RE DOVER HARBOUR BOARD

INQUIRY UNDER s.31 HARBOURS ACT 1964

OBJECTIONS TO 2010 AND 2011 HARBOUR DUES

RESPONSE ON BEHALF OF DOVER HARBOUR BOARD TO COMMENTS MADE IN ANNEX 3 OF THE WRITTEN CLOSING SUBMISSIONS ON BEHALF OF THE FERRY OPERATORS IN RESPONSE TO THE BOARD'S COMPETITION LAW SUBMISSIONS (INQ/44/DHB)

General

1. This response is submitted to the Inquiry on behalf of Dover Harbour Board ("DHB") in response to the comments made on behalf of the ferry operators ("the Operators") at Annex 3 to the Closing Submissions on behalf of the Operators delivered on 14th October 2011(INQ/46/OBJ). This Response does not seek to duplicate unnecessarily points made in DHB's original Competition Law Submissions (INQ/44/DHB) nor to restate in full DHB's case on the merits of the Operators' Section 31 objections (where relevant to competition law matters) as set out in its principal Closing Submissions.

The role of the Secretary of State

2. We note and agree that the Inspector does not have the power to make recommendations to the Secretary of State on purely legal arguments.

3. The Operators refer at paragraph 7 of Annex 3 to Article 3 of Council Regulation 1/2003 and conclude at paragraph 8 of Annex 3 that the Secretary of State is required to apply Article 102 TFEU. This conclusion is wrong. In relation to Article 3 of Council Regulation 1/2003, the Secretary of State is not a competition authority of a Member State and is not a national court. Further, in reaching a

4. At paragraph 8 of Annex 3 the Operators base an argument on the premise that "…if under Article 102…the Board is held to have abused its dominant position….". Similarly in paragraph 9 the Operators argue that the Secretary of State has "the power and indeed the duty to apply competition law where this falls within the scope of his powers under Section 31 Harbours Act 1964." These arguments are wrongly based. No competent body has considered or determined whether DHB has in any way abused a dominant position. The Secretary of State is not determining whether Article 102 has been infringed. The Secretary of State has no jurisdiction or standing to determine such an issue and the Secretary of State's role is to reach a decision on the basis of Section 31 as discussed in DHB's earlier submission (INQ/44/DHB). Nothing in Section 31, nor any of the other provisions referred to by the Operators, gives the Secretary of State the power to apply Article 102 and nothing imposes on the Secretary of State the duty to do so. As a consequence, and in any event, the Secretary of State does not need to decide and should not decide whether DHB is dominant, nor does the Secretary of State need to decide whether the tariffs set by DHB are abusive of any alleged dominant position. It is sufficient for the Secretary of State to decide that, if she correctly exercises her powers pursuant to Section 31 of the Harbours Act 1964, then *ipso facto* her decision will not infringe the competition law rules. Moreover, it is our view that, if the Secretary of State determines that the current charges are commercial and competitive, fair and equitable, she can be satisfied that the charges would not be abusive of any dominant position. It is submitted that the threshold for intervention pursuant to Section 31 is plainly lower than that contemplated in a finding by a competent authority of abuse of dominant position. Thus a detailed analysis by the Secretary of State of the rules specifically relating to abuse of a dominant position confuses the questions which the Secretary of State should be addressing and is in our view unnecessary. It is DHB's position, in any event, as discussed below and in evidence produced throughout these proceedings, that DHB has not abused any dominant position it may hold and that no dominant position is admitted.

5. The Operators argue at paragraph 9 of Annex 3 that any contrary interpretation to theirs would deprive the Operators of an effective remedy under EU law. This again is wrong. Any decision reached by the Secretary of State will be wholly without prejudice to the rights of the Operators to pursue any other legal remedy available to them including any claim or remedy for abuse of dominant position before a competent body. In relation to these matters, we would refer to the Deutsche Telekom case[1] in which the European Court of Justice upheld a

[1] **Deutsche Telekom AG v European Commission, Vodafone D2 GmbH, formerly Vodafone AG & Co. KG, formerly Arcor AG & Co. KG and Others (Case C-280/08 P)**

complaint of abuse of dominance in relation to an earlier decision of the regulator. This is in our view more analogous to the position here where, in our submission, any decision of the Secretary of State would not deprive the Operators of the opportunity to pursue any competition law remedy available to them if they wish to do so. It is, however, DHB's strongly held position that any allegation of abuse of dominance before any competent body would fail.

6. Finally, the reference at paragraph 1.2.3 of MTP2 can only be a reference to the decision maker having regard to what a competent authority might conclude in relation to abuse of dominant position. However, as discussed above, if dues are found to be "commercial, competitive, fair and equitable" pursuant to the key principles of MTP2, then it will follow *ipso facto* that no abuse of dominant position can sensibly be said to arise.

7. As noted previously, the evidence in relation to the reasonableness of the dues as set by DHB falls so far short of established notions of "abuse" that any further debate on competition law issues would be entirely arid.

Dominant Position

8. In relation to the further submissions on dominant position set out by the Operators at paragraphs 11 to 21 of Annex 3, we would refer again to paragraph 13 of our original Submissions (INQ/44/DHB) which referred to evidence produced to the Inquiry. We would also reiterate that Section 31 does *not* require the Secretary of State to determine whether or not DHB holds a dominant position in any market, the Section 31 Inquiry was not competent to undertake such an investigation and we consider that the Secretary of State does not need to seek to determine this issue in order to reach a decision under Section 31.

9. In relation to paragraph 17 of Annex 3, this refers to Mr Goldfield's evidence. Whilst the Operators might not agree with it, it did and does represent his view.

10. In relation to paragraph 18 of Annex 3, it is not accepted that cruise ships are treated "favourably". This claim is addressed in detail and rebutted at paragraphs 98-100 of DHB's Closing Submission, which we do not repeat.

11. In relation to paragraph 19 of Annex 3, there is no evidence that the Port of Ramsgate is incapable of providing an alternative to the Port of Dover. In relation to paragraph 20, the conclusions of the Court following a detailed competition investigation in relation to Helsingborg cannot simply be "read across" to the Port of Dover, where no such investigation has taken place.

12. However, even if it were to be concluded that a competent authority might determine that Dover has a dominant position in the market in which it operates, such a conclusion would be *of no significance whatsoever* in the absence of a finding of abuse, as to which see DHB's Closing Submissions and below.

Abuse

13. At paragraphs 22 et seq of Annex 3, the Operators make a number of further submissions on whether the tariff levels in 2010 and/or 2011 were abusive and on the appropriate manner in which the question should be addressed. At paragraph 31 of Annex 3, the Operators accept that a finding of "abuse" would require it to be demonstrated that the tariffs set are *significantly in excess* of the economic value of the service provided. This is a high bar which the Operators' evidence did not begin to reach. The way in which the Operators' submissions are then developed at paragraphs 34 et seq of Annex 3 is unforgivably partial in its misrepresentation of the evidence before the Inspector.

14. It is DHB's view that the evidence presented to the Inquiry clearly establishes that the tariffs for both 2010 and 2011 were properly set and are not excessive. Whilst not setting out in detail in these further Submissions the oral evidence adduced during the Inquiry and referred to in the Inquiry documents, we would specifically refer again to paragraphs 15 to 27 of DHB's original Competition Law Submissions (INQ/44/DHB) and also to DHB's principal Closing Submissions (INQ/47/DHB), the salient points of which can be summarised as follows:

14.1 The detailed evidence of Mr. Waggott and Mr. Ogier demonstrates that the tariffs in 2010 and 2011 have been set on a proper basis in accordance with guidance, that the pricing is not unreasonable and the profits generated by DHB are not excessive. The wholly partial "synopsis" of the debate between Messrs Ogier and Harman at Annex 2 of the Operators' Submissions was not accepted by the Inspector as an appropriate document for submission in closing and is not to be relied upon (cf. paragraph 36 of Annex 3);

14.2 DHB's margins in relation to the ferry operation and the Port as a whole are reasonable in comparison to other ports. Additionally, Mr Pusey on behalf of the Operators has also undertaken a comparative assessment of DHB's financial performance measured against a suite of other UK Trust Ports the outcome of which (when undertaken accurately) is that DHB is *within a range* for each and every one of the metrics examined;

14.3 That the cash balance retained by DHB is for the legitimate purpose of funding a new terminal when required and that the retention of this cash is consistent with

14.4 Paragraphs 37 and 38 of Annex 3 attack the principle of accruing funds to invest in new terminal capacity as being reliant upon "a highly improbable contingency" or "a remote contingency". Again, this ignores the forecasting evidence given by DHB's witnesses which was not challenged by any comparable evidence adduced by the Operators. Moreover, it also flies in the face of the conclusions reached by the Secretary of State on 28th November 2011 in deciding to make the Harbour Revision Order for a New Terminal 2 at Dover Harbour (see separate Note on T2 HRO);

14.5 No evidence has been produced by any of the Objectors' witnesses to suggest that the reweighting of the tariff undertaken by DHB in 2010 was unreasonable or out of line with practice at other ports. The reweighting has been undertaken to reflect more appropriately the high fixed costs which DHB bears in administering and maintaining the Port of Dover. It represents a re-structuring, but one which leaves DHB still charging fixed dues which are significantly lower as a proportion of SPG dues than other UK ports It also means that the tariffs for 2009 and 2010 are not directly comparable (as to which see below for the effect of the ILO transfer);

14.6 Ms. Deeble for P&O expressly referred to Calais as a port operating with a customer focus and in a competitive environment and expressly acknowledged in cross examination that the economic value to P&O of the use of Calais was the same economic value to P&O of using Dover;

14.7 The Operators agreed that tariffs at Calais are materially higher than at Dover and no evidence refuted the assertion that the tariffs at Calais are approximately 43% to 74% higher than at Dover. Mr. Ogier's evidence did consider and allow for the level of services provided in making this comparison. The conclusion that Calais (on the Operators' own case, the most closely comparable port to Dover) is more expensive to use than Dover is inescapable (cf. paragraphs 39-40 and 51 of Annex 3);

14.8 Mr. Chadney on behalf of the Operators sought to undertake a comparison between 2009 and 2010 for the dues charged on a representative vessel, as defined by him. When this exercise is carried out properly, Mr. Chadney's representative vessel would see a *reduction* in dues by -7.8%. Mr. Chadney expressly agreed in cross examination that his exercise did not amount to evidence of abuse of a dominant position. The representative or hypothetical vessel was designed as an evidential tool *by the Operators*. It is wholly disingenuous to try to disown the tool when the exercise for which it was

14.9 During the Inquiry, Mr. Chadney's representative vessel exercise was supplemented by INQ/37, which examines the effect of the 2010 tariff on P&O. This exercise has been controlled for volume changes as between 2009 and 2010 and also seeks to factor in the outsourcing of the ILO function to ferry operators. Even on the basis of the figures as presented, the "actual" increase on cost to P&O is stated to be 3.55%. As Ms. Deeble agreed, given that the DHB tariff represents 7.4% of P&O's turnover on the Short Sea Route, a 3.5% increase in 2010 would (if the figure were correct) amount to an increase of 0.26% or one quarter of one percent as an impact on turnover.

14.10 In fact, as Ms. Deeble agreed in cross examination, the 2010 ILO figure in INQ/37 does not represent P&O's actual ILO costs in 2010. Ms. Deeble agreed that the figure of £1,673,892 is simply a pro rata figure based upon the 59 employees previously allocated to P&O. The number actually transferred to P&O was 34, with DHB bearing the redundancy costs of the balance. If the actual numbers transferred are used, Ms. Deeble agreed that the correct pro rata figure to use would be £1.1m. If this is substituted into calculation for the £1,673, 892, then Ms. Deeble agreed that this would represent an increase of 0.8% over the amounts paid by P&O to DHB in 2009, when controlled for volume. When this 0.8% increase is considered by reference to the 7.4% of turnover which is represented by tariff payments to DHB, the impact on P&O for 2010 is an increase of only 0.06%. Mr. Chadney (for the Operators) expressly agreed in cross examination that this analysis did not disclose evidence of abuse (cf. paragraph 48 of Annex 3).

14.11 Paragraphs 45, 53 and 54 of Annex 3 are disingenuous. The assumptions underlying the allegations of abuse in the passage of Mr. Chadney's proof cited at paragraph 45 were directly challenged in cross examination. Mr. Chadney agreed two key points: first, it was necessary to consider the *aggregate effect* of the tariff changes and not to "cherry pick" individual elements where an increase was made and ignore those where a reduction was made; second, if one considers the aggregate effect (including the effect of ILO transfer) as described in the paragraph above, then the conclusion of that exercise *did not* support allegations of excessive pricing or abuse. In re-examination, Mr. Chadney was invited to consider in isolation those elements of the tariff which experienced an increase and was invited to conclude that these were abusive. However this exercise was completely devoid of meaning and irrelevant, given Mr. Chadney's earlier acceptance in cross-examination that one must look at the *aggregate effect* of the tariff changes.

14.12 There is no evidence that the SPG dues levied in 2010 or 2011 have significantly distorted competitive conditions in the market. The Operators continue to secure

15. The evidence therefore clearly demonstrates that the SPG dues were not excessive, were not abusive and indeed were set a reasonable level, at or below the level of the economic value of the services provided.

Thomas Hill QC

Eversheds LLP

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