

Notice of intention to accept  
commitments offered by P&O and  
DFDS in relation to a capacity  
sharing agreement for freight  
customers on ferries on the Dover-  
Calais Sea route

Competition Act 1998  
Case number 51099

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# 1. Introduction

- 1.1 On 11 November 2021, the Competition and Markets Authority (the '**CMA**') opened an investigation into whether an agreement entered into by P&O Ferries Holdings Limited ('**P&O**') and DFDS A/S ('**DFDS**') (together the '**Parties**') on 21 May 2021 (the '**Capacity Sharing Contract**') and associated arrangements for the creation of a joint sailing schedule between Dover and Calais (together referred to as the '**Agreement**') infringe the Chapter I prohibition of the Competition Act 1998 (the '**Act**').
- 1.2 On 13 May 2022, the Parties offered to provide binding commitments to the CMA that aim to address competition concerns that the CMA has identified with respect to the Agreement (the '**Proposed Commitments**'). The Proposed Commitments are described in Chapter 5 of this notice and are set out in full in Annex 1.
- 1.3 The CMA gives notice<sup>1</sup> that it proposes to accept the Proposed Commitments and invites representations from interested third parties on this proposed course of action. Formal acceptance of the Proposed Commitments by the CMA would result in the termination of its investigation, with no decision made on whether or not the Act has been infringed by the Parties.
- 1.4 The CMA invites interested third parties to make representations on the Proposed Commitments, which it will consider before making a final decision on whether to accept the Proposed Commitments. The closing date for representations is **5 p.m. on 4 July 2022**.
- 1.5 Acceptance of the Proposed Commitments would not prevent the CMA from taking any action in relation to competition concerns which are not addressed by the Proposed Commitments. Moreover, acceptance of the Proposed Commitments would not prevent the CMA from continuing the investigation, making an infringement decision, or giving a direction in circumstances where the CMA had reasonable grounds for:
  - Believing that there had been a material change of circumstances since the commitments were accepted;<sup>2</sup>
  - Suspecting that a person had failed to adhere to one or more of the terms of the commitments; or

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<sup>1</sup> Pursuant to paragraph 2 of Schedule 6A to the Act.

<sup>2</sup> This may, for example, include circumstances in which service levels deteriorate or the price of services appear to be rising, or to have risen beyond levels that may be expected on the basis of the CMA's investigation.

- Suspecting that information which led the CMA to accept the commitments was incomplete, false, or misleading in a material particular.<sup>3</sup>

1.6 The remainder of this notice provides:

- an overview of the CMA's investigation (Chapter 2);
- background information regarding the Parties and the relevant market context (Chapter 3);
- details of the CMA's competition concerns (Chapter 4);
- a summary of the Proposed Commitments and why the CMA provisionally considers that they address its competition concerns (Chapter 5);
- details of the CMA's intentions and how to provide comments in response to this notice (Chapter 6); and
- the text of the Proposed Commitments (Annex 1).

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<sup>3</sup> Pursuant to section 31B of the Competition Act 1998.

## 2. The CMA's investigation

### The investigation

- 2.1 In May 2021, the Parties informed the CMA that they had entered into the Agreement. On 11 November 2021, the CMA launched an investigation into the Agreement on the basis that it had reasonable grounds to suspect that the Agreement may have the object or effect of preventing, restricting or distorting competition within the UK, contrary to the Chapter I prohibition of the Act.
- 2.2 The CMA has since undertaken a number of investigative steps to gather evidence from the Parties and from third parties. These steps include sending formal notices requiring the production of documents and provision of information under section 26 of the Act as well as obtaining further information through meetings and other correspondence.

### The commitments offer

- 2.3 Following correspondence with the CMA in March and April 2022, the Parties indicated an intention to offer commitments to address the CMA's competition concerns. In accordance with paragraph 10.22 of the CMA's *Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8)*<sup>4</sup> (the '**Procedural Guidance**'), the CMA proceeded to discuss with the Parties the scope of any commitments which the CMA considered would be necessary to address the concerns it had identified.
- 2.4 Section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, the CMA may accept, from such person or persons as it considers appropriate, commitments to take such action (or refrain from taking such action) as it considers appropriate. The Procedural Guidance describes the circumstances in which it may be appropriate to accept binding commitments and the process by which parties to an investigation may offer commitments to the CMA.<sup>5</sup>
- 2.5 In accordance with paragraph 10.21 of the Procedural Guidance, a business under investigation can offer commitments at any time during an investigation until a decision on infringement is made. In this case, no such decision has been made.

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<sup>4</sup> [Guidance on the CMA's investigation procedures in Competition Act 1998 cases \(CMA8\)](#), 10 December 2021.

<sup>5</sup> [The Procedural Guidance](#), paragraphs 10.15 to 10.25.

- 2.6 The Parties offered the Proposed Commitments, as set out in Annex 1 to this notice, to the CMA on 31 May 2022. The offer of commitments does not constitute an admission of an infringement of the Chapter I prohibition by the Parties.
- 2.7 The CMA is currently of the view that the Proposed Commitments address its competition concerns and that it is appropriate for the CMA to close its investigation by way of a formal decision accepting the Proposed Commitments. Formal acceptance of the Proposed Commitments would result in the CMA terminating its investigation, and not proceeding to a decision on whether the Chapter I prohibition of the Act has been infringed.

### 3. Background

#### The Parties

- 3.1 P&O is a UK-registered ferry operator and DFDS is a Danish shipping and logistics company. Both Parties operate freight and passenger ferry services internationally, including on the route between Dover and Calais.

#### The relevant market and the Parties' market shares

- 3.2 The Agreement relates to the provision of freight transport ferry services by the Parties between Dover and Calais. The relevant market has previously been found to be the provision of freight transport services on the Short Sea.<sup>6</sup> The CMA provisionally considers that the provision of freight transport services on the Short Sea is likely to be the relevant market for its assessment, but it does not consider it necessary to reach a conclusion on this point for present purposes.
- 3.3 The Parties' competitors for the provision of freight services on the Short Sea are Eurotunnel, which operates services between Folkstone and Coquelles, and Irish Ferries, which began operating ferry services between Dover and Calais in 2021 and has since announced plans to expand its operations on the Dover-Calais route.
- 3.4 Based on information gathered during the course of its investigation, the CMA estimates that the Parties each have a share of between 20% and 30% of the relevant market, by value.

#### Parameters of competition in the relevant market

- 3.5 In order to inform its assessment of the Agreement, the CMA has identified and considered the main parameters of competition in the market. On the basis of evidence provided by the Parties and third parties, the following factors appear to be the principal considerations for freight customers:
- (a) Price – many freight customers are price-sensitive and price is a particularly important factor of competition in the market.

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<sup>6</sup> The Short Sea consists of routes across the narrowest sections of the English Channel and the Belgian Straits (comprising ferry routes between Dover, Folkestone, Ramsgate and Newhaven in England and Calais, Dieppe, Boulogne, Dunkirk, and Ostend in continental Europe, and the Channel Tunnel between Folkestone and Coquelles). See, for example, [Competition Commission Final Report on Completed acquisition by Groupe Eurotunnel S.A. of certain assets of former Seafarce S.A.](#), of 6 June 2013, paragraphs 6.35 to 6.36.



- (b) Sailing frequency and journey time – frequency of sailings and overall journey time are important considerations for more time-sensitive freight customers, for example those transporting perishable goods. Such customers tend to value a short journey time and reliability of service.
- (c) Other non-price considerations – other considerations such as pre-boarding, on-board service quality, and fast-track lanes also appear to be relevant aspects of competition. DFDS's service differs from P&O's in that it offers a choice of two arrival/departure ports in France (Calais and Dunkirk) and free meals to drivers.<sup>7</sup>

3.6 These aspects of competition can be seen in differences between the services offered by the Parties and their competitors. In particular, the CMA understands that Eurotunnel, the operator of the Channel Tunnel freight and car transport services between Folkestone and Coquelles, tends to be more expensive than the Parties but that it provides a faster service with shorter crossing times.

## **The Agreement**

### **The purpose of the Agreement**

- 3.7 The Parties have told the CMA that the purpose of the Agreement is to provide a 'turn up and go' facility for the Parties' freight customers, allowing the driver of a freight vehicle to take the next available ferry at Dover or Calais, regardless of which Party the freight operator has contracted with (i.e. bought a ticket from). The Parties have submitted to the CMA that this will reduce the amount of time their freight customers spend in-port before the start of their crossing, leading to shorter overall journey times. The Capacity Sharing Contract relates solely to standard freight and expressly excludes tourist customers and non-standard freight.<sup>8</sup> The Agreement does not extend to coordination in relation to port-side services or infrastructure.
- 3.8 The Agreement allows the Parties to continue to set capacity levels and prices independently of each other. Additionally, there are very limited circumstances in which payments may be made between the Parties. In particular, there is no general price compensation mechanism and no wholesale acquisition of freight capacity on the other Party's vessels. Accordingly, the Agreement will not give rise to commonality of costs. Each

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<sup>7</sup> The Parties have stated that service differentiation by way of DFDS providing free meals to its customers will be maintained: DFDS will issue a voucher which is redeemable on P&O ferries and P&O will invoice DFDS for the cost of the meal.

<sup>8</sup> Non-standard freight includes hazardous and noxious freight, animals/livestock, out of gauge (i.e. very long/very wide) freight, and unaccompanied freight (i.e. freight on trailers without a tractor unit).

vessel operator will also continue to assume the risk for the use it makes of the chartered capacity on the other Party's vessel.

### **The vessel schedule and removal of sailings**

- 3.9 The Capacity Sharing Contract provides for the Parties to align their respective vessel schedules to create a single consolidated sailing schedule. Subsequent to entering into the Capacity Sharing Contract in May 2021, the Parties jointly created a consolidated schedule that distributed their respective sailings more evenly than was previously the case. The Parties have told the CMA that the purpose of this was to reduce congestion and delays both within the ports and at sea by reducing customer dwell time and reducing clashing or overlapping sailing schedules.
- 3.10 The aligned schedule contains 7 to 11 fewer sailings per week (3-5% of the Parties' combined sailings) than immediately prior to the Parties' creation of the aligned schedule.<sup>9</sup> The CMA understands that these were night and weekend sailings with low levels of utilisation.

### **Capacity sharing**

- 3.11 The Capacity Sharing Contract provides for the Parties each to determine the freight capacity it will make available on the market (that is, the size and number of vessels, the frequency of sailings and the proportion of deck space that is allocated to freight) and which will be subject to that contract. The Parties' respective freight capacities determine their respective shares of total freight capacity (the '**Capacity Ratio**'). For example, if over a given month P&O's freight capacity was (hypothetically) 1,000 lane metres and DFDS's was 500 lane metres, then the Capacity Ratio would be 67:33 in favour of P&O.
- 3.12 The Capacity Sharing Contract entitles each of the Parties to use a part of the other Party's freight capacity on every applicable vessel and sailing in proportion to its share of the Capacity Ratio. Thus, under the hypothetical example given above, P&O would be allocated 67% of the freight capacity on each sailing, whether the sailing was operated by P&O or DFDS, and DFDS would be allocated 33%. This means that each of the Parties has the same total freight capacity as it would in the absence of the Capacity Sharing Contract, but that capacity is spread over a greater number of sailings.
- 3.13 The Capacity Sharing Contract also provides that, if a Party does not fill the capacity allocated to it 20 minutes prior to the scheduled departure of a

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<sup>9</sup> The precise number of sailings removed depends on the reference point.

vessel, the other Party may, for a fee, use some or all of that unused capacity for its own freight customers.

- 3.14 The Capacity Sharing Contract provides for changes to be made to the Capacity Ratio to reflect any changes to the amount of freight capacity that one or both Parties make available on the market, although short-term disruptions to capacity will be addressed by a rebalancing mechanism (see paragraphs 3.16 to 3.17 below). The Parties have told the CMA that they do not intend the Capacity Ratio to be fixed and that it will be adjusted from time to time.
- 3.15 There is no obligation on the Parties to share capacity on any additional vessels that either Party might add to the Dover-Calais route.

### **Rebalancing mechanism**

- 3.16 The Capacity Sharing Contract provides that, where there is a short-term disruption resulting in an imbalance between a Party's Capacity Ratio under the Capacity Sharing Contract and its actual delivery of freight capacity, each of the Parties will endeavour to bring their respective freight capacities back in line with the Capacity Ratio within 30 days. The Party that provided additional capacity has the express right to make less capacity available than its share under the Capacity Ratio until the underproducing Party meets its Capacity Ratio.
- 3.17 If the underproducing Party does not restore its capacity during the 30-day period (or within a mutually agreed extended period), the other Party can charge it an agreed 'shortfall price' for each lane metre which has not been delivered. The Parties have told the CMA that they expect such imbalances resulting in the need for such payments to occur rarely in practice, if at all, and, accordingly, they do not expect any sums involved to be significant.

### **Information to be shared**

- 3.18 The Capacity Sharing Contract provides for the Parties to share certain information for the purpose of giving effect to the contract. The CMA has assessed the nature and extent of the information to be shared and does not consider that the sharing of such information will bring about a material reduction in the Parties' strategic uncertainty regarding one another's operations. Much of the information, such as the Parties' sailing schedules and seasonal maintenance plans, will already be in the public domain and other information, such as the amount of freight carried by each Party, could be observed by monitoring the physical number of departures in-port.

## **Implementation of the Agreement**

- 3.19 The Parties have implemented some aspects of the Agreement, particularly with respect to departures from Dover. The Parties have told the CMA that they expect the Agreement to be fully implemented later in 2022.

## 4. The CMA's competition concerns

- 4.1 This chapter sets out the CMA's competition concerns regarding the Agreement.
- 4.2 As a preliminary point, the CMA notes that the Agreement is intended (and in the CMA's judgement is likely) to deliver certain benefits for competition, customers and the economy. In particular:
- (a) By allowing the Parties' freight customers to 'turn up and go' on the next available sailing, the Agreement is likely to reduce in-port dwell times for such customers leading to shorter overall journey times, thus benefitting those customers directly and, in addition, benefitting the wider economy through shorter supply times.<sup>10</sup> This is likely to have particular salience at a time when there are concerns about supply shortages and delays on shipping freight between the UK and continental Europe (including, in particular, on routes to and from Dover). For some freight customers (such as those transporting perishable goods) the reduced dwell times are likely to be particularly important benefits.
  - (b) Given that a material competitive advantage that Eurotunnel has over ferry services on the Short Sea is shorter journey times (see paragraph 3.6), by reducing the Parties' customers' journey times, the Agreement is likely to intensify the competitive interaction between the Parties and Eurotunnel, and so strengthen the competitive constraint that each provides to the other.
- 4.3 However, the CMA considers that certain aspects of the Agreement are more restrictive of competition than is necessary for the realisation of the likely benefits. These concerns are outlined below.<sup>11</sup>

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<sup>10</sup> While some freight customers currently have contracts with both Parties and can therefore already travel on both Parties' sailings, the Agreement will mean that they no longer need to contract with both Parties and may therefore make administrative costs savings while also potentially benefitting from greater volume rebates from the Party they contract with.

<sup>11</sup> The Capacity Sharing Contract provides for the Parties to share information for the purpose of giving effect to the Agreement. The CMA has considered the nature and extent of the information shared and does not consider, on the basis of the evidence it has seen, that the information being exchanged is sufficient to bring about a material reduction in strategic uncertainty. Much of the information exchanged is already in the public domain (e.g. schedules and seasonal maintenance) and other information is exchanged too late to allow the other Party to alter its competitive conduct.

## Joint removal of sailings

- 4.4 The CMA is concerned that the Parties' joint removal of certain sailings while creating their aligned vessel schedule may constitute an anti-competitive output restriction.
- 4.5 The CMA notes that the number of sailings that the Parties have jointly removed to date is relatively small<sup>12</sup> and that the sailings that were removed were night and weekend sailings with low levels of utilisation. However, the CMA has seen evidence that the Parties were contemplating more significant joint removals of capacity in the future.
- 4.6 As noted in paragraph 3.5 above, the CMA understands that sailing frequency is a key aspect of competition between the Parties. The CMA is concerned that joint removal of capacity may distort this important aspect of competition by reducing the number of sailings that are available to those freight customers that, prior to the Agreement, already used both Parties' services and to tourist customers. Further, excess capacity is likely to constrain the Parties' prices for both freight and tourist customers and the removal of sailings may therefore lead to an increase in prices because the Parties have less capacity to fill.
- 4.7 Accordingly, the CMA is concerned that if the Parties were jointly to remove further sailings, this could have a material adverse impact on competition, potentially leading to increased prices and reduced customer choice.
- 4.8 The CMA has considered whether an exemption could in principle be available under section 9 of the Act. However, the CMA's preliminary view is that the Parties' joint removal of sailings is unlikely to be indispensable to achieving the benefits of the Agreement. In particular:
- (a) benefits relating to the ability of freight consumers 'to turn up and go' and the resulting reductions of dwell times arise from the Parties' alignment of their sailing schedules and the Capacity Sharing Contract, rather than from the Parties' joint removal of sailings, and the former could be implemented without the latter; and
  - (b) benefits relating to reduced costs for the Parties, which may be passed on to customers by way of lower prices, and reduced CO<sub>2</sub> emissions could be achieved by the Parties removing certain sailings unilaterally, rather than jointly.

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<sup>12</sup> Between 7 and 11 sailings per week (3-5% of the Parties' combined sailings) depending on the reference point – see paragraph 3.10 above for more details.

## Fixing of capacity

- 4.9 The CMA is concerned that a certain clause within the Capacity Sharing Contract appears to fix the Parties' shares of capacity (or could be so interpreted) and therefore has the potential to result in a form of market sharing between competitors. In particular, while the Capacity Sharing Contract provides that the Capacity Ratio will change from time to time, it also states that each Party will have access to the same total freight capacity that they had when they entered into the Capacity Sharing Contract on 21 May 2021.

## Incentives to cancel sailings

- 4.10 The CMA is concerned that the Capacity Sharing Contract may restrict competition by weakening the Parties' incentives to avoid *ad hoc* cancellations of sailings. Such cancellations could lead to a reduction of customer choice (for tourist customers and those freight customers that, prior to the Agreement, already used both Parties' services) and a reduction of capacity, which may lead to upward price pressure.
- 4.11 In the absence of the Capacity Sharing Contract, the Parties both have incentives to maintain full and frequent sailing schedules, including off-peak sailings, due to the importance of this aspect of their service to many of their customers. This is because, if it were not for the Agreement, if either Party were to cancel sailings, it could expect to lose business to its competitors, including to the other Party, both in the short-term (i.e. those customers which would have travelled on the cancelled sailing but which may instead travel with a competitor) and over the longer-term (as customers may choose to contract with a more reliable competitor).
- 4.12 However, the Capacity Sharing Contract may weaken the Parties' disincentives against cancelling sailings because the freight customers which would have travelled on that sailing will be able to travel on the next available sailing even if it is operated by the other Party, with the cancelling Party incurring no loss of freight customers or associated revenue (other than on-board expenditure).
- 4.13 The CMA is concerned that the Parties' incentives regarding cancellations of sailings may be further distorted by the rebalancing clause within the Capacity Sharing Contract since it allows a cancellation by one Party to be balanced by a cancellation by the other Party.
- 4.14 The CMA has considered whether an exemption could, in principle, be available under section 9 of the Act in respect of this aspect of the

Agreement. However, the CMA's preliminary view is that the potential distortion of competition outlined above is unlikely to be indispensable to the achievement of the customer benefits to which the Capacity Sharing Contract may give rise. In this respect, the CMA provisionally considers that the Proposed Commitments and the amendments to the Capacity Sharing Contract as outlined in Chapter 5 of this notice will address the CMA's competition concerns while enabling the customer benefits of the Agreement to be achieved.



## 5. The CMA's assessment of the Proposed Commitments

- 5.1 In order to address the CMA's competition concerns (as described in section 4), and without prejudice to their position that they have not infringed the Act, the Parties have offered the Proposed Commitments to the CMA. The Proposed Commitments are set out in Annex 1 of this notice and are summarised in paragraph 5.3 below.
- 5.2 For the reasons set out in paragraphs 5.10 to 5.17 below, the CMA provisionally considers that its competition concerns are addressed by the Proposed Commitments.

### The Proposed Commitments

- 5.3 The Parties have offered the Proposed Commitments as follows:
- (a) Each of the Parties will unilaterally determine the capacity they respectively make available on the Dover-Calais route (including the frequency of sailings and vessels used). Each of the Parties may amend the vessel schedule in advance by giving reasonable prior notice to the other Party concerning planned changes in supply.<sup>13</sup>
  - (b) Each of the Parties remains at all times the sole decision-maker in relation to the freight capacity it provides which is subject to the Capacity Sharing Contract.
  - (c) The total freight capacity (and thereby the Capacity Ratio) may be varied from time to time as a result of (i) increases or decreases that either Party decides to apply to its freight capacity; (ii) changes in a Party's passenger capacity; and (iii) changes in vessels used.
  - (d) The Capacity Ratio shall vary from time to time in light of changes to the freight capacity either Party provides which is subject to the Capacity Sharing Contract.
  - (e) The Parties will not make sailing cancellations which result in disruptions lasting less than 72 hours<sup>14</sup> for reasons other than (i) breakdown of vessels, bad weather, industrial action; (ii) other unforeseen

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<sup>13</sup> Examples of such changes in supply include vessel drydock, maintenance, or changes in vessels, and foreseen changes in demand like peak tourist periods (such as Easter, Christmas/New Year, school holidays, and July/August), all as unilaterally decided by each of the Parties.

<sup>14</sup> Disruptions lasting more than 72 hours will constitute a change to the Party's sailing schedule and result in consequent recalculation of the Capacity Ratio.

circumstances outside the Parties' control; or (iii) low utilisation (see the next bullet point).

- (f) Any cancellations for reasons of underutilisation shall be limited to no more than 0.5% of each Party's scheduled sailings in each six month period following adoption of the Proposed Commitments.
- (g) The application of the rebalancing mechanism (see paragraphs 3.16 to 3.17) shall be limited to cancellations lasting less than 72 hours that are made because of (i) breakdown of vessels, bad weather, industrial action; or (ii) other unforeseen circumstances outside the Parties' control. It will not apply to cancellations due to low utilisation.
- (h) The provision in the Capacity Sharing Contract stating that a Party which made available more capacity than its Capacity Ratio may make available less capacity until the underproducing Party meets its Capacity Ratio (i.e. for Party A to cancel a sailing if Party B has cancelled one) will be deleted. Instead, the Capacity Sharing Contract will provide that the underproducing Party will endeavour to bring its delivery of freight capacity back up to the applicable Capacity Ratio during the next 30 days.
- (i) The Proposed Commitments shall apply from the date on which the Parties are notified of any CMA commitments decision and for as long as the Capacity Sharing Contract remains in the same or substantially similar form.
- (j) The Parties may request the CMA to review the Proposed Commitments with a view to their variation or release where there has been a material change in any of the facts on which any CMA commitments decision was based. In these cases, the CMA should respond to the Parties in writing as soon as reasonably practicable, having regard to the nature of the request, the aim of the Proposed Commitments and the CMA's statutory duties. The Parties acknowledge that the acceptance of such requests shall be at the discretion of the CMA and any variation or release of the Proposed Commitments shall not affect the validity or enforceability of any rights or obligations that arose prior to such variation or release.
- (k) The Parties will provide the CMA with any information and documents which the CMA reasonably requires and requests from the Parties throughout the duration of the Proposed Commitments for the purposes of enabling the CMA to monitor and review the operation of the Proposed Commitments.
- (l) The Parties will keep, maintain and produce records specified in writing by the CMA that relate to the operation of the Proposed Commitments.

- (m) The Parties will provide a report to the CMA of all cancellations containing: the reasons for cancellations of sailings; the dates of cancellations; and the duration of cancellations.

## **The CMA's assessment of the appropriateness of this case for commitments**

### **The CMA's Guidance**

- 5.4 Pursuant to section 31A of the Act, for the purposes of addressing the competition concerns it has identified, the CMA may accept from such person (or persons) as it considers appropriate, commitments to take such action (or refrain from taking such action) as it considers appropriate.
- 5.5 The Procedural Guidance states that the CMA is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable; (b) the competition concerns are addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.<sup>15</sup>
- 5.6 The CMA will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern and/or where the CMA considers that not to complete its investigation and make an infringement decision would undermine deterrence.<sup>16</sup>

### **The CMA's assessment**

- 5.7 The CMA has assessed the Proposed Commitments against the criteria referred to in paragraphs 5.5 and 5.6 above and sets out its provisional conclusions below.

### **The competition concerns are readily identifiable**

- 5.8 The CMA provisionally considers that the competition concerns with respect to the Agreement are readily identifiable. Those competition concerns are set out in Chapter 4 of this notice.

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<sup>15</sup> Paragraph 10.18 of the Procedural Guidance.

<sup>16</sup> Paragraph 10.20 of the Procedural Guidance.

## **The CMA has reached the provisional view that the Proposed Commitments address the competition concerns**

5.9 The CMA sets out below its provisional assessment of whether the Proposed Commitments address each of its competition concerns.

### **a) Joint removal of sailings**

5.10 The CMA provisionally considers that the Proposed Commitments, and in particular the Proposed Commitments set out in paragraphs 5.3(a) and 5.3(b) above, address the CMA's competition concern regarding the joint removal of sailings (as set out in paragraphs 4.4 to 4.8 above).

5.11 The Proposed Commitments will ensure that the Parties do not make joint decisions regarding the capacity they each make available on the Dover-Calais route. The Parties will remain able to make unilateral decisions regarding capacity, as they would be able to in the absence of the Agreement.

### **b) Fixing of capacity**

5.12 The CMA provisionally considers that the Proposed Commitments, and in particular the Proposed Commitments set out in paragraphs 5.3(b) to 5.3(d) above, address the CMA's competition concern regarding the potential fixing of the Parties' relative shares of freight capacity (as set out in paragraph 4.9 above).

5.13 The Proposed Commitments provide that both Parties' freight capacity may vary from time to time according to the Parties' independent decisions regarding the capacity that they each make available, and that the Capacity Ratio set out in the Capacity Sharing Contract will, in turn, vary accordingly.

### **c) Incentives to cancel sailings**

5.14 The CMA is satisfied that the Proposed Commitments, and in particular the Proposed Commitments set out in paragraphs 5.3(e) to 5.3(g) above, address the CMA's competition concern regarding the Parties' incentives to cancel sailings (as set out in paragraphs 4.10 to 4.14 above).

5.15 Pursuant to the Proposed Commitments, the Parties will be able to cancel sailings only due to reasons that are outside their control, including breakdown of vessels, bad weather, or industrial action, or for reasons of low utilisation. Further, where a Party cancels a sailing for a reason that is outside its control, it shall endeavour to increase its future provision of freight capacity to compensate for the cancellation.

- 5.16 In addition, the Parties' ability to cancel sailings for reasons of low utilisation will be restricted to 0.5% of their respective sailings. This figure is broadly in line with the rate of such cancellations that the Parties' made in recent years (prior to the Covid-19 pandemic) thus ensuring that such cancellations are not materially higher than they were prior to the Parties entering into the Agreement, while ensuring that the Parties retain the ability to cancel some sailings for which there is particularly low demand. In this respect, the CMA notes that the Parties' ability to cancel some particularly underutilised sailings is likely to both improve their overall efficiency and have consequential environmental benefits through the reduction of CO<sub>2</sub> emissions. As such, the CMA provisionally considers that it would not be appropriate to prohibit the Parties from making any cancellations for reasons of low utilisation.
- 5.17 Further, the CMA considers that the cancellation of up to 0.5% of the Parties' total sailings constitutes a sufficiently small proportion of total sailings such that the cancellations would be unlikely materially to affect customer choice, overall service levels or price competition.

**The Proposed Commitments are capable of being implemented effectively and, if necessary, within a short period of time.**

- 5.18 The Parties will implement the Proposed Commitments by making relevant amendments to the Capacity Sharing Contract. The Parties have committed to implement these amendments to the Capacity Sharing Contract within a maximum of one week of being formally notified of the CMA's commitments decision.
- 5.19 As such, the CMA is satisfied that the Proposed Commitments are capable of being implemented effectively and within a short period of time.

**Compliance with the Proposed Commitments and their effectiveness would not be difficult to discern**

- 5.20 The CMA provisionally considers that the Parties' compliance with the Proposed Commitments and their effectiveness will not be difficult to discern. In the regard, the CMA considers the proposed monitoring and reporting provisions set out in paragraphs 5.3(k) to 5.3(m) above to be appropriate. In particular, the Parties will be required to report to the CMA details of all cancellations, including the reason for which the cancellation took place, its date and duration.
- 5.21 In addition, the Parties will be required to keep, maintain, and produce records that relate to the operation of the Proposed Commitments and to provide the CMA with any information and documents which the CMA

reasonably requires and requests for the purpose of monitoring and reviewing the operation of the Proposed Commitments.

### **Acceptance of the Proposed Commitments would not undermine deterrence**

- 5.22 The CMA provisionally considers that acceptance of the Proposed Commitments would not undermine deterrence. Indeed, the CMA considers that the fact that it has investigated the Agreement and obtained binding commitments to address its competition concerns should help to provide guidance to any undertakings that may be considering entering into an agreement with similar terms.
- 5.23 Acceptance of the Proposed Commitments would not preclude the CMA from taking further enforcement action in relation to other suspected breaches of competition law. In particular, any future capacity sharing arrangements entered into either by the Parties or other undertakings would be subject to competition law and may be subject to enforcement action.

## 6. The CMA's intentions and invitation to comment

- 6.1 In light of the above, the CMA provisionally considers it appropriate to accept the Proposed Commitments that are set out in Annex 1 of this notice.
- 6.2 Pursuant to paragraphs 2 and 8 of Schedule 6A to the Act, the CMA now invites interested third parties to make representations on the Proposed Commitments. The CMA has not reached a final view on whether to accept the Proposed Commitments and it will take all representations it receives into account before making its final decision on whether to do so.

### Invitation to comment

- 6.3 Any person wishing to comment on the Proposed Commitments should submit written representations to the email address given below **by 5 p.m. on 4 July 2022**. Please quote the case reference 51099 in all correspondence related to this matter.

Email address: [case51099consultation@cma.gov.uk](mailto:case51099consultation@cma.gov.uk)

### Confidentiality

- 6.4 The CMA does not intend to publish the responses to this notice with any commitments decision or notice of its intention to accept any modified commitments. However, the information contained in the responses may be used or summarised on an anonymous basis in such documents.
- 6.5 If the CMA decides not to accept the Proposed Commitments and is considering disclosing information provided to it in response to this notice (such as in or with a statement of objections), the CMA will revert to the provider of that information to obtain representations on confidentiality. The CMA will then consider those representations before deciding whether the information should be disclosed under Part 9 of the Enterprise Act 2002.

# Annex 1: The Proposed Commitments

## Introduction

1.1. On 21 May 2021, DFDS A/S (“**DFDS**”) and P&O Ferries Holdings Limited (“**P&O**”), together the “**Parties**”, entered into a capacity sharing agreement (the “**Capacity Sharing Agreement**”) for the reciprocal carriage of freight units on the short sea shipping route between Dover and Calais (the “**Route**”). The purpose of the Capacity Sharing Agreement is to provide a full ‘turn up and go’ vessel schedule on the Route for freight shipping customers, achieving benefits for those customers of reducing port congestion and overall customer transit times in order to provide a more efficient service on the Route. The Parties expect to achieve a reduction in variable costs through more efficient utilisation of vessels and other assets and lower emissions per unit carried.

1.2. On 25 May 2021, the Parties informed the CMA that they had entered into the Capacity Sharing Agreement. On 11 November 2021, the CMA commenced an investigation under section 25 of the Act (“**CMA Investigation**”) in relation to the Capacity Sharing Agreement.

1.3. To address the CMA’s competition concerns, [Party] hereby offers Commitments under section 31A of the Act. Consistent with sections 31A and 31B of the Act, the Commitments are offered on the understanding that, if the CMA accepts the Commitments in accordance with section 31A(2) of the Act, it shall not continue the CMA Investigation, make a decision within the meaning of section 31(2) of the Act, or give a direction under section 35 of the Act. The CMA has not established that there is any evidence that an infringement of competition law has occurred and makes no determination as to the existence of such an infringement.

1.4. This offer of Commitments by [Party] does not constitute an admission of any infringement, any other wrongdoing or liability. Nothing in these Commitments may be construed as implying that [Party] agrees with any concerns identified by the CMA in its investigation, including those set out in the Notice of Intention to Accept Commitments of [Date] or a Commitments Decision. [Party] has not been the subject of any infringement decision or statement of objections in respect of the investigation.

## Definitions

2.1. For the purpose of these Commitments, the terms listed below shall have the following meaning:

“Act” means the Competition Act 1998;



“Capacity Sharing Agreement” means the capacity sharing agreement between P&O and DFDS signed on 21 May 2021, as updated on [Date];

“Capacity Ratio” means in respect of each Party, the proportion its freight capacity bears to the total freight capacity made available by both Parties under the Capacity Sharing Agreement;

“CMA” means the Competition and Markets Authority;

“CMA Investigation” has the meaning set out in Clause 1.2;

“Commitments” means the commitments given by [Party] hereunder pursuant to section 31A of the Act;

“Commitments Decision” means a formal decision by the CMA under section 31A of the Act to accept these Commitments, such that section 31B of the Act applies with respect to the CMA Investigation;

“DFDS” means DFDS A/S of Sundkrogsgade 11 2100 Copenhagen Denmark, a company incorporated under the laws of Denmark and listed on NASDAQ OMX Copenhagen A/S;

“Duration” has the meaning set out in Clause 6;

“Effective Date” means the date on which [Party] receives formal notification from the CMA of a Commitments Decision;

“Freight Capacity” means the freight capacity made available by each Party to the other in proportion to the Capacity Ratio;

“Passenger Capacity” means the part of a Party’s capacity allocated by that Party for carriage of passenger units;

“P&O” means P&O Ferries Holdings Limited;

“Rebalancing Mechanism” means the mechanism for addressing an imbalance between the applicable Capacity Ratio and a Party’s delivery of its freight capacity;

“Route” means the Dover-Calais route;

“Total Freight Capacity” means the aggregate of each Party’s Freight Capacity;

“Vessels” means the vessels of either Party operated on the Route;

“Vessel Schedule” means the Parties’ consolidated vessel schedule.

### **Commitments on no joint removal of sailings and no fixing of capacity**

3.1. [Party] will unilaterally decide on how much capacity it makes available on the Route and will not agree on capacity reductions with [Party].

3.2. Within a maximum of 1 week of the Effective Date, [Party] will make the following clarifications to the Capacity Sharing Agreement:

3.2.1. [Party] will at all times decide unilaterally on its capacity, including frequency of sailings and Vessels used;

3.2.2. [Party] may amend the Vessel Schedule in advance by providing reasonable prior notice to DFDS concerning planned changes in supply such as vessel drydock, maintenance, or changes in Vessels, and foreseen changes in demand like peak tourist periods (such as Easter, Christmas/New Year, school holidays, and July/August), all as unilaterally decided by [Party];

3.2.3. [Party] remains at all times the sole decision-maker over the Freight Capacity it provides to the Capacity Sharing Agreement with the result that the Total Freight Capacity (and thereby the Capacity Ratio) is not fixed and may be varied from time to time as a result of (i) increases or decreases either Party decides to apply to its Freight Capacity; (ii) changes in a Party's Passenger Capacity and (iii) changes in Vessels used;

3.2.4. The Capacity Ratio, which takes account of changes made since the commencement of the Capacity Sharing Agreement, shall vary from time to time in light of the possible changes to the Freight Capacity either Party provides to the Capacity Sharing Agreement, including in relation to disruptions expected to last 72 hours or more.

### **Commitments to maintain the parties' incentives to avoid ad hoc cancellations of sailings**

4.1. Within a maximum of 1 week of the Effective Date, [Party] will amend the Capacity Sharing Agreement to limit the application of the Rebalancing Mechanism to cancellations made for the following reasons, which result in disruptions lasting less than 72 hours:

4.1.1. breakdown of vessels, bad weather, industrial action; or

4.1.2. other unforeseen circumstances outside the Parties' control.

4.2. For the avoidance of doubt, [Party] will not make sailing cancellations that result in disruptions lasting less than 72 hours for any other reason, with the exception of cancellations for low utilisation set out in paragraph 4.3.

4.3. Both Parties shall retain the right to unilaterally cancel sailings for reasons of low utilisation. The number of return trip sailing cancellations that each Party can make for reasons of low utilisation shall be limited to a maximum of 0.5% of that Party's sailings in each six-calendar-month period following the date of implementation of the Commitments. The first period to which this obligation shall apply will end on 31 December 2022 irrespective of when it commences.

4.4. Within a maximum of 1 week of the Effective Date, [Party] will amend the Capacity Sharing Agreement to clarify that (i) a Party which has made available more capacity than its Capacity Ratio shall not be permitted to make available less capacity until such time as the underperforming Party meets its Capacity Ratio, and (ii) the following obligation applies only to the Capacity Ratio applicable at the time: the obligation on the underproducing Party to bring its deliveries of Freight Capacity back up to the Capacity Ratio during the next 30 consecutive days where there is an imbalance between the Capacity Ratio and a Party's delivery of its freight capacity.

## **Reporting and compliance**

5.1. [Party]:

5.1.1. will provide to the CMA any information and documents which the CMA reasonably requires and requests from [Party] throughout the duration of these Commitments for the purposes of enabling the CMA to monitor and review the operation of the Commitments or any of its provisions;

5.1.2. will keep, maintain and produce those records specified in writing by the CMA that relate to the operation of the Commitments or any provision of the Commitments;

5.1.3. in respect of Section 4 of these Commitments, will provide a report to the CMA of all cancellations of sailings on a twice-yearly basis, i.e., by 31 July for the preceding six-calendar-month period from 1 January to 30 June, and by 31 January for the preceding six-calendar-month period from 1 July to 31 December, for the Duration of the Commitments. The first report shall exceptionally cover the period from the date of implementation of these Commitments to 31 December 2022. In its reports, [Party] shall include:

5.1.3.1. The reason for cancellation of sailings;

5.1.3.2. The date of cancellation;

5.1.3.3. The duration of the cancellation.

## **Duration of the commitments**

6.1. These Commitments shall apply from the Effective Date for as long as the Capacity Sharing Agreement in the same or substantially similar form remains in force.

## **Review of the commitments**

7.1. Without prejudice to the generality of Section 31A(4)(b) of the Act (or the generality of [Party's] right to make such a request), [Party] may request the CMA to review the Commitments with a view to their variation or release where there has been a material change in any of the facts on which the Commitments Decision was based.

7.2. In the event that [Party] requests the review contemplated in Clause 7.1, the CMA will respond in writing as soon as is reasonably practicable having regard to the nature of the request, the aim of these Commitments and to its statutory duties. Acceptance of such requests to review shall be at the discretion of the CMA.

7.3. The variation or release of these Commitments shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation or release.