

Letter sent via e-mail to:
P&O Ferries Holding Ltd – c/o Mr
Francis Tyrrell Bircham Dyson Bell
LLP;
DFDS Seaways BV (formerly
Norfolkline Shipping BV) c/o Mr
Edmund Wollam Hill Dickinson LLP;
Sea France SA c/o Mr Philippe
Ruttley Clyde & Co LLP;
Dover Harbour Board c/o Mr Richard
Prowse Eversheds LLP

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Dear Sirs

HARBOURS ACT 1964 - SECTION 31

Objections to the harbour dues charged by Dover Harbour Board for the year 2011

Objectors: P&O Ferries Holding Ltd, SeaFrance SA and (late objection) DFDS Seaways BV (formerly Norfolkline Shipping BV) (“the objectors”)

1. I am authorised by Mr Norman Baker, Parliamentary under Secretary (the Minister), on behalf of the Secretary of State for Transport (the Secretary of State) to inform you that consideration has been given to the report of the Inspector, Mr Lloyd Rodgers, BEng (Hons), CEng, MICE, MBA who held a public inquiry on 11 sitting days, between 13 September and 14 October 2011, into objections lodged with the Secretary of State under section 31 of the Harbours Act 1964 against harbour dues charged by Dover Harbour Board (DHB).
2. P&O Ferries Holdings Limited and SeaFrance SA lodged objections to the harbour dues charged by DHB from 1 January to 31 December 2011 (the 2011 harbour dues). Their objections were lodged on 7 February 2011 and 8 February 2011 respectively. A late objection was received from DFDS Seaways BV (formally Norfolkline Shipping BV). Objections were also lodged by DFDS Seaways BV and P&O Ferries Holdings Limited to the harbour dues charged by DHB from 1 January to 31 December 2010 (the 2010 harbour dues). Their objections were lodged on 17

June 2010 and 24 June 2010 respectively. A late objection was received from SeaFrance SA.

3. The objectors and DHB agreed at the public inquiry that the 2011 harbour dues comprised the charges in the Ferry Tariff booklet published by DHB for 2011 contained in the sections identified as Conservancy Charge, Harbour Dues, Passenger Dues, Wharfage and Security (IR 6).
4. This letter conveys the Minister's decision taken in pursuance of section 31(6) in relation to the 2011 harbour dues. Although the report and public inquiry referred to in paragraph 1 considered objections in relation to both the 2010 and 2011 harbour dues jointly, a separate letter has been sent today to all parties to convey the Minister's decision in relation to the 2010 harbour dues.
5. The Secretary of State has not been personally involved in the making of the Minister's decision. References to the Secretary of State in this letter in relation to the making of the decision mean the Minister acting on behalf of the Secretary of State.

The Inspector's Report

6. In this letter, references to paragraph numbers in the Inspector's report are indicated by the abbreviation "IR". A copy of the Inspector's Report is attached to the decision letter covering the 2010 harbour dues.
7. The Inspector has considered all of the objections to, and representations about, the harbour due charges made in writing and orally at the Inquiry and has submitted his report to the Secretary of State. His conclusions are at IR 247 to IR 467 and his recommendation is at IR 468. The Inspector recommended that, in accordance with section 31(6)(a) of the Harbours Act 1964, the Secretary of State should approve the 2011 harbour dues.

8. The 2011 harbour dues were set by applying a percentage uplift to the 2010 harbour dues. The Inspector noted that many of the underlying arguments were common to both the 2010 and 2011 harbour dues and, in addition to considering those, went on to look at the arguments specific to the uplift applied in 2011 (IR 290).

The Secretary of State's Decision

9. The Secretary of State has carefully considered the Inspector's report, and for the reasons set out below, accepts the recommendation of the Inspector that the 2011 harbour dues should be approved. The Secretary of State approves the charges in accordance with section 31(6)(a) of the Harbours Act 1964 subject to a limit on the period during which the approval is to be of effect of 12 months from 1 January 2011.

The Secretary of State's Reasoning

10. The Secretary of State in considering the Inspector's report makes the following comments on matters raised in the report.

Procedural Matters

11. The Secretary of State notes that the Inspector sets out a number of procedural matters at IR 1 to IR 14. In particular, it is noted he recorded that only P&O Ferries Holdings Limited (P&O) and SeaFrance SA (SeaFrance) had made timely objections to the 2011 harbour dues, whereas DFDS Seaways BV (DFDS) had made a late objection. In relation to the 2010 harbour dues, only P&O and DFDS Seaways BV had made timely objections to the 2010 harbour dues and SeaFrance had made a late objection. In each case the Department for Transport had accepted the late objection as a valid representation.
12. The Secretary of State also notes that the three ferry operators intended to present a common case to the inquiry and that DHB accepted that, in the interests

of expediency and efficiency, all three of the ferry operators should be regarded as having objected to the 2010 and 2011 harbour dues. This was accepted by all parties involved. The Secretary of State further notes that only DHB and the ferry operators gave evidence at the Inquiry, but that written representations were also received from other persons and were taken into account by the Inspector. These are detailed at IR 5 and IR 230 to IR 246.

13. The Secretary of State is satisfied with the way the Inspector dealt with this matter in IR 4. The Secretary of State accepts that no one was prejudiced or prevented from putting forward their case at the time, and that the Inspector took into account all relevant evidence.

14. It has come to the attention of the Secretary of State that since the close of the inquiry, SeaFrance has been the subject of corporate liquidation proceedings in France. SeaFrance's UK solicitors, Clyde & Co, have informed the Department that SeaFrance was placed under judicial liquidation by order of the Tribunal de Commerce of 16 November and this took effect on 9 January 2012. Clyde & Co have also explained that SeaFrance has ceased trading but the company remains in existence at the present time. At the time when its objections were made to the Secretary of State SeaFrance was operating four ferries between Dover and Calais. As such SeaFrance had a substantial interest in the 2010 and 2011 harbour dues, satisfying the requirement for objections under section 31(2) of the Harbours Act and for representations under section 31(4). The Secretary of State takes the view that the subsequent liquidation proceedings do not impact on the decision making process or affect the Secretary of State's decision.

The objectors' case

15. The objections lodged against the 2011 harbour dues were expressed to be made on the ground that the charge ought to be imposed at a rate lower than that at which it was imposed.

16. The objectors' case is set out in IR 21 to IR 105 and Annexes D and G of the Inspector's report. The Secretary of State has given full consideration to the points raised by the objectors.

DHB's case

17. The case for DHB that the 2011 harbour dues should be approved by the Secretary of State is set out in IR 106 to IR 229 and Annex E of the Inspector's report. The Secretary of State has given full consideration to the points raised by DHB.

18. After the inquiry finished sitting, DHB, on 9 December 2011, submitted a representation consequent upon the Secretary of State's decision to make a Harbour Revision Order for a new Terminal 2 at Dover Harbour. At the same time DHB submitted a response to the objectors' closing submissions on competition law issues.

19. The Secretary of State was informed by DHB's solicitors (Eversheds) that the representations submitted on 9 December 2011 had not been forwarded to the objectors. For completeness the Department wrote to the objectors enclosing DHB's representations. No further representations were received by the Secretary of State in response to that letter. The Secretary of State considers that the representation concerning Terminal 2 would add nothing of significance to the consideration of the issue by the Inspector at IR 367 – IR 398 and has therefore disregarded the representation made by DHB on 9 December 2011 concerning Terminal 2.

20. The treatment of DHB's representation in response to the objectors' closing submission on competition law issues is subject to the following considerations. The representation was made with the consent of the Inspector and the knowledge of the other parties. A copy of the representation is enclosed. The representation contained argument on three issues: the role of the Secretary of State, dominant position and abuse. These issues are relevant to the applicability of and

compliance with EU and UK competition law, a matter which the Inspector determined to be outside the scope of his inquiry. The representation does not attempt to introduce any new evidence. Although the representation was submitted after the end of November 2011 which was the timing agreed at the inquiry, the delay has not caused any prejudice or other adverse effects. Having regard to these circumstances the Secretary of State considers that it is fair and reasonable to take the representation made by DHB on 9 December 2011 concerning competition law issues into account and has done so.

The Statutory Framework

21. The Secretary of State notes that the Inspector set out at IR 248 to IR 251 the statutory basis for the setting of harbour dues under the Harbour Act 1964 and for the lodging of objections to harbour dues. IR 252 to IR 255 describes the powers and duties of the Secretary of State when considering objections. The Secretary of State is satisfied that the Inspector correctly identified and summarised the relevant provisions.
22. The Secretary of State notes that prior to the Inquiry officials at the Department for Transport published guidance on the role of the Secretary of State in reaching decisions under Section 31 of the Harbours Act 1964. This was available to all the parties before the Inquiry took place and was taken into account by the Inspector when holding the inquiry (IR 263 and IR 270).
23. The Secretary of State notes that the Inspector heard arguments as to whether section 31 enabled the Secretary of State to issue a direction requiring a rebate of harbour dues collected in previous years or reducing the harbour dues so that they did not cover DHB's costs. The Secretary of State accepts the Inspector's analysis and conclusions on this issue set out in IR 272 to IR 277.

Policy and Guidance

24. The Secretary of State notes that the Inspector at IR 257 to IR 262 identified government policy and guidance documents to which he attached substantial weight. None of the parties to the Inquiry raised any substantive objection to their use. These documents included *Modernising Trust Ports: A Guide to Good Governance* published by DETR in 2000 (MTP1) and *Modernising Trust Ports* (second edition) published by the Department for Transport in 2009 (MTP2).
25. MTP2 was intended to update and replace MTP1, which is no longer current in England (and Wales). The Secretary of State notes that the assessment criteria which the Inspector derived from the policy and guidance documents as set out in IR 282 includes criteria ascribed to MTP1. However, each of these criteria can be found in MTP 2 or another cited document, as well as in MTP1. Whilst the criterion that dues should not be imposed for services that port users do not need is expressed by the Inspector to be found only in MTP1, in fact it also appears in MTP2 paragraph 1.2.7. Accordingly the Secretary of State considers that the Inspector's reliance on MTP1 has not materially affected his conclusions on the criteria to apply in considering the objections (IR 279 to IR 282) and the Secretary of State accepts the criteria identified in IR 282.

Privatisation

26. The Secretary of State notes the Inspector's remarks about the objectors' concerns over DHB's voluntary privatisation proposals (IR 283 to IR 284). As referred to by the Inspector at IR 285, officials at the Department indicated before the inquiry that any possible future change of status of DHB could not be made before the end of 2011 and therefore did not have any bearing on the decision in relation to the harbour dues charged for 2010 or 2011. The Inspector agreed and concluded that the harbour dues must be assessed in the context of DHB's current trust port status. This remains the view of the Secretary of State. Any representations relating to the potential impact of the proposed sale of DHB should be made in relation to those proposals at the appropriate time. Although not

relevant to this decision, the Secretary of State notes that DHB told the inquiry that it is its intention to find a legal mechanism to ensure that whatever cash surplus exists at the point of privatisation (should it occur) is ring-fenced for the benefit of the objectors in terms of future capital expenditure (IR 395).

The Inspector's consideration

27. The Inspector considered at length the arguments made concerning the 2010 harbour dues. These arguments and the Inspector's analysis and findings are equally relevant to the 2011 harbour dues which were set by applying an uplift to the 2010 harbour dues.

28. The Secretary of State's consideration of the Inspector's analysis and conclusions on the arguments made concerning the 2010 harbour dues are set out in the letter from Mr Anthony Ferguson of the Department for Transport, dated today, conveying the Minister's decision in relation to the 2010 harbour dues (the 2010 harbour dues decision letter) . Paragraphs 26 to 45 of that letter apply equally to the 2011 harbour dues and are incorporated into this letter by reference. The objectors complain that the harbour dues for 2011 have been derived based on an inflated baseline (being the 2010 harbour dues). For the reasons given in the 2010 harbour dues decision letter, the Secretary of State does not consider that that criticism, which depends on the prior objections to the 2010 tariffs, is sustained by the evidence.

The 2011 uplift

29. At IR 448 the Inspector observed that the 2011 harbour dues were derived from the application of a percentage increase to the 2010 harbour dues. The objectors raised the same objections to the 2011 dues as they raised to the 2010 dues and these have been dealt with in the 2010 harbour dues decision letter. In addition they argued that DHB's chosen inflationary increase was too high; that CPI (consumer price index) should have been used rather than RPI (retail price index)

and that the RPI figure chosen (the figure for July 2010) was too high to represent actual inflation (IR 449).

30. The Secretary of State notes the Inspector's analysis at IR 451 to IR 453 of the arguments and evidence put forward about the merits or otherwise of using RPI rather than CPI to set the percentage increase for the harbour dues and of using the July 2010 RPI figure. The Secretary of State is not persuaded that any indexation should necessarily have been carried out on the basis of CPI rather than RPI, or that the July 2010 figure was unrepresentative, as was contended by the objectors. The Secretary of State acknowledges the objectors' concern about the language used by DHB when discussing setting the tariff but accepts the Inspector's conclusion at IR 454 that he saw no cogent reason for seeking to overturn DHB's chosen inflationary figure.

Dominant position and abuse under competition law and the Secretary of State's role

31. There was one line of argument presented to the inquiry that the Inspector considered to be beyond the scope of the inquiry (IR 13). This was an allegation introduced by the objectors in their opening submissions that DHB had abused a dominant position in breach of EU and UK law. This allegation and its relevance to the role of the Secretary of State has been considered in detail in the 2010 harbour dues decision letter. Paragraphs 46 to 129 of that letter apply equally to the 2011 harbour dues and are incorporated into this letter by reference.
32. Specifically in relation to the 2011 uplift, the Secretary of State does not consider that a tariff based on the indexation of the prior year's tariff can, without more, be regarded as excessive.
33. The Secretary of State notes moreover Mr Harman's evidence regarding the small excess of revenue over cost for 2011. This is broadly consistent with the factual evidence of Mr Waggott that the total surplus for 2011 was expected to be smaller than that for 2010 (Waggott para 17.3).

34. The Secretary of State therefore does not consider that the material before the Inspector indicates that the difference between the 2011 prices and the costs incurred is excessive.
35. The conclusion of the Secretary of State is that the available evidence does not indicate that in charging the 2011 harbour dues, DHB abused a dominant position contrary to Article 102 TFEU. Accordingly a decision of the Secretary of State to approve the 2011 harbour dues under section 31 of the Harbours Act is not contrary to the Secretary of State's duty under Article 106.1 TFEU, if such a duty pertains.

Conclusion

36. For the reasons set out above the Secretary of State approves the 2011 harbour dues in accordance with section 31 (6)(a) of the Harbours Act 1964 subject to a limit on the period during which the approval is to be of effect of 12 months from 1 January 2011.
37. A copy of this letter is being sent to each of the parties and will be available on the Department's website in due course.
38. A notice in compliance with section 31(6)(a) of the Act is being sent to DHB and will be published in the relevant newspapers in accordance with section 31(9) as soon as practicable.

Yours faithfully

Anthony Ferguson