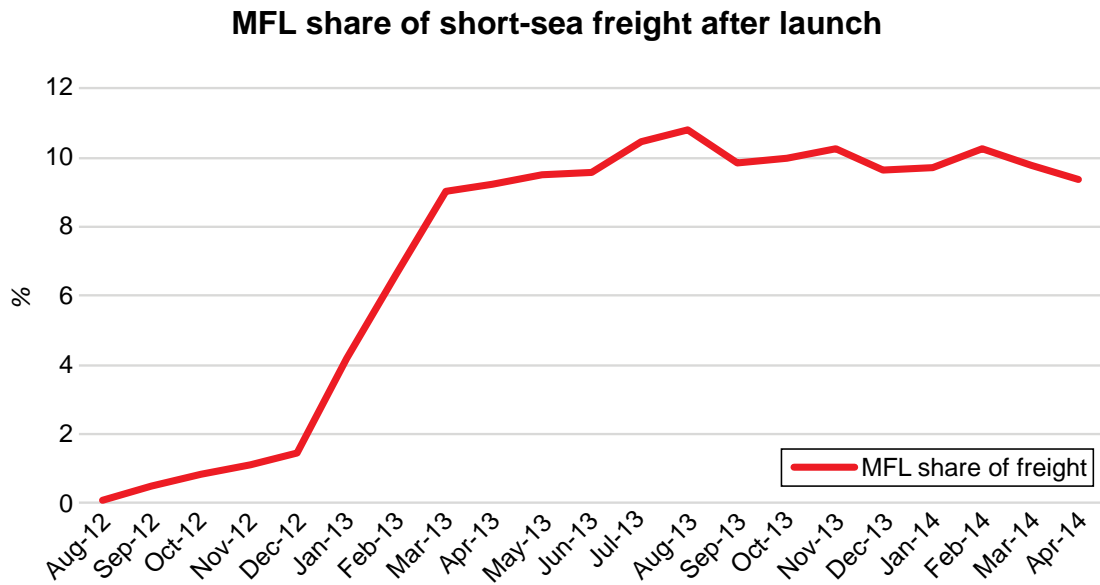
FIGURE 7



Source: Ferrystat.

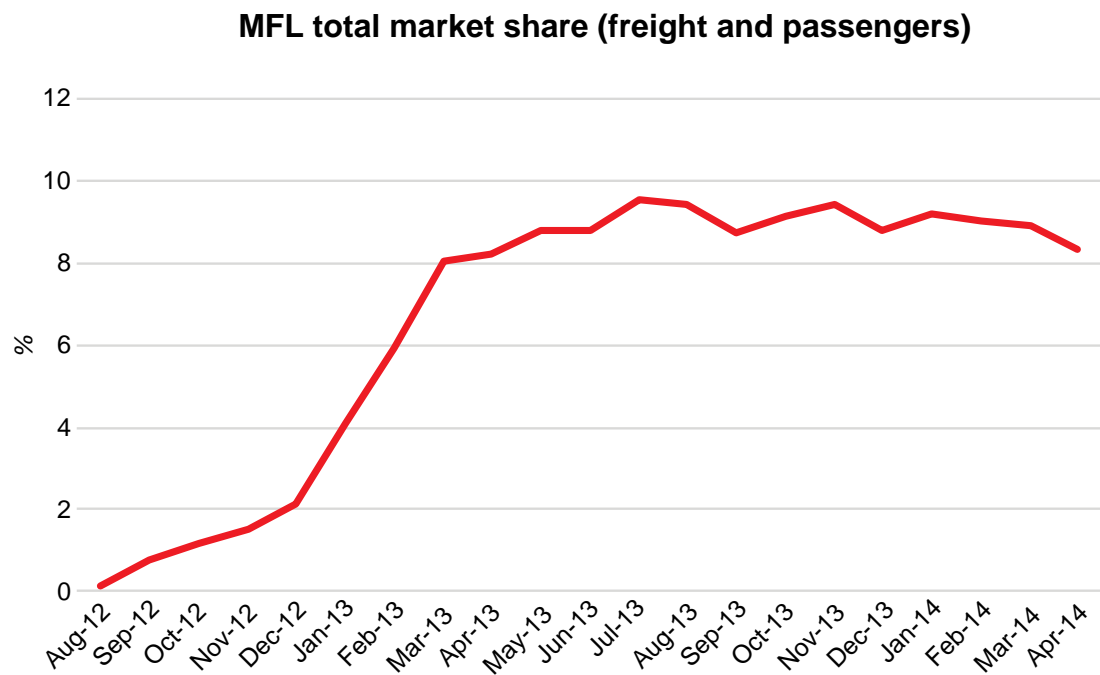
- 5.64 Figures 6 shows that MFL freight volumes were low in Q1 2013, and comparing this with Figure 3 we can see that this was an MFL-specific effect rather than a market-wide effect. Figure 7 shows the same for passengers, where the comparison is with Figure 4. Thus it is the low Q1 2013 figures which are the main reason for the very high Q1 2013 to Q1 2014 growth. MFL volumes were increasing from their start point in August/September 2012 and level out after Q1 2013. This is particularly clear in the freight figures, which represent the largest share of volume in Q1, accounting for 85% of Q1 2014 revenues.
- 5.65 MFL appears to have enjoyed very strong freight growth in its first nine months of operation, which we interpret as having come during the process of getting the business fully operational. Figure 8 shows the MFL freight market share as it develops after launching. It shows strong growth between December 2012 and March 2013, after which the share stabilises. Figure 9 shows the same for passengers and freight together converted to the common unit of lane metres. It shows broadly the same pattern, with strong growth in the first nine months followed by stabilisation.
- 5.66 By taking Q1 2013 to Q1 2014 growth rates, the SCOP claimed that the strong growth experienced while building up the business could be repeated in 2014. However, this seems extremely unlikely given that MFL's share of the market has broadly stabilised after March 2013. Freight growth between Q1 2013 and Q1 2014 averaged 61% for MFL. We believe that this growth was exceptional, being associated with the build-up of the business, and is consequently not a good basis on which to project 2014 growth rates.

FIGURE 8



Source: FreightStat and CMA calculation.

FIGURE 9



Source: FreightStat and CMA calculation.

Note: Calculated in lane metres.

- 5.67 The evolution of traffic over the whole year for freight and passengers shown in Figures 4 and 5 above suggests that the growth figures suggested by the SCOP are very high as a basis for projecting 2014 growth rates and beyond. We conclude from this analysis of total volumes on the short sea that MFL and DFDS are extremely unlikely to enjoy the growth rates that the SCOP is suggesting for 2014.

- 5.68 We used the SCOP's profitability analysis of MFL to create a break-even frontier for MFL comparable to that presented for DFDS in Figure 5. This is shown in Figure 10.

FIGURE 10

MFL break-even analysis and growth forecasts

Source: CMA analysis.

- 5.69 Figure 10 shows the average revenue (price)/volume point achieved by MFL in 2013. Similarly to Figure 5, the three leftmost vertical lines represent a forecast of MFL's demand levels in 2015 with the MARPOL sensitivities.²²⁵ The rightmost vertical line represents the demand growth that the SCOP argued would be enjoyed by MFL in 2014. This graph confirms that the SCOP's argument rests on extremely high demand growth forecasts.²²⁶
- 5.70 The SCOP argued that DFDS could expect demand growth of around 19% in 2014, and that this would bring it close to break-even and would make it 'incrementally profitable'. GET, in the figures underlying its MCC submission, forecast DFDS growth for 2014 in line with market growth at 6.4% for freight and 2.8% for cars.
- 5.71 We believe that the SCOP demand projection for DFDS is implausible. The 18% figure is calculated by examining changes in freight volumes *per crossing* between Q1 2013 and Q1 2014. DFDS freight volumes themselves rose by 2% between these two periods. DFDS had vessels in dry dock in Q1 2014, meaning that DFDS's number of freight units per crossing rose. However, the SCOP does not provide a reason why freight volumes *per crossing* ought to be the basis of projecting demand rather than freight volumes. We would expect companies to try to minimise the impact of dry docking on sales. This would include measures such as seeking to move freight units to alternative crossings, which would increase freight units per crossing. It is quite likely that some sales will be lost to competitors during periods of dry docking and reduced frequency, possibly accounting for the fact that DFDS saw Q1 2013 to Q1 2014 growth of only 2%.

²²⁵ The forecast is based on MFL maintaining the market share that it achieved between May 2013 and April 2014 and applying market growth assumptions from GET's submission on MCC. This method produces a higher demand level for MFL than was assumed by GET in the figures underlying its MCC submission because that did not take account of MFL's ramp in 2013.

²²⁶ Our analysis suggests that MFL needs [X]% growth to achieve break-even while the SCOP analysis suggests the higher number of [Y]%. The difference arises from the conservative assumptions we have made regarding which costs to include as being true route costs, comparable to DFDS's. See Appendix I for a discussion of the assumptions made.

5.72 We noted in paragraph 5.49 that the overall market for freight grew by 7% between Q1 2013 and Q1 2014, which is very close to GET's projection for overall market growth for the whole of 2014 and which has been used to show demand levels against break-even in Figure 5. The SCOP has provided no argument that DFDS will benefit from any extraordinary circumstances that would make its market growth deviate substantially from overall market growth.

5.73 The SCOP said that the key question for the CMA was whether DFDS could expect the Dover–Calais route to be incrementally profitable over its lifetime. Our analysis shows that DFDS is incurring significant losses on the Dover–Calais route with three operators present. In our view DFDS would be unlikely to remain on the route, even if it were to become profitable at some point in the long term, given the substantial cash outflows and negative effect on return on invested capital that it is experiencing and given its ability to redeploy resources to other routes in its network.

- *P&O position*

5.74 P&O does not appear to have lost average revenue to such an extent as DFDS and MFL during 2013. It said that 'price competition on this route has been very intense since the commencement of both the DFDS Calais service and the MyFerryLink service'. It said that it had experienced some price reductions but had not participated in price reductions to the same extent as DFDS or MFL. We see in Table 3 that P&O has lost both freight (20%) and passenger (7%) volume over this period, which is consistent with its not having implemented price reductions of similar magnitudes.

TABLE 3 **Short-sea market volumes by operator, 2012/13**

	<i>'000 passengers</i>	
	2012	2013
<i>Passengers</i>		
P&O	8,430	7,843
MFL	137	1,261
DFDS D–C	851	1,332
DFDS D–D	2,497	2,293
Eurotunnel	10,040	10,328
		<i>No of trucks</i>
<i>Freight</i>		
P&O	1,282,078	1,025,892
MFL	11,417	326,269
DFDS D–C	133,509	355,117
DFDS D–D	522,647	500,026
Eurotunnel	1,464,880	1,362,849

Source: FerryStat and FreightStat.

5.75 GET suggested that the reduction in demand served by P&O indicated that P&O had the strongest incentive to reduce capacity on the route (paragraph

5.12). In the Report, we argued that P&O was unlikely to reduce capacity before the exit of one of the smaller operators (paragraph 8.51). We note that P&O has maintained capacity and we do not accept GET's argument that there is any new indication that P&O is likely to accommodate entry in the medium term.²²⁷

- *Conclusion on profitability of three ferry operators on the Dover-Calais route*

- 5.76 We believe that market conditions during 2013 are as we would expect in a situation of overcapacity in which each operator is waiting for capacity reductions from another operator. Price has been unsustainably low and appears insufficient to support three ferry operators on the Dover–Calais route. We believe that price and quantity movements during 2013 do not represent movements to a sustainable state.
- 5.77 We noted that the Mayor and other representatives of Calais told us that a logistics centre and theme park were to be built in Calais which she said would affect cross-Channel demand (paragraph 5.15). However, we note that the overall demand growth mentioned by the Mayor that is projected by the Ports of Dover and Calais is 40% by 2030.²²⁸ The Port of Dover said that this assumed 2% compounded growth per year from 2014 to 2030 and that the figure was supported by previous external forecasts and allowed for a further increase in 2015 due to MARPOL. We consider that this growth would be insufficient to change our view that with three ferry operators there will be overcapacity on the Dover–Calais route for a substantial period.
- 5.78 GET argued in its response to our consultation on MCC that there was a plausible scenario in which MFL and DFDS both 'increase prices to a level which enables them to achieve break-even more quickly'. However, in a situation of overcapacity with high fixed costs as described here, we do not consider that this is a plausible scenario.
- 5.79 We conclude from this analysis that the recent growth in demand, accompanied as it has been by reduced average revenues on the Dover–Calais ferry segment, is unlikely to enable three ferry operators to break even by 2015 or earlier. We therefore continue to believe that the most likely scenario for capacity reduction, absent an intervention, is a DFDS exit from the route.

²²⁷ We also note that the SCOP told us that P&O was 'a little bit more aggressive than the last period in terms of price'. This is consistent with P&O moving to protect market share.

²²⁸ The growth is set out in the Dover–Calais BRIDGE project.

Internalisation and competition-weakening analyses

- 5.80 As noted in paragraph 5.16, GET and the SCOP submitted that if demand were to be sufficient now or in the near future to sustain all of GET/MFL, DFDS and P&O on the Dover–Calais segment, then we ought to reconsider the internalisation and competition-weakening²²⁹ analyses that led to our SLC decision and recompute indicative price rises (IPRs) and gross upward pricing pressure indices (GUPPIs) in light of new market shares. However, we do not believe that the change in demand and likely future demand has been such as to put us into this situation. We believe that it remains the case that DFDS is likely to exit (see also the analysis of DFDS’s financial performance and evidence relating to the chartering of the *Molière* below).
- 5.81 The SCOP further argued that price increases arising from internalisation in a scenario in which demand had grown and GET/MFL, DFDS and P&O were all sustainable operators on the Dover–Calais maritime route could be counter-acted by a competition-weakening effect in this case compared with one in which DFDS and P&O alone operated the route, suggesting that DFDS might also choose to restrict Dover–Calais capacity in order to benefit its existing ferry services elsewhere in the short sea (specifically Dover–Dunkirk).
- 5.82 We considered the SCOP comments. Since we do not believe it likely that demand can sustain three operators, and do not expect it to be, we consider that these are hypothetical questions that we do not need to consider at this time.
- 5.83 In performing calculations for IPRs and GUPPIs, the Report chose levels of prices, short-term margins and market shares for MFL that were argued to be consistent with sustainable, profit-making levels of operations. These levels were also consistent with what we believed would be the likely behaviour of P&O. We do not believe that 2013 short-term margins and market shares are a good basis for estimating the appropriate prices, margins and market shares because a substantial part of the price and volume movements during 2013 is likely to have been the result of short-term competition due to overcapacity on the route. We therefore believe that the margins and market shares in the Report continue to be the right basis on which to judge expected levels of IPRs and GUPPIs.

²²⁹ The competition-weakening effect is discussed in paragraph 8.128 of [the Report](#):

Competition between ferry operators affects the price of ferry crossings on the short sea and in turn constrains the price that Eurotunnel can charge. The vigour of competition between ferry operators therefore has an impact on the level of profit achieved by Eurotunnel. It follows that if GET manages Eurotunnel and MFL in a way that maximizes profits across the two businesses, it could be the case that MFL would compete less vigorously against other ferry operators in order to avoid damaging the profitability of Eurotunnel.

Conclusion on demand growth

- 5.84 GET provided evidence that there had been growth in demand in 2013 and that there would be further growth through to 2015. In our provisional view, and without reaching any conclusions as to the likelihood of such growth in demand materialising, we do not believe that this materially changes our analysis and conclusions that there exists overcapacity on the route which cannot sustain three ferry operators and that DFDS is likely to exit the Dover–Calais maritime segment. SCOP offered growth forecasts for 2014 that we judged to be extremely implausible.
- 5.85 GET and the SCOP submitted that we ought to redo our SLC analysis to take account of DFDS remaining on this route. We do not consider that this is appropriate in the light of our analysis that shows that DFDS is still likely to exit the route.
- 5.86 We believe that the margins and market shares in the Report continue to be the right basis on which to judge expected levels of IPRs and GUPPIs.

DFDS's financial performance

Background

- 5.87 In the Report, we concluded that:

On the balance of probabilities, DFDS will exit the Dover–Calais route, if the MFL service continues in its current form and ownership. Given the size of the losses being incurred by DFDS on this route, we expect this outcome to be reached in the short term and as early as October 2013 when the charter agreement for one of its vessels comes to an end.²³⁰

- 5.88 In arriving at this conclusion, we said:

- ‘Both companies [DFDS and GET] anticipated losses on the Dover–Calais route in the next 12 months. We note that GET anticipated that it would continue to fund losses until the end of [X]. We have seen no evidence to suggest that DFDS would be prepared to sustain losses for as long a period of time [as GET].’²³¹

²³⁰ [The Report](#), paragraph 8.98.

²³¹ *ibid*, paragraph 8.95.

- 'We consider that they both [GET and DFDS] have the financial strength to sustain losses on the Dover–Calais route.'²³²
- 'Although both companies view the Dover–Calais route as strategic ... we consider that GET has significantly stronger incentives²³³ than DFDS to continue operating a loss-making service on the route. GET would also incur significantly greater exit costs.'²³⁴

DFDS financial performance

5.89 We first set out and assess the evidence in relation to DFDS's financial performance. DFDS Group's financial statements show an improved financial performance in 2013 compared with 2012. DFDS stated in its annual report²³⁵ that:

- The growth in revenue for the year was 'mainly driven by the full-year effect of the addition of the French shipping company Louis Dreyfus Armateurs and increased activity on Dover–Calais, which opened with only one ship on the Channel during Q1 2012'.²³⁶
- The increase in profit was 'mainly driven by higher earnings from the freight and passenger activities in the North Sea'.²³⁷
- Its return on invested capital was 5.8%, excluding special items. This implied a gap of 4.2 percentage points to the goal of a 10% return. Around 2.5 percentage points of the gap was due to the extraordinary situation on the Channel.²³⁸

5.90 The annual report figures show that Group revenue increased from €1,568 million to €1,622 million. The Channel Business Area (the Channel)²³⁹ also increased revenue from €186 million to €249 million. The DFDS Group profit increased, with EBIT increasing from €121 million to €201 million. The

²³² *ibid*, paragraph 8.96.

²³³ *ibid*, paragraphs 8.85–8.87. These covered the ability to recoup losses in the long term; the strategic importance of the Dover–Calais route to their businesses; the visibility of losses to their shareholders; size of exit costs; and nature of their business model.

²³⁴ *The Report*, paragraph 8.97.

²³⁵ *DFDS annual report 2013*, Management Review, p9.

²³⁶ *ibid*, p9. DFDS started operating on Dover–Calais on 17 February 2012 with one vessel (*Norman Spirit*). On 27 April 2012 it added a second vessel on the route, the *Deal Seaways Barfleur*.

²³⁷ *DFDS annual report 2013*, Management Review, p9.

²³⁸ *ibid*, Financial Goals, p8.

²³⁹ The Channel business area includes Dover–Dunkirk, Dover–Calais, Portsmouth–Le Havre and Newhaven–Dieppe.

Channel recorded an EBIT loss of €14 million. The EBIT loss in 2012 was €18 million.

- 5.91 Revenue for the Dover–Calais route was €70.9 million in 2013, a substantial increase from €43.7 million in 2012 when DFDS had commenced services on the route. The 2013 EBIT loss (before the allocation of central overheads ‘overheads’) for Dover–Calais of €14.6 million was greater than the loss reported for the Channel business area overall.²⁴⁰ The EBIT loss (before overheads) in 2012 for Dover–Calais was €12.8 million. These figures are set out in Table 4.

TABLE 4 DFDS summary financial performance

	€ million					
	Group		Channel		Dover–Calais	
	2013	2012	2013	2012	2013	2012
Revenue	1,622	1,568	249	186	71	44
EBITDA*	163	146	-	-	-	-
EBIT*	67	57	-14	-18	-15	-13
Cash flow from operating activities	201	121	-	-	-	-
ROIC (%)	5.7	3.4				

Source: DFDS annual reports and management accounts.

*The Group and Channel figures are stated after overhead but before special items. The Dover–Calais figure is stated before the allocation of central overheads. The comparable EBIT loss for Dover–Calais would be higher by €1.9 million.

Note: Exchange rate €:DKK: 2013 1:7.458, 2012 1:7.462.

- 5.92 In its 2014 budget for the Channel Business area DFDS budgeted for an EBIT loss of €[X] million (€[X] million before overheads). DFDS’s 2014 budget for Dover–Calais shows an increase in revenue from €71 million to €[X] million. However, its 2014 budget also shows that the EBIT loss (before overheads) for the route worsens from 2013 to €[X] million.²⁴¹ [X]

- 5.93 DFDS provided actual financial performance figures for the Dover–Calais route for the first 14 weeks of 2014, which are set out in Appendix J. The data shows that DFDS generated revenue of €[X] million in the first 14 weeks of 2014 and a positive contribution before vessel costs. Once vessel costs are taken into account, Dover–Calais shows a negative contribution (loss after vessel costs) of €[X] million. DFDS provided a schedule of additional costs which are not included in its weekly reports but are included in its EBIT (before overheads) figures. These showed that in the 14-week period the

²⁴⁰ Within the Channel business area Dover–Dunkirk and Newhaven–Dieppe were profitable at the EBIT before overheads level, Dover–Calais and Portsmouth–Le Havre were loss making at the EBIT before overheads level.

²⁴¹ DFDS Shipping Division ‘budget 2014 Channel’, prepared for presentation to DFDS’s Executive Board, and shows a budgeted loss of €[X] million. DFDS told us that this was revised to €[X] million (€[X] million after overheads). DFDS is budgeting an increase in gross profit of €[X] million as a result of higher revenue. This though is more than offset by a 20% increase in vessel costs (€[X] million) as well as smaller increases in bunker and port costs.

Dover–Calais route continued to make a loss, totalling €[X] million EBIT (before overheads). Further details are provided in Appendix J.²⁴²

- 5.94 GET and the SCOP argued that DFDS may not be operating as an efficient operator. The SCOP argued that DFDS could be wrongly allocating costs in its profitability assessment. It submitted that there was a lack of transparency in its accounting of costs for the Channel routes²⁴³ and that it was in DFDS's interest to understate its profitability in relation to the remittal process. The SCOP also argued that the correct measure of profitability should be incremental profit.²⁴⁴ GET argued that DFDS may not have a suitable business strategy to operate profitably on Dover–Calais. It submitted that DFDS had itself stated that its own actions affected its performance in 2013 'due to the costs of the short term decisions it made about vessels'.
- 5.95 The SCOP also argued that DFDS's results for the first 14 weeks of 2014 showed that losses were made in the weeks when each of DFDS's vessels were in dry dock for a period and that outside this period DFDS experienced weeks of break-even or even positive contribution after vessel costs. It considered that these two periods were more representative of the performance for the remainder of 2014 rather than the whole period including the dry docking of DFDS's vessels.²⁴⁵

DFDS views on the viability of the Dover–Calais route

- 5.96 DFDS argued²⁴⁶ that the viability and likelihood of exit of the relevant operators on Dover–Calais remained the same as at the time of the Report. It said that it was still a long way from break-even on its Dover–Calais operation and reiterated that it would exit if MFL did not. DFDS told us that:

the economical fact asserts that we will have to exit the Calais route if GET/MFL are allowed to operate on this Calais route ...
There is no way that higher growth rates, MARPOL or cost saving

²⁴² The two periods are not exactly comparable given differences in charter day rates, changes in the way terminal charges are levied and the number and when vessels were in dry dock.

²⁴³ The SCOP submitted that this lack of transparency was shown in comments made in April 2013 by Didier Marie, President of the Seine-Maritime regional council for whom DFDS operates the Newhaven–Dieppe line, that the 2010 accounts were still to be validated and that there was a '*manque de transparence certain*' (a 'certain lack of transparency') in DFDS's accounting practices (www.lesinformationsdieppoises.fr/2013/04/06/dieppe-des-doutes-sur-les-comptes-de-la-ligne-transmanche/).

²⁴⁴ The SCOP stated that examples of shared services included DFDS operating all its commercial teams for the Channel routes from Dieppe and operating two routes from Dover.

²⁴⁵ The SCOP also submitted that DFDS would have, as a result of both vessels being in dry dock in the first eight weeks of the year, 44 weeks of unbroken operation in the remainder of 2014.

²⁴⁶ [DFDS response to invitation to comment on MCC](#), paragraph 3.2.

initiatives on our side can change the structural challenge [of overcapacity] we are seeing.

5.97 DFDS told us that as a result of GET's continued presence on the Dover–Calais route, its losses continued to mount.²⁴⁷ It estimated the value of additional business that DFDS would gain were MFL no longer to operate on the route (per the CMA's proposed remedy) to be approximately £[X] a week on average.

5.98 DFDS told us that Dover–Calais was not at the 'heart' of its network of maritime routes and that there was no 'emotional attachment' to continuing to operate on the route. It said that it did not arrive on the Dover–Calais route until 2012 and it had only entered the Dover–Dunkirk route as a consequence of acquiring Norfolkline in July 2010. It said that it was a listed company but 'for two years [DFDS] had been destroying value ... solely because of [the Dover–Calais] route'. DFDS said that its return on invested capital is below its cost of capital and it was under pressure from shareholders and analysts.

5.99 DFDS's annual report states in relation to the Channel that:

The operating loss will continue as long as the overcapacity on the Dover Strait persists. The financial outlook for 2014 is, therefore, contingent on when the UK Competition Commission's Eurotunnel/SeaFrance merger inquiry is finalised and the outcome of the inquiry.²⁴⁸

5.100 At DFDS's AGM,²⁴⁹ Niels Smedegaard²⁵⁰ answered a question on how DFDS would be impacted in the event that the UK competition authorities would not uphold the current preliminary findings concerning Eurotunnel:

We would rather not speculate at this point in time. We are strongly convinced that the competition authorities will uphold the decision now made. We have previously stated – and we maintain that statement – that we are currently in an untenable position and as I stated earlier today it is a strategic priority for the company to be represented on the Channel. We strongly believe that we can achieve our aim but it is obvious that if something happens which means that it will not happen we still have a very serious challenge that we will need to consider how to deal with. We have also previously announced – also to the UK competition

²⁴⁷ *ibid*, paragraph 2.5(c).

²⁴⁸ [DFDS annual report 2013](#), p20.

²⁴⁹ 26 March 2014.

²⁵⁰ DFDS President and CEO.

authorities – that if no solution is found we will have to withdraw from that route. We simply cannot become successful on the Channel through cutting down costs as this is a structural problem. But as mentioned we trust that we are on our way to a sensible solution.²⁵¹

- *Charter of the Molière*

5.101 We noted GET's arguments about the charter of the *Molière* (paragraphs 5.21 and 5.25). DFDS told us that it took the decision to extend the charter of the *Molière/Dieppe Seaways* until October 2014 in the hope of a swift resolution to the [Appeal regarding the Report].²⁵² DFDS's board minutes of 19 November 2013 stated:

In spite of earlier hopes for a decision by mid-October there is still no decision in the competition case concerning Eurotunnel/ MyFerryLink. Consequently *Dieppe Seaways* [previously *Molière*] has been extended for 12 months, following attempts by the owner to achieve a sale or alternatively a 24 month extension. There are still no real alternatives to *Dieppe Seaways* available in the market, so reluctantly the company has extended for 12 months.

5.102 DFDS told us that it had been aware of the owner of the *Dieppe Seaways/Molière* was looking to sell the vessel. DFDS told us that it was not at that time in a position to make a bid. To do so would have been speculative and risky given the ongoing uncertain position of DFDS on the Channel, and the fact that the vessel would not obviously and easily fit into DFDS's operations elsewhere. DFDS's board minutes for the meeting on 14 January 2014 stated:

The chartered vessel *Molière* has been sold to Stena, and the company was informed of the sales process in December, but considering the unsettled situation on the Channel the executive board had not found it relevant to approach the board for an authority to make a bid. Currently Stena is not completely unwilling to consider a short term charter for the period beyond October 2014, but the plans of Stena seem to involve using the vessel [✂].

²⁵¹ Extract from minutes of Annual General Meeting of DFDS A/S held on 26 March 2014.

²⁵² [DFDS response to invitation to comment on MCC](#), paragraph 2.5(d).

5.103 DFDS stated that it continued to face significant challenges in procuring and maintaining suitable tonnage for the Dover–Calais route.²⁵³ It told us that it made contact with Stena to explore the possibility of extending the charter. Stena indicated that this might be possible for a short period before the vessel was transferred for use elsewhere. However, no agreement had yet been reached. [REDACTED]²⁵⁴ DFDS told us that it had no plans to transfer the Sirena Seaways to the Dover–Calais route as the vessel was not suited for the route as configured and a conversion would be prohibitively expensive (paragraph 5.27).

CMA assessment

5.104 We noted that DFDS's financial performance as a Group had improved in 2013 from 2012. However, its Channel routes, whilst showing an improved performance, were still loss-making. Statements in DFDS's annual report indicate that the losses on the Channel had a negative 2.5 percentage point effect on DFDS's return on invested capital. The Dover–Calais route (part of the Channel) made a loss in 2013 of €14.6 million, which was greater than DFDS's overall loss on the Channel.

5.105 DFDS had also budgeted an EBIT loss of €[REDACTED] million (before overheads) for the Dover–Calais route in 2014. We noted that the 2014 figures include a significant increase in vessel costs as well as smaller increases in other costs. However, even if we assume that the total of these costs remains the same as in 2013, DFDS would still be budgeting for a loss of €[REDACTED] million. In the first 14 weeks of 2014 it reported an EBIT loss (before overheads) of €[REDACTED] million. Although we agree with the SCOP and GET that it is not possible to extrapolate these results for the full year given that it is low season and the vessels had been in dry dock for a period, we consider that a loss of this size given the known seasonality of the route is still significant and consistent with DFDS's budgeted loss for 2014. We also note that MFL also made substantial losses on the Dover–Calais route with an EBITDA loss in 2013 of €[REDACTED] million. It has also budgeted an EBITDA loss for 2014 of €[REDACTED] million and is forecasting losses for 2015 (€[REDACTED] million) and 2016 (€[REDACTED] million).

5.106 We consider that EBIT (before overheads) is the correct measure of profitability as, although the route is part of the Channel, it is treated by DFDS as a stand-alone route. We note in this respect that if the Dover–Dunkirk and Dover–Calais routes are consolidated, DFDS is budgeting to make an EBIT (before overheads) loss of around €[REDACTED] million in 2014. In addition, DFDS has

²⁵³ *ibid*, paragraph 3.2.

²⁵⁴ *ibid*, paragraph 2.5(d).

the ability to redeploy its resources on to other more profitable routes. As such, it is potentially forgoing profit by continued operation on Dover–Calais.

- 5.107 We considered that DFDS’s financial performance on Dover–Calais has not improved in the period since the Report and was not forecast to improve by DFDS while there were three operators on the route.
- 5.108 We also note that DFDS sets out in its annual report the financial effect of losses on the Channel and the structural problems of overcapacity on the Dover–Calais route. These are consistent with the Report findings on the losses incurred by DFDS and also the likelihood of its exit from Dover–Calais if the MFL service continues in its current form and ownership. We also consider that MFL’s loss-making position is also consistent with overcapacity on the route. Furthermore, DFDS’s statements in relation to Dover–Calais in the press releases and articles highlighted by GET (see paragraph 5.19) are consistent with the DFDS statements to investors – in particular, that the route suffers from overcapacity and the present situation is unsustainable.²⁵⁵
- 5.109 We note GET’s argument that Dover–Calais was at the ‘heart of [DFDS’s] route network for Europe’ and as such had significant importance to it from a geographical perspective. We found in the Report that Dover–Calais was seen as strategically important by DFDS (paragraph 8.97) but that its incentives to remain on a loss-making route long term, even if strategic, were not as strong as GET’s. We do not consider that this conclusion is changed by GET’s ‘heart of network’ argument.
- 5.110 We set out in the Report in paragraph 8.86 our view of DFDS’s incentives to remain on Dover–Calais given its statement at the time of launch of its strategic importance, as well as the resultant losses that it has sustained (and the prominence of these in its accounts), its historical willingness to exit unprofitable routes and its alternative options for redeployment of its resources. We consider that the evidence submitted by GET, the SCOP and DFDS does not change our view of DFDS’s incentives. DFDS still states the importance of being on the short sea but continues to make significant losses and has recently exited a number of routes.²⁵⁶ We also note that DFDS is chartering the *Molière* on a short-term basis reducing its exit costs.
- 5.111 With regard to GET’s and the SCOP’s arguments that DFDS was still operating on Dover–Calais and had extended the charter of the *Molière* (paragraphs 5.21 and 5.25), we consider that the uncertainty caused by the appeal of the Report had a fundamental effect on DFDS’s continued operation on the route

²⁵⁵ [§§]

²⁵⁶ Harwich–Esbjerg and Newhaven–Dieppe, both in early 2014.

using the *Molière*. At the time that the charter of the *Molière* expired, the CAT's decision relating to the appeal had not been made and therefore the outcome of this appeal was uncertain. DFDS's board minutes note this uncertainty and the role it played in its decision not to either acquire the *Molière* or to take up the offer of a 24-month charter. It chose to extend the charter for only one year.

- 5.112 We consider that DFDS continuing to operate on Dover–Calais in the short term, given the uncertainty of the CAT appeal and the subsequent remittal, is consistent with DFDS's statement set out in the Report that [X].²⁵⁷ It is also consistent with the statements made by Niels Smedegaard at the AGM that the outcome of the CMA inquiry is key to DFDS's continued operation on Dover–Calais.
- 5.113 We note GET and the SCOP's argument that DFDS may not be operating as an efficient operator (paragraphs 5.22 and 5.26). GET also argued that DFDS's own actions had affected its performance in 2013 because of the short-term decisions it had made about vessels (paragraph 5.94). DFDS told us that the effect of the short-term decisions it made (mainly about vessels) was €1–€2 million. Although this is a sizeable figure, adjusting for it in DFDS's route profitability would not lead to a significant reduction in its losses. We also note from our analysis in the footnote to paragraph 5.60 that DFDS is a more efficient operator on the route than MFL. We also noted the argument that DFDS might allocate its costs in such a way to increase artificially the loss on Dover–Calais. We reviewed DFDS's route cost allocation methodology and considered it reasonable²⁵⁸ (see Appendix J).

Conclusion on DFDS financial performance

- 5.114 We conclude that, for the reasons set out in paragraphs 5.104 to 5.113, DFDS's financial performance has not materially improved; we also do not consider that the submissions of GET and the SCOP relating to the extension of the charter of the *Molière* and various statements made in the press materially affect the conclusion in the Report that DFDS is likely to exit the Dover–Calais route, if the MFL service continues in its current form and ownership.

²⁵⁷ [The Report](#), paragraph 8.58.

²⁵⁸ We noted that the costs in respect of DFDS's Channel commercial team (which were highlighted in particular by the SCOP) represent commissions paid.

Conclusion on the MCCs proposed by GET and the SCOP

5.115 In the Report, we concluded that DFDS would be likely to exit the Dover–Calais route if the MFL service continued in its current form and ownership. We have assessed submissions from GET and the SCOP that there had been material changes since the date of the Report which mean that DFDS would exit. These possible material changes related to (a) the impact of the growth in demand in 2013 through to 2015; and (b) DFDS’s financial performance as well as various press statements attributed to DFDS. In relation to each of these factors individually (and all of them collectively), we do not consider that they are such as to impact materially on our assessment and conclusions in the Report that DFDS is likely to exit; our conclusion is therefore that no MCC has arisen in this regard. Since we have not found an MCC we also consider that the SLC finding in the Report is unchanged.

6. Remedies

- 6.1 We have considered whether there has been an MCC or other special reason that has arisen since the publication of the Report that would lead us to reach a different view on remedies. In this context, we believe that the change of circumstances or special reason must not only be material in its nature, but also should be relevant to the decisions that we are required to take when assessing whether a remedy is as comprehensive a solution to the SLC, or resulting customer detriment, as is reasonable and practicable.²⁵⁹ Accordingly, we have had regard to all relevant considerations, including alleged relevant changes in the market and material changes in the factors that were relevant to our original remedies decision.
- 6.2 In their submissions to us about the MCC, GET, the SCOP and DFDS put forward proposals for alternative remedies, or changes to the remedy set out in the Report.

Remedies specified in the Report

- 6.3 The remedies specified in the Report are detailed in Appendix K.

²⁵⁹ Under section 41(3), a decision by the CMA as to the action it should take to remedy the SLC and resultant detriment through its undertaking or order-making powers shall be consistent with its decisions as included in its report, unless there has been an MCC since the preparation of the Report or the CMA otherwise has a special reason for deciding differently. This reflects the CMA’s duty of consistency between its findings, as set out in its report, and the action that it takes as a result of those findings.

Alternative remedies proposed by GET

6.4 GET submitted that the CMA should, in devising any remedies in the event that the SLC finding stands, take account of the fact that the short-sea market is evolving significantly and quickly. GET said that any remedies imposed on it should therefore be temporary, proportionate and take account of imminent highly likely market changes (eg growth in short-sea freight volumes as a result of the MARPOL regulations and GDP growth). GET said that this meant that the long-term structural remedies previously adopted by the CMA were no longer appropriate.

6.5 GET submitted the following remedy options:

- Option 1: Maintain the current FCA Hold Separate regime for an additional period in order to allow for the impact of the MARPOL regulations and market growth to become evident (eg three years or until June 2017 to coincide with the expiry of the Inalienability Clause).²⁶⁰ At the end of this period, the CMA could then decide whether to open a market study into whether further action (ie a full market investigation reference) is needed in relation to the provision of ferry services on the short-sea route.
- Option 2: Maintain the current, more stringent, UK type of Hold Separate regime for the same further period, and with the same potential for a CMA market study, as outlined in Option 1.
- Option 3: Temporarily suspend operating the *Nord Pas-de-Calais* from the Port of Dover.

6.6 We concluded in the Report that behavioural remedies of this type would not be effective in addressing the SLC.²⁶¹ We also found in the Report that other remedies (including our chosen remedy) would address the SLC in a more timely manner than a market investigation. Moreover, we noted that the CMA could undertake a market study at its own discretion without the need for a recommendation or a remedy to that effect.²⁶² In addition, in assessing these remedy options we noted that GET told us that if there had been no change to the SLC in the Report, it considered that its proposals would not be effective.

6.7 GET also said that even if the CMA should reject the above remedies, it considered that the remedies originally proposed by the CMA in the Report

²⁶⁰ An Order made by the French Commercial Court on 11 June 2012 which authorised the sale of the Vessels and certain other assets formerly owned by SeaFrance to GET contained a provision declaring the Vessels to be 'inalienable' for a period of five years (the inalienability clause) which prohibited their sale. See [the Report](#), paragraph 10.23, and Appendix J, paragraphs 12–20.

²⁶¹ [The Report](#), paragraphs 10.152–10.153 & 10.62–10.64.

²⁶² *ibid*, paragraph 10.173.

were disproportionate. It said that the prohibition period on GET operating ferry services at Dover with the *Berlioz* and the *Rodin* and the prohibition on GET reacquiring or chartering the vessels should be reduced from ten to five years from the date the prohibition comes into effect. GET considered that a prohibition period of five years from the date of the completion of the acquisition of the former SeaFrance assets²⁶³ would be sufficient to remedy any SLC identified by the CMA. GET also considered that any remedies adopted by the CMA should contain an express requirement for them to be reviewed formally by the CMA in June 2017, to coincide with the expiry of the Inalienability Clause. GET said that this would help to reduce the risk of the remedies being maintained if the short-sea market did develop in the way that it anticipated.

- 6.8 Given our conclusion set out in paragraph 5.115, we conclude that none of GET's proposed remedy options detailed in paragraph 6.5 would be effective in addressing the SLC. We considered GET's argument that the prohibition period should be reduced but, given that we have not found an MCC, we find no reason to change our initial view on the length of the prohibition period. We also noted GET's argument that there should be a requirement for the CMA to review the remedies in June 2017. However, the CMA has a statutory duty to keep under review undertakings and orders made under the Fair Trading Act and under the Act²⁶⁴ and an express requirement is therefore unnecessary.

Alternative remedy proposed by the SCOP

- 6.9 The SCOP submitted a remedy to us that it had not proposed at the time of the Report. Although the proposal was in draft form and not fully developed, it was similar in some respects to the remedy concerning the sale of the MFL business that was considered in the Report (paragraph 10.53). At the time of the Report, this remedy was rejected on the basis that the only likely purchaser was DFDS, which was not interested in a divestiture that involved taking over the commercialisation contract with the SCOP. We also found that the SCOP thought it would be unlikely that a purchaser would want to take over the commercialisation contract.
- 6.10 The SCOP was not considered as a potential acquirer of that business, nor did it put itself forward as a potential purchaser. However, the SCOP indicated that its improved financial position and establishment on the market as a reliable provider meant that it may be able to obtain the funding to enable it to take on the commercial risk associated with the operation of the MFL

²⁶³ The acquisition by GET of the former SeaFrance assets completed on 2 July 2012.

²⁶⁴ See [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders](#), CMA11.

business. Accordingly we have considered whether the SCOP's changed circumstances are such as to lead us to believe that the remedy proposal put forward by the SCOP would be a viable effective remedy that would represent as comprehensive a solution to the SLC as is reasonable and practicable.

6.11 The SCOP's proposal consisted of:

- the complete separation of the MFL business from GET, with all MFL SAS staff transferring to the SCOP. SCOP would be responsible for marketing and ticket sales (freight and passenger)
- behavioural remedies to match those offered to the FCA
- a staggered reduction over time in the revenues available to GET (as opposed to capacity), with corresponding reductions in the per-crossing price paid to the SCOP
- extension of the SCOP's existing bareboat charters and commercialisation agreement (as amended in light of the above) to June 2017 to tie in to the end of the inalienability provisions in the French Commercial Court judgment of 11 June 2012
- an option for the SCOP to extend its bareboat charter on arm's-length terms for a further period, not to expire before June 2017
- agreement that if the remedy could not be implemented within six months, or in the event that the SCOP subsequently ceased operating the vessels, the CMA's existing prohibition on GET operating services to the Port of Dover would apply for an appropriate period. The six-month period would run concurrently with the six-month period for the implementation of the remedy set out in the Report

6.12 The SCOP submitted²⁶⁵ that the proposal met the requirements of section 35(4) of the Enterprise Act to achieve 'as comprehensive a solution as is reasonable and practicable' in light of the constraints on divestment imposed by the French Commercial Court judgment. The SCOP considered that this new remedy proposal, if properly developed, would result in the complete exit of GET from the MFL operation by June 2017 at the latest. It argued that its proposal removed any concerns in the short term that GET would continue to have an interest in the SCOP's financial success with the only remaining interest for GET consisting of the arm's-length bareboat charter fees payable

²⁶⁵ [SCOP response to invitation to comment on MCC](#), paragraphs 5.12 & 5.13.

by the SCOP. It also argued that it would eliminate the possibility for any internalisation effect as GET's revenues under the commercialisation agreement would be reduced on a staged basis from 100% to 0% over the period.²⁶⁶

Review of the SCOP remedy

6.13 The SCOP's remedy proposal is intended to separate the MFL SAS business from GET with the SCOP taking over both the risk and reward of operating the three vessels owned by GET on the Dover–Calais route. It is a structural remedy involving the divestiture (through the transfer) of the business (excluding the vessels) of MFL SAS by GET to the SCOP over a three-year period with interim behavioural remedies to match those offered to the FCA over the three-year divestiture period.²⁶⁷

6.14 In our consideration of the SCOP's remedy, we first look at its effectiveness by considering: its level of development, its timeliness, and its risk profile in respect of purchaser risk, composition risk and asset risk. If we conclude that the remedy could be effective, we then look at the proportionality of the remedy. In carrying out this assessment, we have looked at the remedy on a stand-alone basis against the CMA guidelines.²⁶⁸

The effectiveness of the structural remedy

• *Development of the proposed remedy*

6.15 The CMA's guidelines²⁶⁹ state that the CMA will seek remedies that have a high degree of certainty of achieving their aims. Further, the scope and likely content of these remedies should be reasonably clear at the time our final report is published, so that a view can be formed as to their likely effectiveness. We do not consider it consistent with our statutory duties to accept a

²⁶⁶ The rate and timing of the reduction over this period was not set out in the remedy proposal.

²⁶⁷ The remedies given to the FCA were:

- 'Eurotunnel Group undertakes not to grant, on its rail freight tariffs, any rebates conditional on the customers using its maritime freight transport service and in particular not to take into account the freight volumes transported by its maritime service when negotiating tariffs related to its rail freight transport service.'
- 'Eurotunnel Group also undertakes not to discriminate in any way [against] customers who do not use its maritime transport service as opposed to those customers who do use them.'
- 'To ensure the effectiveness of this undertaking, Eurotunnel Group commits to conclude separate contracts for its rail and maritime freight transport services and to assign the sales of its maritime transport service to a specific team, separate from the team in charge of the marketing of its rail transport service so that both teams are trading independently from each other.'

These undertakings were specified to have a duration of five years from the date of the decision by the FCA authorising the notified transaction, subject to a review clause. GET also gave certain undertakings to the FCA that would come into effect if GET were successful in its tenders for the contracts to operate the ports in Boulogne-sur-Mer and Calais.

²⁶⁸ [CC8, Merger Remedies: Competition Commission Guidelines](#), adopted by the CMA.

²⁶⁹ *ibid*, paragraph 1.8(d).

remedy that is reliant on further negotiation between parties following publication of the Report.

6.16 The SCOP told us that the proposal was in draft form and as such:

- not all the elements of the proposal had been fully developed
- [§] (see paragraph 6.27)
- it had discussed its remedy proposal in principle but had not held detailed discussions with GET (see paragraph 6.32)

6.17 We note that the draft nature of the remedy and the fact that no detailed discussions with key entities have taken place is in direct contrast to the detailed nature of the chosen remedy in the Report.

- *Implementation period*

6.18 The CMA's guidelines²⁷⁰ state that 'Remedies that act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the long term or where the timing of the effect is uncertain'.

6.19 In assessing the SCOP's remedy proposal, we note that our chosen remedy has an implementation date of six months from the date of the CMA Order to implement the remedy. This timescale is consistent with the CMA's normal maximum divestiture period for a structural remedy.²⁷¹

6.20 We looked at the SCOP's proposed remedy and considered that it had the following timeliness risks and risks about certainty of outcome:

- The SCOP's proposal has a three-year period before it is fully implemented. This has the effect that the SLC would continue to persist for three years. This is significantly longer than the divestiture period of our chosen remedy in the Report and that in CMA guidelines.
- Therefore throughout the three-year implementation period GET and the SCOP would remain interdependent because GET would retain an economic interest in the SCOP. This compares with the remedy in the Report where the interdependence only exists for six months. The SCOP argued that any possible internalisation effect would be reduced as GET's revenues would decrease over the three years but the SCOP also

²⁷⁰ CC8, paragraph 1.8.

²⁷¹ *ibid*, paragraph 3.24, which states that the length of the divestiture period will depend on the circumstances of the merger but will normally have a maximum duration of six months.

suggested that the revenue percentage may not be zero at the end of the implementation period. The SCOP proposal envisages a percentage of revenues being paid to GET (as opposed to capacity) but this does not address our internalisation concerns because the economic interest would remain.

- The three-year period would also be subject to uncertainty. Funding would be required to be in place to cover at least the three-year implementation period but if the SCOP did not make enough profit it would be unable to take on the full MFL business after the implementation period. Further funding would then be required to support MFL further. The longer the time period over which funding is required, the greater the business risk that insufficient funding is available to meet the business's requirements or that financial support is withdrawn by the funder. This leads to significant risks around the certainty of the outcome of the remedy and its effectiveness at addressing the SLC. Financing of the SCOP's remedy is discussed in more detail in paragraphs 6.23 to 6.30.
- The SCOP proposal includes behavioural remedies to match those given to the FCA. These remedies would require monitoring for a three-year period. We consider that this necessarily increases the risks over monitoring and compliance, and circumvention.

6.21 We consider that for the reasons set out in paragraph 6.20, the SCOP's proposed implementation period is not sufficiently timely and there is a significant degree of uncertainty that it will address the SLC.

- *Purchaser risk*

6.22 In assessing the nature of purchaser risk, we have looked at financial risk relating to the SCOP obtaining sufficient funding, and third party risk relating to GET's agreement to the divestiture.

- *Financial risk*

6.23 The SCOP's proposed remedy requires it to take over the entirety of the business risk of operating the *Rodin*, the *Berlioz* and the *Nord Pas-de-Calais*. This would mean a fundamental change to the SCOP's business model, including its financial and operating structure.

6.24 The SCOP currently operates the vessels and provides the crews. It is responsible for the pricing, marketing and selling of freight and passenger tickets as agent of MFL (although it subcontracts the marketing of services to freight customers back to MFL). MFL buys ferry crossings from the SCOP and

receives income from sales of passenger and freight crossings (and a commission on on-board sales), thus effectively assuming the commercial risk from the operation. After the implementation period the SCOP would assume all these responsibilities and the risk and reward associated with them.

- 6.25 We note that in the Report the SCOP told us that ‘it did not have the financial capability to operate the MFL business independently because the operation was not profitable, and the SCOP did not expect to have such financial capability for [X]’.²⁷² Whilst it told us that its financial position had improved since the Report, we note that there is still a significant difference in the relative sizes of the SCOP and MFL and in the level of the SCOP’s profits and financial resources compared with MFL’s losses. The SCOP recorded an EBIT of €[X] for the year ended 31 December 2013 and had capital of €[X]. It also had a cash balance of €[X]. The SCOP told us that its capital was now €[X] and was [X]. The SCOP is budgeting in 2014 to achieve an EBIT of €[X].²⁷³
- 6.26 In comparison with the SCOP, MFL has been loss-making since it started services on Dover–Calais in August 2012. MFL recorded a loss for 2013 of €[X] million and is not forecast to be profitable until 2016.²⁷⁴ We examined the MFL budget and note that in 2016 MFL is budgeting to [X].²⁷⁵ The SCOP’s remedy does not include the ownership of the vessels; these would be chartered from GET. As such, we consider that the €[X] more accurately reflects the profitability of the MFL business under the remedy in 2016; although we note it is likely that cost savings would be made by the SCOP taking over the MFL SAS business.
- 6.27 The SCOP said that it had had [X]. However, we note that it has [X]. As a consequence, the level of finance required to enable the effective implementation of the remedy has not been determined.
- 6.28 In addition, as set out in paragraph 5.79, we consider that the Dover–Calais route is unlikely to be able to sustain three operators. This raises fundamental issues as to whether the SCOP would be able to raise the necessary finance to fund its proposal.
- 6.29 We would need to look at the nature of the funding under our assessment of purchaser suitability.²⁷⁶ We would need to ensure that sufficient funding was available to enable the remedy to be effective. We would also need to assess

²⁷² *ibid*, paragraph 10.104.

²⁷³ The SCOP told us that it was expecting a [X].

²⁷⁴ The SCOP said, however, that significant increases in traffic levels in Q1 2014 compared with the same period in 2013 had resulted in GET reporting around a [X]% increase in revenues for MFL.

²⁷⁵ MFL forecast profitability in 2016 assumes that MFL is a fully integrated business with the SCOP, including ownership of the vessels.

²⁷⁶ CC8, paragraph 3.15.

whether the source and/or conditions related to the funding raised issues of independence and/or regulatory and competition concerns. We note in this regard that funding from GET or state aid could raise such concerns.

6.30 We consider that, for the reasons set out above, there is a significant financial risk associated with the SCOP's proposal.

- *Third party risk*

6.31 GET's consent is fundamental to the remedy being effective.

6.32 The SCOP told us that it had discussed its remedy proposal in principle with GET but had not held detailed discussions with GET. We note that in the Report one of the reasons for rejecting GET's structural remedy proposal was that the proposal had not been discussed with the SCOP, 'without whose full and active support the whole scheme collapses at the outset'.²⁷⁷

6.33 We note that the SCOP's proposal would fundamentally change the relationship between GET and the SCOP. It reduces the costs GET would incur and the proportion of revenues passing back to GET under the commercialisation agreement from its current position of 100% to 0% over the three-year implementation period. As a result, after implementation GET's only return would be through chartering the vessels.

6.34 We consider that GET's agreement, whilst possible, lacks an appropriate degree of certainty, especially given the fundamental change in the nature of the relationship with the SCOP and its return on its investment in the vessels, including the recovering of start-up losses. We consider that the requirement to obtain GET's agreement is a significant risk to the effectiveness of the proposed remedy.

6.35 We note that the chosen remedy in the Report is not affected by third party risk.

- *Composition risk*

6.36 We assessed the composition risk²⁷⁸ of the SCOP proposal. We said in the Report that it was unlikely that a purchaser could be found for the sale of MFL SAS without the vessels. We also found that it was unlikely that a purchaser would take over the commercialisation contract with the SCOP. As such, we

²⁷⁷ [The Report](#), paragraph 10.108(a).

²⁷⁸ The risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.

considered the sale of MFL SAS unlikely to be an effective remedy.²⁷⁹ As noted in paragraph 6.10, the SCOP was not considered as a potential acquirer of that business. However, under its remedy proposal the SCOP has now indicated that it would be willing to take on the commercial risk associated with the operation of the MFL business and this would negate the need for a third party purchaser.

6.37 In the Report,²⁸⁰ we considered that:

a number of contractual arrangements would be required to address issues associated with the time-limited nature of the existing contracts: for example ... GET should be required to renew the charters to the SCOP upon their expiry; ... and GET should be prohibited from entering into any new commercialization contract with the SCOP or any other party for the operation of the Vessels and from operating the Vessels itself.

6.38 The SCOP's proposal includes: the extension of the SCOP's existing bareboat charters and commercialisation agreement to June 2017 to tie in to the end of the inalienability provisions in the French Commercial Court judgment of 11 June 2012; and the option for the SCOP to extend its bareboat charter on arm's-length terms for a further period not to expire before June 2017.

6.39 We consider that for the remedy to be effective, it would require certainty in respect of the charter's time period. In addition, the charter would need to be of a sufficient length to prevent circumvention of the remedies by GET. Circumvention could occur, for example, by GET terminating the charter at the end of its initial period (or extension) and carrying out an asset swap with a third party ferry company. This would allow it to operate on Dover–Calais within the ten-year period set out in the Report.²⁸¹ The remedy would appear though to negate the need for a commercialisation agreement with GET as the business of MFL would be transferred from MFL to the SCOP and GET's revenue from the vessels' operation would end in June 2017.

6.40 We consider that for the remedy to be effective it would require a long-term charter (ten years) and sufficient additional restrictions to be placed on GET in respect of how it uses the vessels in the event of the termination of the GET–SCOP contract within the ten-year period. In addition, any other contracts (including any form of commercialisation agreement) entered into at or before the remedy is fully implemented would need to be reviewed and agreed by the

²⁷⁹ [The Report](#), paragraph 10.53.

²⁸⁰ *ibid*, paragraph 10.50.

²⁸¹ *ibid*, paragraph 10.183.

CMA to ensure that independence of the SCOP and the ferry services from Dover to Calais is maintained. The safeguards set out in the Report (see paragraph 10.183) would also need to apply.

- *Asset risks*

6.41 We consider that GET and the SCOP have the incentive to ensure that there is not a material risk that the competitive capabilities of the assets would be allowed to deteriorate.

Conclusion on the effectiveness of the SCOP proposal

6.42 We consider that the SCOP's proposal has significant risks in relation to:

- the draft nature of the proposal
- the timeliness of the proposal in addressing the SLC and the certainty that the remedy would be effective at the end of the three-year implementation period
- the ability of the SCOP to raise sufficient finance given the level of MFL losses; the period to its forecast break-even; the change in the SCOP's business risk; and the ability of the Dover–Calais route to sustain three operators
- the ability of the SCOP to obtain GET's approval for the proposal without whose full and active support the remedy could not be implemented
- the independence of the SCOP from GET during the three-year implementation period
- the requirement for monitoring and enforcement during the three-year implementation period

6.43 We also consider that the remedy has risk specifically over the proposed charter length and the ability of GET to circumvent the remedy.

6.44 Furthermore, we consider that the SCOP's remedy does not provide a timely solution to the SLC. In addition, the SCOP's remedy entails significant risks and an unacceptably high level of uncertainty.

6.45 Given the risks identified above, and specifically in respect of the three-year implementation period, we have not assessed the effectiveness of the behavioural aspects of the SCOP's proposal (paragraph 6.11).

6.46 We therefore conclude that the SCOP's remedy proposal would not be effective in addressing the SLC.

Proportionality

6.47 Given our conclusion above that the remedy proposal would not be an effective remedy to address the SLC, we have not assessed the proportionality of the SCOP's proposed remedy.

DFDS's proposed amendment to the Report remedy

6.48 DFDS submitted that the period of six months from the date of the CC's Order in which to implement the remedy, as set out in the Report, was too long. It argued that a period of three months was appropriate and that this was particularly imperative given the time that had by then elapsed since publication of the Report.

6.49 DFDS submitted that the following factors in combination should be regarded by the CMA as an MCC and/or special reason pursuant to section 41(3) of EA02 that would justify the originally envisaged six-month period to be shortened to three months (at a maximum):²⁸²

- Six months would effectively allow MFL to operate for the whole of 2014. This would be at odds with selecting remedies that effectively addressed the identified anticompetitive outcome and that were the least costly, effective remedies.²⁸³
- GET had been aware of the CC's decision and proposed remedy since early June 2013 (and arguably since the CC's provisional findings in February 2013). It had therefore already had many months to consider what arrangements would need to be made in order to implement the remedy. Further, the sale of the vessels could easily be completed to an approved purchaser within three months (and potentially even more swiftly).²⁸⁴ Any objection by GET to a three-month period would, in DFDS's view, merely reflect its interest in further prolonging the process and causing additional loss to DFDS.

²⁸² [DFDS response to invitation to comment on MCC](#), paragraph 2.5.

²⁸³ See [CC8](#), paragraph 2.13. See also paragraph 3.24, which states that the divestiture period 'will depend on the circumstances of the case, but will normally have a maximum duration of six *months*' (emphasis added). This is a case where a period significantly shorter than the usual maximum is appropriate.

²⁸⁴ DFDS commented that a vessel sale could easily be completed within a month.

- DFDS's losses as a result of GET's continued presence on the Dover–Calais route continued to mount.
- DFDS said that it took the decision to extend the charter for the *Molière* until October 2014²⁸⁵ in the hope of a swift resolution to these proceedings. The vessel had now been sold to Stena by its previous owner. As noted in paragraph 5.103, DFDS said that in light of the difficulty of procuring suitable tonnage for the Dover–Calais route, it made contact with Stena to explore the possibility of extending the charter. Stena indicated that this might be possible for a short period before the vessel was transferred for use elsewhere. No agreement had yet been reached; [✂].

6.50 DFDS told us that GET had submitted a letter and shown an interest in the upcoming tender for Dieppe–Newhaven and that this showed that it had already been looking for alternative routes for redeployment of the vessels. In addition, it said it considered that disruption for customers would be limited, as interoperability agreements were in place between ferry operators which would enable freight and passengers to still cross the Channel.

6.51 GET told us that three months was too short a period to ensure an orderly implementation of the remedy. It said that three months would negatively affect not just GET/MFL but would also would create 'a sales disruption in the market and serious disruption for customers', who were already booking trips for the rest of the year. It stated that it would also lead to issues during the peak summer period when capacity of ferry operators and Eurotunnel was constrained. In addition, GET told us that due to the uncertainty around the outcome of the appeal and the remittal, no preparatory work on remedies had been undertaken and, as such, GET was no closer to be in a position to implement the remedy than it was at the time of the Report.

Review of DFDS remedy proposal

6.52 DFDS's arguments set out in paragraphs 6.48 to 6.51 concern the negative effects on DFDS of maintaining the six-month implementation period given the length of time since the Report was published.

6.53 We considered in the Report²⁸⁶ the different timescales submitted by parties to sell a vessel(s), if GET chose to do this, and the appropriate time period for GET to apply to the Court to lift the inalienability clause. DFDS has not

²⁸⁵ The charter period was due to come to an end in October 2013.

²⁸⁶ [The Report](#), paragraph 10.114.

provided any new evidence to show that our conclusion on these issues is incorrect.

- 6.54 We also considered²⁸⁷ the time to effect an orderly exit of the MFL ferry services from the Port of Dover, and to make arrangements to operate on other routes, should GET wish to do so. We do not consider that DFDS's arguments change our view on GET's ability to make an orderly exit from Dover and transfer operations to other routes. DFDS argued elsewhere in its submissions on the MCC that the appeal and the subsequent remittal had led to a period of uncertainty in relation to the decision set out in the Report. Therefore it is reasonable that GET would not have undertaken preparatory work in the period since the Report in respect of implementing the remedy.
- 6.55 We note that DFDS argued that interoperability agreements would mean that disruption for customers would be limited. However, we consider that even with such agreements in place it would cause significant disruption for passengers, many of whom book in advance. It would also affect freight customers who may be looking to take advantage of volume discount in framework agreements and therefore also plan their journeys in advance.
- 6.56 We note DFDS's arguments in respect of the financial effect of MFL continuing operating out of Dover and on its decision whether to charter or acquire an alternative vessel to the *Molière*. However, we consider that following the implementation of the Order, DFDS has certainty in respect of GET's continued operations out of Dover. Our view is that this provides the necessary certainty of outcome to DFDS to allow it to take long-term strategic decisions. We do not consider that the additional three-month period to DFDS's proposed three months would have a material effect on the long-term strategic decisions that DFDS will need to take in relation to its operation on Dover–Calais.

Conclusion on DFDS's proposal

- 6.57 We conclude that circumstances have not changed so materially as to affect our conclusion on timescale for implementation of the remedy as set out in the Report.

Proportionality of remedies in the Report

- 6.58 GET argued that in considering the nature and extent of any remedies the CMA must take account of the loss of customer benefits that only arise as a

²⁸⁷ *ibid*, paragraph 10.113.

result of the transaction. It submitted that MFL's entry on to the Dover–Calais route had already created price competition, which had been to the immediate benefit of customers, and that DFDS had itself valued the benefits of the price competition resulting from MFL's entry at about €50 million annually²⁸⁸ and had indicated that if MFL exited Dover–Calais, DFDS would raise prices. GET further argued that this benefit was real but that any future benefit from the remedy set out in the Report was less certain and more speculative. This, in its view, would argue against the imposition of a remedy preventing MFL from operating from the Port of Dover, and for any such remedy (if one is to be imposed) having a shorter duration.

6.59 GET argued therefore that any remedies should be proportionate in the sense that they should be for a shorter duration than those proposed by the CMA and should allow GET freely to redeploy the Vessels to routes not involving the Port of Dover. GET said that the provisional consideration of possible MCCs had not addressed the submissions which GET made as to why, even if the CMA's previous SLC findings were upheld, the remedies set out in the Report:

- should be for a duration of five years, not ten years
- should not require the CMA's prior consent for a divestment or sale of the Vessels to an independent entity who is not at the time of the transaction an operator on the short sea

6.60 In paragraph 10.128(b) of the Report, we stated that:

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

6.61 We note that although there has been price competition in 2013 which resulted in DFDS's estimate of the effect of MFL's entry of €50 million

²⁸⁸ [DFDS hearing summary](#), paragraph 10.

annually as set out in paragraph 6.58, we believe that it remains the case that if MFL remains on the route DFDS will exit. As a result, we consider that our view in the Report that ‘consumers would not benefit from competition between three operators for more than a short period’²⁸⁹ remains the case. As such, it remains the case that the costs of the SLC over the long term would continue to significantly outweigh any short-term benefits.

- 6.62 We note the concerns raised by the Mayor and other representatives of Calais about the impact of the decision on employment in Calais (paragraph 5.28). We continue to conclude that DFDS would be likely to exit the Dover–Calais route if the MFL service continued in its current form and ownership and note that if DFDS exits this would also lead to substantial job losses.²⁹⁰ In the Report, we noted (paragraph 10.135) that DFDS told us that if it acquired the *Berlioz* and the *Rodin* it was very possible that it would hire some of the SCOP employees as it would need to hire an additional crew because one of the vessels it currently operated on the Dover–Calais route would be redeployed to another route. In the Report we said that, taking into account the potential loss of employment at DFDS and the SCOP, we considered that it was not appropriate for the CMA to place more weight on preserving the jobs of the SCOP members than those of the employees of DFDS, and considered that the sustainable and efficient level of employment would be determined best through the process of competitive rivalry.
- 6.63 We also note that the remedy in the Report prohibits GET from operating ferry services at the Port of Dover with the *Berlioz* and the *Rodin* for ten years and with any vessel for two years. GET is therefore able to redeploy the Vessels to routes not involving the Port of Dover.

Conclusion on remedy proposals

- 6.64 We considered GET’s remedy proposals. We note that GET had submitted similar remedies during the original inquiry to those it has submitted now and conclude that we see no reason to amend our remedy to take account of the GET proposals.
- 6.65 We considered the remedy proposal from the SCOP. We noted that there were risks with this proposal. The proposal has not been discussed in detail with GET; there are substantial doubts over the ability of the SCOP to finance the proposal; and the three-year implementation period creates significant uncertainty of outcome for both the funder and the transaction parties. We

²⁸⁹ [The Report](#), paragraph 10.128.

²⁹⁰ In the Report, we noted that DFDS told us that it employed approximately 400 people on the Dover–Calais route, of which approximately 280 were ex-SeaFrance employees.

also have concerns over whether the SCOP would be wholly independent from GET under these arrangements, and any lack of independence would result in a failure of the proposed remedy to address the SLC. The SCOP proposal would also require monitoring for the three-year implementation period. The proposed remedy also raises issues about charter length and the risk of circumvention.

- 6.66 The concerns over the SCOP remedy are such as to lead us provisionally to conclude that in its current form there is not the requisite degree of certainty that this proposal will produce a comprehensive solution in addressing the SLC identified.
- 6.67 We note that the remedies specified in the Report would not prevent another suitable purchaser, fully independent of GET, from financing the acquisition of MFL and for the SCOP to continue to operate the vessels.
- 6.68 We considered the DFDS proposal to reduce the time for implementation of the remedy and conclude that there is no reason to change our conclusion on timescale set out in the Report.
- 6.69 We conclude that it remains appropriate, subject to our consideration of any responses to our consultation, to take remedial action consistent with our decisions as set out in the Report.