

Decision to accept binding
commitments under the Competition
Act 1998 from P&O and DFDS in
relation to a capacity sharing
agreement for freight customers on
ferries on the Dover-Calais Sea route

Case number 51099

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1. Introduction and summary

- 1.1 In this decision made under section 31A of the Competition Act 1998 (**'the Act'**), the Competition and Markets Authority (**'the CMA'**) accepts the commitments offered by P&O Ferries Holdings Limited (**'P&O'**) and DFDS A/S (**'DFDS'**) (together **'the Parties'**) as set out in the Annex to this decision (**'the Commitments'**).
- 1.2 The Commitments relate to an agreement to share capacity for freight customers on the Dover to Calais route (**'the Capacity Sharing Contract'**) along with associated arrangements between the Parties for the creation of a joint sailing schedule (all of which are together referred to as **'the Agreement'**).
- 1.3 The CMA considers that there are competition concerns which arise from the Agreement, relating to the joint removal of sailings, the fixing of capacity between the Parties, and incentives for the Parties to cancel sailings. The CMA considers that these competition concerns are addressed by the Commitments.
- 1.4 As a result of accepting the Commitments, the CMA has closed its investigation under the Act into whether the Parties infringed the prohibition in section 2(1) of the Act (**'the Chapter I prohibition'**). Accordingly no decision is being made as to whether or not there was an infringement.¹
- 1.5 Nevertheless, the CMA's acceptance of the 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:
- (a) believing that there has been a material change of circumstances since the Commitments were accepted;²
 - (b) suspecting that a person has failed to adhere to one or more of the terms of the Commitments; or

¹ Section 2(1) of the Act prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (or a part of it), and which may affect trade within the United Kingdom (or a part of it) unless they are exempt in accordance with the provisions of Part 1 of the Act or they fall within a category of excluded agreements pursuant to section 3 of the Act. The arrangements which are the subject of the present investigation do not fall within any of the excluded cases.

² This may, for example, include circumstances in which the prices of services appear to be rising, or to have risen, beyond levels that may be expected on the basis of the CMA's investigation.

(c) suspecting that information which led the CMA to accept the Commitments was incomplete, false or misleading in a material particular.³

1.6 If a person from whom the CMA has accepted commitments fails, without reasonable excuse, to adhere to the Commitments, the CMA may apply to the court for an order requiring, among other matters, the default to be made good.⁴

1.7 The remainder of this decision is structured as follows:

(a) Chapter 2 sets out relevant background, including details of the CMA's investigation, the Parties and the market context in which the investigation has been carried out.

(b) Chapter 3 sets out the CMA's competition concerns and a summary of the Commitments.

(c) Chapter 4 sets out the CMA's assessment of the Commitments and the responses to the consultation.

(d) Chapter 5 sets out the CMA's decision to accept the Commitments.

(e) The Annex sets out the text of the Commitments.

³ Section 31B of the Act.

⁴ Section 31E of the Act.

2. Background

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 for suspecting that the Agreement had the object or effect of preventing, restricting or distorting competition within the UK, contrary to the Chapter I prohibition.
- 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)*⁵ (**'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.⁶
- 2.5 The Parties offered proposed commitments to the CMA on 31 May 2022 (**'the Proposed Commitments'**), without prejudice to their contention that they had not infringed the Chapter I prohibition.
- 2.6 On 13 June 2022, the CMA issued a Notice of intention to accept commitments (**'the NIAC'**), setting out the Proposed Commitments, the

⁵ [Guidance on the CMA's investigation procedures in Competition Act 1998 cases \(CMA8\)](#), 10 December 2021.

⁶ [The Procedural Guidance](#), paragraphs 10.15 to 10.25.

reasons why the CMA proposed to accept them and inviting interested third parties to make representations (**'the Consultation'**).⁷

- 2.7 The Consultation closed on 4 July 2022 and representations were received from three interested parties. The responses to the Consultation and the CMA's consideration of them are summarised in chapter 4 of this decision.
- 2.8 The CMA has given full consideration to all the relevant material in its possession and has concluded that, for the reasons set out in chapter 4 of this decision, the Commitments address its competition concerns in this case and that it is appropriate for the CMA to accept the Commitments, subject to the consideration in paragraph 2.9 below.
- 2.9 The CMA has decided, following representations made to it in the course of the Consultation and its due consideration of them, that further monitoring safeguards are appropriate and necessary in relation to aspects of the Commitments relating to cancellations of sailings, which in the view of the CMA require proportionate independent verification in order to be effective and credible. The Parties have offered revised commitments to appoint a monitoring trustee to oversee compliance with those aspects of the Commitments.
- 2.10 Accordingly, the CMA has decided to accept the Commitments (as amended) and has closed its file in respect of this investigation. No decision is being made on whether or not the Act has been infringed.

The Parties

- 2.11 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

- 2.12 The Capacity Sharing Contract relates to the provision by the Parties of ferry services for standard, driver-accompanied freight between Dover and Calais.⁸ The relevant market has previously been found to be the provision of freight

⁷ [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, 13 June 2022.](#)

⁸ 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).

transport services on the Short Sea.⁹ The CMA considers that the provision of transport services for driver-accompanied freight on the Short Sea is likely to be the relevant market for its assessment, but the CMA does not consider it necessary to reach a conclusion on this point for present purposes.

- 2.13 The Parties' competitors for the provision of transport services for driver-accompanied freight 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.
- 2.14 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, with Eurotunnel accounting for between 30% and 40% of the market.¹⁰

Parameters of competition in the relevant market

- 2.15 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 an important factor of competition in the market.
 - (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

⁹ 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 Seafrance S.A.](#), of 6 June 2013, paragraphs 6.35 to 6.36.

¹⁰ Based on January 2022 data. More recent data available to the CMA is likely to be distorted by the temporary cessation of services by P&O in spring 2022.

it offers a choice of two arrival/departure ports in France (Calais and Dunkirk) and free meals to freight drivers.¹¹

- 2.16 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 Capacity Sharing Contract

- 2.17 The Parties have told the CMA that the purpose of the Capacity Sharing Contract 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.¹² The Agreement does not extend to coordination in relation to port-side services or infrastructure.
- 2.18 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 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

- 2.19 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

¹¹ 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.

¹² See footnote 8 above.

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.

- 2.20 The aligned schedule contains 7 to 11 fewer sailings per week (3% to 5% of the Parties' combined sailings) than immediately prior to the Parties' creation of the aligned schedule.¹³ The CMA understands that these were night and weekend sailings with low levels of utilisation.

Capacity sharing

- 2.21 The Capacity Sharing Contract provides for each of the Parties 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. The Parties have told the CMA that the Capacity Ratio is not fixed but is adjusted from time to time according to how much freight capacity each Party unilaterally makes available.
- 2.22 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.
- 2.23 The Capacity Sharing Contract also provides that, on any particular sailing, if a Party has not filled the freight capacity allocated to it 20 minutes prior to the scheduled departure of a vessel, the other Party has the option, for a fee, to use some or all of that unused capacity for its own freight customers (although it is not required to do so).
- 2.24 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

¹³ The precise number of sailings removed depends on the reference point.

disruptions to capacity will be addressed by a rebalancing mechanism (see paragraphs 2.26 to 2.27 below). The Parties envisage that the Capacity Ratio will be adjusted from time to time.

- 2.25 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

- 2.26 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.
- 2.27 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

- 2.28 The Capacity Sharing Contract provides for the Parties to share certain information for the purpose of giving effect to the contract. This information includes information regarding schedules and the capacity each of them will operate (i.e. how many ships, how many sailings, and how much space on each sailing will be allocated to freight).

Implementation of the Agreement

- 2.29 At the time of issue of the NIAC, the Agreement had only been partially implemented, largely with respect to departures from Dover. Since then, it has been fully implemented in both directions.

3. The CMA's competition concerns and summary of the Commitments

Introduction

- 3.1 This chapter sets out the CMA's competition concerns regarding the Agreement. It then provides a summary of the Commitments that the Parties have offered the CMA and which the CMA has decided to accept.
- 3.2 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.¹⁴ 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 represent a particularly important benefit.
 - (b) Given that Eurotunnel has a material competitive advantage over ferry services on the Short Sea as a result of its shorter journey times (see paragraph 2.16), the Agreement, by reducing the Parties' customers' journey times, is likely to intensify the competitive interaction between the Parties and Eurotunnel, and so strengthen the competitive constraint that they exert on one another.
- 3.3 It has also been put to the CMA that the Agreement may bring certain environmental benefits, by ensuring that vessels are filled more efficiently and so avoiding unnecessary carbon dioxide emissions. It is also possible that a reduction of freight lorry congestion will reduce carbon dioxide emissions.¹⁵
- 3.4 However, the CMA considers that certain aspects of the Agreement raise competition concerns such that the Agreement is more restrictive of

¹⁴ 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 in order to access both Parties' sailings, and may therefore make administrative costs savings while also potentially benefitting from greater volume rebates from the Party they contract with.

¹⁵ The CMA considers that benefits of this kind are a likely consequence of the Agreement, although it has not seen quantification of such benefits and therefore has placed limited weight on them.

competition than is necessary for the realisation of the likely benefits. These concerns are outlined below.

The CMA's competition concerns

Joint removal of sailings

- 3.5 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.
- 3.6 The CMA notes that the number of sailings that the Parties have jointly removed to date is relatively small¹⁶ 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.
- 3.7 As noted in paragraph 2.15 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 already used both Parties' services prior to the Agreement, 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.
- 3.8 Accordingly, the CMA has been 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.
- 3.9 The CMA's view is that the Parties' joint removal of sailings is unlikely to be indispensable to achieving the benefits of the Agreement (which would preclude exemption under section 9 of the Act). 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

¹⁶ Between 7 and 11 sailings per week (3-5% of the Parties' combined sailings) depending on the reference point – see paragraph 2.20 above for more details.

- (b) benefits relating to reduced costs for the Parties, which may be passed on to customers by way of lower prices, could be achieved by the Parties removing certain sailings unilaterally rather than jointly. The same is true of any benefits resulting from reduced carbon dioxide emissions.

Fixing of capacity

- 3.10 While the Capacity Sharing Contract provides that the Capacity Ratio will change from time to time, one clause within the contract 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. The CMA has been concerned that this clause 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.

Incentives to cancel sailings

- 3.11 The CMA has been 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.
- 3.12 In the absence of the Capacity Sharing Contract, the Parties would 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).
- 3.13 However, the Capacity Sharing Contract may weaken the Parties' disincentives against cancelling sailings because 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).
- 3.14 The CMA has been 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.

- 3.15 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, in the CMA's view 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.

Summary of the Commitments

- 3.16 In order to address the CMA's competition concerns, and without prejudice to the Parties' contention that they have not infringed the Act, the Parties have offered Commitments to the CMA, which the CMA has decided to accept. The Commitments are set out in full in the Annex. In brief, the Commitments provide that:

- (a) The Parties will each unilaterally determine the capacity that each of them makes 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.¹⁷
- (b) Each of the Parties remains at all times sole decision-maker in relation to the freight capacity it provides which is subject to the Capacity Sharing Contract. Each Party will put in place compliance training for staff engaged in interactions with the other Party.
- (c) The total freight capacity (and therefore 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 the 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 hours¹⁸ for reasons other than (i) breakdown of vessels, bad weather, industrial action; (ii) other unforeseen

¹⁷ 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.

¹⁸ 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 subparagraph (f) below).

- (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 Commitments.
- (g) The application of the rebalancing mechanism (see paragraphs 2.26 to 2.27) 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 Commitments shall apply from the date on which the Parties are notified of the CMA's decision to accept the Commitments and for as long as the Capacity Sharing Contract remains in the same or a substantially similar form.
- (j) The Parties may request that the CMA 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 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 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 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 Commitments for the purposes of enabling the CMA to monitor and review the operation of the Agreement or of the Commitments (or both).
- (l) The Parties will keep, maintain, and produce records specified in writing by the CMA that relate to the operation of the Commitments.

(m) The Parties will appoint a monitoring trustee to monitor the Parties' compliance with the aspects of the Commitments described in paragraphs 3.16(e) to 3.16(g) above.

4. The CMA's assessment of the Commitments and the consultation responses

- 4.1 This chapter sets out the CMA's assessment of the Commitments against the criteria set out in its Procedural Guidance and the reasons why, having taken careful account of the information available, including the representations the CMA received in response to the NIAC, the CMA considers it appropriate to accept the Commitments.
- 4.2 The CMA received three written submissions from third parties in response to the NIAC. It also held meetings with three third parties. The representations received by the CMA are summarised in the relevant parts of this chapter below.

Assessment of the Commitments

The Procedural Guidance

- 4.3 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.
- 4.4 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 commitments are capable of being implemented effectively and, if necessary, within a short period of time.¹⁹
- 4.5 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.²⁰

The competition concerns are readily identifiable

- 4.6 The CMA considers that the competition concerns with respect to the Agreement, which are set out in chapter 3 of this decision, are readily identifiable.

¹⁹ Paragraph 10.18 of the Procedural Guidance.

²⁰ Paragraph 10.20 of the Procedural Guidance.

4.7 The CMA has considered whether the Agreement gives rise to other competition concerns, including those issues raised by third party responses to the NIAC. For the reasons set out in paragraphs 4.35 to 4.57 below, the CMA does not consider that the Agreement gives rise to further competition concerns that are not addressed by the Commitments.

The Commitments address the competition concerns

4.8 The CMA sets out below its assessment of whether the Commitments address each of its competition concerns, including taking into account representations received by the CMA in response to the NIAC.

Joint removal of sailings

4.9 The CMA considers that the Commitments, and in particular the Commitments set out in paragraphs 3.16(a) and 3.16(b) above, address the CMA's competition concern regarding the joint removal of sailings (as set out in paragraphs 3.5 to 3.9 above).

4.10 The 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.

4.11 One respondent to the NIAC considered that there would be an adverse effect on price competition, notwithstanding the Commitments. That respondent contended that the Commitments are insufficient to address the CMA's concerns in circumstances where the Parties remain free to reduce capacity, particularly in off-peak hours, and to increase prices accordingly. The CMA does not agree. Although it is true that the Parties remain free to reduce (or increase) their capacity, they would need to do this unilaterally – as indeed they could in the absence of the Agreement.

4.12 Further, any unilateral removal of off-peak capacity by either Party would lead to a recalculation of the Capacity Ratio, meaning that the Party which had removed capacity would lose a proportional amount of capacity on all sailings (i.e. both its own sailings and those operated by the other Party) across the full sailing schedule, including the most profitable peak-time sailings. Accordingly, the CMA considers that there will remain a disincentive against the Parties removing sailings from their respective sailing schedules.

Fixing of capacity

4.13 The CMA considers that the Commitments, and in particular the Commitments set out in paragraphs 3.16(b) to 3.16(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 3.10 above).

- 4.14 The 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.
- 4.15 None of the responses to the NIAC made representations regarding this specific aspect of the Commitments.

Incentives to cancel sailings

- 4.16 The CMA is satisfied that the Commitments, and in particular the Commitments set out in paragraphs 3.16(e) to 3.16(g) above, address the CMA's competition concern regarding the Parties' incentives to cancel sailings (as set out in paragraphs 3.11 to 3.15 above).
- 4.17 Pursuant to the Commitments, the Parties will be able to cancel sailings only (a) for reasons that are outside their control, including breakdown of vessels, bad weather, or industrial action, or (b) for reasons of low utilisation (as to which, see paragraph 4.18 below). Further, where one of the Parties cancels a sailing for a reason that is outside its control, it is under an obligation to endeavour to increase its future provision of freight capacity to compensate for the cancellation.
- 4.18 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 each of the Parties retains 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 also to have some consequential environmental benefits through the reduction of carbon dioxide emissions. The CMA considers that it would not be appropriate to prohibit the Parties from making any cancellations for reasons of low utilisation.
- 4.19 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.

- 4.20 None of the responses to the NIAC made representations regarding this specific aspect of the Commitments.

The Commitments are capable of being implemented effectively and within a short period of time

- 4.21 The CMA is satisfied that the Commitments are capable of being implemented effectively and within a short period of time.
- 4.22 The Parties will implement the 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.
- 4.23 None of the respondents to the NIAC made representations that the Commitments were not capable of being implemented effectively and within a short period of time.

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

- 4.24 The CMA provisionally concluded in the NIAC that the Parties' compliance with the Proposed Commitments and their effectiveness would not be difficult to discern.
- 4.25 Two respondents to the NIAC contended that the proposed monitoring arrangements were inadequate and suggested that a monitoring trustee be appointed to provide better assurance of the Parties' compliance with the Commitments. Having carefully considered the representations on this, the CMA considers that the presence of a monitoring trustee would be likely to increase awareness of competition law risk among the staff responsible for implementing the Agreement in general. In addition, and more specifically, a monitoring trustee would serve the important function of providing independent verification of key aspects of the Commitments, so increasing their effectiveness in addressing the CMA's concerns and their credibility. In particular, a monitoring trustee would be well-placed to:
- (a) review the reasons for cancellations and follow up with the Parties if anything is unclear; and
 - (b) verify the adequacy and accuracy of information that the Parties provide, for example as to the proportion of scheduled sailings in a six-month period that have been cancelled for reasons of under-utilisation.

- 4.26 One response to the NIAC also contended that the proposed monitoring commitment was inadequate to monitor other aspects of the Parties' conduct relating to the Agreement which may not strictly relate to the operation of the Commitments, such as any mechanisms used by the Parties to punish or compensate one another for deviation from the Agreement. The CMA considers that the Proposed Commitments would have permitted the CMA to require the production of relevant documents and information. However, it sees merit in remedying any potential ambiguity in the scope of the information and documents that can be required.
- 4.27 One respondent also stated that the CMA should seek additional commitments with respect to the handling of information and the implementation of internal competition law compliance programmes to limit the risk of strategic information being shared between the Parties. As set out in paragraphs 4.39 to 4.41 below, the CMA has assessed the nature and extent of the information to be shared between the Parties pursuant to the Agreement 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. Nevertheless, the CMA considers that the implementation of competition compliance training for staff involved in interactions between the Parties will help mitigate a risk of such staff exchanging information beyond that which is necessary for the operation of the Agreement, and which may be commercially sensitive.
- 4.28 In the light of the above, the CMA sought the Parties' agreement to make certain amendments to the Proposed Commitments to strengthen the compliance and monitoring arrangements. On 4 August 2022, the Parties confirmed their agreement to amend the Proposed Commitments to:
- (a) provide for the appointment of a monitoring trustee to verify the Parties' compliance with the Commitments relating to the cancellations of sailings;
 - (b) clarify that the requirement on the Parties to provide information and documents to the CMA upon request applies to the monitoring and review of the operation of the Agreement, as well as of the Commitments themselves; and
 - (c) provide that each Party will implement specific competition compliance training for staff who are involved in interactions with the other Party.
- 4.29 These changes are reflected in paragraphs 3.16(k) to 3.16(m) above.
- 4.30 On the basis of these Commitments as amended, the CMA considers that the monitoring and reporting provisions set out in paragraphs 3.16(k) to 3.16(m) above are 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, and such information will be independently verifiable by a monitoring trustee.

- 4.31 In addition, the Parties will be required to keep, maintain, and produce records that relate to the operation of the 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 Commitments.

Acceptance of the Commitments would not undermine deterrence

- 4.32 The CMA considers that acceptance of the Commitments would not undermine deterrence against infringements of the Act. 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.
- 4.33 Acceptance of the 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.
- 4.34 None of the respondents to the NIAC made representations that acceptance of the Commitments would undermine deterrence.

Additional potential competition concerns raised in responses to the NIAC

- 4.35 In addition to the responses to the NIAC summarised above, the third-party responses to the NIAC identified additional potential competition concerns that they considered the CMA should take into account. The key themes raised in the three written responses and at the meetings held with third parties are set out below along with the CMA's assessment of them.

Pricing incentives

- 4.36 One of the respondents to the NIAC raised concerns regarding the effect of the Agreement on the Parties' pricing incentives. It made three main representations on this subject:
- (a) The introduction of a **wholesale fee** for a Party that wishes to use more than its allocated capacity on its own ferry will reduce its incentives to

reduce prices. The fee represents an additional cost which will disincentivise the Parties from increasing their volumes of sales, with the consequence that they will be disincentivised from lowering prices (i.e. below the level of the wholesale fee) to attract those customers.

- (b) There will be a reduction in **strategic uncertainty** with respect to the Parties' respective capacities and scheduling, reducing their incentives to compete on price. Indeed, any non-negligible disparity in price between the Parties would destabilise the Agreement by unbalancing the proportion of customers using each Party's service.
- (c) The Parties will be **indifferent as to whose vessels** their customers sail on, and this will create incentives for the Parties to align or increase prices.

4.37 The CMA's assessment of each of these issues is set out below.

Wholesale fee

4.38 The CMA does not agree that the wholesale fee will disincentivise the Parties from reducing prices for the following reasons:

- (a) Pursuant to the Agreement, both Parties have access to the same overall capacity as in the absence of the Agreement, but that capacity is spread across a greater number of sailings. Accordingly, the Agreement does not reduce the Parties' incentives to price keenly to attract customers.
- (b) If one of the Parties fills its capacity for a given sailing and still has waiting freight customers, it has the option to purchase additional capacity from the other Party within 20 minutes of the vessel's scheduled departure, for a wholesale fee. However, there is no requirement for it to do so. If it would not be profitable for the Party to purchase additional capacity (e.g. because the Party has priced below the wholesale fee in order to attract customers) then presumably it would not do so. In such a scenario, both ferry operators continue to have access to the overall capacity that they would have had in the absence of the Agreement.²¹
- (c) On the other hand, if a Party wants to buy more capacity and it is profitable for it to do so, this represents an opportunity for it to obtain extra capacity – which may help the Party to further smooth out traffic flows and reduce its customers' dwell times – without incurring significant additional

²¹ While any freight customers that cannot be accommodated within a Party's allocated capacity would need to wait for the next ferry, such customers would, in the absence of the Agreement, potentially have to wait longer for their chosen operator's next available ferry. Accordingly, customers are no worse off.

fixed costs (e.g. of running an additional sailing, which during peak times would likely mean operating an additional vessel).

- (d) It also remains open to each party to acquire extra capacity if they choose to do so (for example, by acquiring another ship). The Agreement allows a Party to add this extra capacity either within the Agreement (with a consequent addition to that Party's proportion of total capacity) or outside the Agreement.²²

Reduction in strategic uncertainty

- 4.39 The CMA does not agree that the Agreement will give rise to a reduction in strategic uncertainty. As set out in the NIAC, the CMA has assessed the nature and extent of the information to be shared between the Parties 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.
- 4.40 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. Similarly, the proportion of each vessel that is allocated to freight could be determined by monitoring the number of freight units entering the vessel during peak-time sailings.
- 4.41 The CMA considers that the contention that any disparity in prices between the Parties will destabilise the Agreement by unbalancing the proportion of customers using each Party's service is based on a misunderstanding of the Agreement. The Agreement does not provide that the Parties will balance the number of customers they carry. Pursuant to the Agreement, each Party has access to the same amount of capacity as it would in the absence of the Agreement and each Party shall therefore continue to be incentivised to price so as to fill as much or as little of that capacity as it considers to be profit maximising.²³

Indifference as to vessels used

- 4.42 The CMA has considered whether the Agreement may reduce the Parties' incentives to compete on price, by making freight customers indifferent as to

²² DFDS will continue to operate three ferries on the Dover to Dunkirk route outside the Agreement.

²³ As set out in paragraphs 2.26 to 2.27, there is a rebalancing mechanism within the Capacity Sharing Contract, but it is limited to dealing with short-term cancellations to ensure that each Party has access to the same overall amount of freight capacity as it operates on the route.

which of the Parties' vessels they travel on. The CMA does not consider such an outcome to be likely.

- 4.43 As set out above, pursuant to the Agreement, the Parties continue to have the same amount of capacity to fill and will therefore continue to have the incentive to attract demand for that capacity, including by competing on price.
- 4.44 Moreover, it remains the case following the Agreement, that the Party with which a freight customer transacts will gain that customer's ticketing revenue, even if that freight customer's vehicle may physically travel on the other Party's vessel.
- 4.45 Accordingly, the Parties will continue to have incentives to compete with one another on price to win freight customers' business. Indeed, all other things being equal, freight customers may be expected to transact with the less expensive of the two Parties which may lead to more intense price competition.

Incentives to compete on quality of service

- 4.46 Two respondents to the NIAC stated that the Agreement will mean that the Parties will be indifferent as to which Parties' vessels their customers sail on, and this will remove the Parties' incentives to compete on quality of service.
- 4.47 The CMA has carefully considered whether the Agreement might reduce the Parties' incentives to compete on quality of service. The CMA considers that the scope for this will not be material, for the following reasons:
- (a) The Agreement is limited to freight customers; tourists will still actively choose which of the Parties they travel with. Accordingly, the Parties will still be incentivised to maintain and compete on aspects of service quality that are shared by both freight and tourist customers, including speed of boarding, punctuality, quality of vessel and the general facilities on board their vessels. The CMA notes that tourist customers account for a significant proportion of the Parties' revenues.
 - (b) On-board spending by freight drivers will remain important to the Parties. The Parties therefore have a continuing interest in providing revenue-generating services such as freight drivers' canteens and duty-free shops (the latter of which will also be used by tourist customers).
 - (c) The Parties have told the CMA 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). One respondent told the CMA that the

cost of meals is ordinarily borne by the drivers, and that the availability of free meals is therefore a matter of indifference to the freight operating companies (their employers) who actually make the decision as to which ferry operator to contract with. However, the evidence the CMA has seen does not bear out such a conclusion. Although this is not the most important consideration for freight customers, five (out of 21) of the Parties' freight customers contacted by the CMA stated that it was a relevant factor when deciding which operator, they use on the Short Sea.

- (d) The Parties' incentives to maintain and compete on aspects of service quality which do not relate to the experience on board the vessel – such as sales-team customer service and the credit terms offered to freight customers – will be unaffected by the Agreement.

4.48 In addition, the CMA considers that any possible restriction of competition with respect to certain aspects of service quality (if such restrictions were likely) would need to be considered in the light of the benefits that the Agreement is likely to achieve by way of increased sailing frequency and reduced customer dwell time in the port. In this respect, the CMA's engagement with a sample of the Parties' freight customers' suggests that sailing frequency/crossing time is generally the most important parameter of non-price competition.

Potential foreclosure of competitors

- 4.49 Two responses to the NIAC expressed concerns about the effect of the Agreement on competitors, including whether Irish Ferries would be foreclosed from the market. One of the responses submitted that the increased sailing frequency that the Parties would offer to freight customers pursuant to the Agreement would raise barriers to entry, that the Agreement would allow the Parties to reduce costs and maintain revenue allowing them greater profitability than other operators, and that the Parties will benefit from inflated environmental performance scores compared to their competitors. Two responses suggested that the CMA consider requiring that third parties be allowed to join the capacity sharing arrangements.
- 4.50 The CMA considers that the increased sailing frequency that the Parties are able to offer their customers as a result of the Agreement will be attractive to freight customers relative to Irish Ferries' less frequent service. However, although service frequency is indeed an important parameter of competition, the Agreement does not constrain Irish Ferries' ability to compete strongly against the Parties with respect to other important parameters of competition, such as price.

- 4.51 Indeed, the CMA considers that the evidence currently available suggests that the Agreement will not prevent Irish Ferries from competing on the market. Irish Ferries deployed its first vessel on the Dover-Calais route in June 2021, after the Parties had announced the Agreement, with additional vessels being added in November 2021 and spring 2022, such that it now operates three vessels on the route. The CMA understands that, by January 2022, Irish Ferries had taken a material share of the market and may account for around 10-20% of the market for the first six months of 2022.²⁴
- 4.52 The CMA considers that the available evidence does not suggest that third parties will be foreclosed from the market as a result of the Agreement. Accordingly, the CMA has not identified a specific competition concern that would be addressed by a commitment requiring the Parties to give Irish Ferries the right of participation in the Capacity Sharing Contract, as if such participation were an ‘essential facility’.
- 4.53 With respect to the submission that the Agreement will allow the Parties to reduce costs and maintain revenue, thereby allowing them greater profitability than other operators, the CMA considers that any reduction of the Parties’ costs may be wholly or partly passed on to customers by way of lower prices given ongoing price competition in the market (see paragraphs 4.42 to 4.45 above). Moreover, the CMA does not consider that any increase in the Parties’ profitability relative to their competitors would give rise to a restriction of competition under the Act. Similarly, the CMA does not consider that any improvement of the Parties’ environmental performance scores compared to their competitors would give rise to a restriction of competition under the Act.

Dominance issues

- 4.54 One respondent to the NIAC contended that the Agreement creates a situation of joint dominance, which (it was argued) would have a number of potential implications, including that the volume rebates that the Parties give to their customers would be loyalty-inducing.
- 4.55 The CMA does not consider it likely that the Parties will hold a dominant position given that (i) as set out in paragraph 2.14, Eurotunnel will remain the single largest provider of transport services for driver-accompanied freight on the Short Sea, with a significant market share and (ii) as set out in paragraphs 4.42, and 4.43 to 4.45 above, the CMA considers that the Parties will continue

²⁴ IRN market share figures provided by P&O, updated with market share figures provided by a third party. However, this includes a period when P&O was not operating any sailings.

to compete with one another on price and, pursuant to the Commitments, to set their respective capacities unilaterally.²⁵

Benefits of the Agreement

4.56 Responses to the NIAC questioned the benefits of the Agreement, contending in particular that:

- (a) The 'turn up and go' benefit of the Agreement will not be felt by the approximately 50% of freight customers which already have contracts with both of the Parties.
- (b) The Agreement will not lead to any easing of congestion in Calais, which does not face the same physical capacity constraints as Dover. Congestion in Dover is a result of additional controls further to the UK's exit from the European Union, which take place upstream of the embarkation areas and the Agreement is unlikely to reduce congestion in these areas. It was observed that the 'Traffic Access Protocol' ('TAP') was implemented 30 times in the first two months of 2022, despite the Agreement.
- (c) Any claimed environmental benefits are disputed, as trains are less polluting than ferries and there are significant adverse environmental consequences arising from an alleged failure by the Parties to prepare for Brexit.

4.57 The CMA does not consider that these points entail that it is not appropriate for the CMA to accept the Commitments. In relation to the points raised:

- (a) A benefit felt by 50% of customers is still a very material benefit. The CMA also understands that some freight customers which have contracts with both Parties nevertheless tend to use one of the Parties for most of their business (for example to achieve volume rebates); these customers will also benefit from the Capacity Sharing Contract.
- (b) The CMA has asked the Parties for an update on the implementation of the Agreement and any assessment of its effects so far. It received some information which indicates that there has already been some impact on congestion and dwell times, although other sources of information indicate that it is too soon to say. The CMA considers that the impact of the Agreement on congestion and dwell times will become clearer once the

²⁵ Based on evidence gathered during the course of its investigation, the CMA estimates that the Parties each have a market share of between 20% and 30% (as set out in paragraph 2.14 above) and that Eurotunnel is currently the single largest operator on the market.

Agreement has been fully implemented without interruption for a longer period of time. The CMA observes in this regard that the Dover Harbour Board is planning to monitor changes in throughput times and will share the results of this monitoring with the Parties.

- (c) The CMA considers that the fact that the TAP has been implemented more often in 2022 than prior to the implementation of the Agreement is not informative of whether the Agreement has had (or will have) a beneficial effect on congestion and dwell times. The Dover Harbour Board confirmed to the CMA that there has been an increase in use of the TAP in 2022, but that this was caused by a number of specific factors which were unrelated to the Agreement.²⁶
- (d) Irrespective of whether additional controls create upstream congestion which will not be remedied by the Agreement, it is clear as a matter of logic that the ability to ‘turn up and go’ will reduce downstream dwell times for those freight customers which previously only (or predominantly) used vessels of just one of the Parties. The Dover Harbour Board has also confirmed to the CMA that they see this as an important benefit.
- (e) The submissions regarding environmental benefits do not appear to address the two main potential environmental benefits of the Agreement: more efficient use of the Parties’ fleets will have environmental benefits, and a reduction of congestion will also have benefits (whatever the cause of the congestion). However, since the Parties have not quantified these benefits, the CMA has placed very limited weight on them in its assessment of the Agreement.

²⁶ The main reasons for the implementation of the TAP in 2022 were the temporary suspension of P&O’s operations in spring 2022, works being carried out to the port infrastructure, disruption by protest groups and delays at check-in and passport control as a result of the UK’s exit from the European Union.

5. The CMA's commitments decision

5.1 For the reasons set out in this decision, the CMA has concluded that the Commitments as set out in the Annex to this decision address the competition concerns it has identified arising from the Agreement and that it is appropriate to accept the Commitments for the purposes of addressing those competition concerns. Accordingly:

- (a) the CMA has decided to accept the Commitments (as amended) by means of this decision; and
- (b) the CMA will discontinue its investigation with effect from the date of this decision.

5.2 The CMA's acceptance of the Commitments shall not prevent the CMA from reopening the investigation, making an infringement decision, or giving a direction, in circumstances where the CMA had reasonable grounds for:

- (a) believing that there has been a material change of circumstances since the Commitments were accepted (this may, for example, include circumstances in which the prices of services appear to be rising, or to have risen, beyond levels that may be expected on the basis of the CMA's investigation);
- (b) suspecting that a person has failed to adhere to one or more of the terms of the Commitments; or
- (c) suspecting that information which led the CMA to accept the Commitments was incomplete, false or misleading in a material particular.

Signed

Michael Grenfell

Senior Responsible Officer and Executive Director, Enforcement

For and on behalf of the Competition and Markets Authority

Date: 5 August 2022

Annex: 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 13 June 2022 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;

“Additional Period” has the meaning set out in Clause 5.5.3;

“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;

“CMA Report” has the meaning set out in Clause 5.5.5.

“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;

“Initial Term” has the meaning set out in Clause 5.5.3;

“Monitoring Trustee” means a person appointed in accordance with Clause 5.5 below;

“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 of P&O Ferries Holdings Limited, Channel House, Channel View Road, Dover CT17 9TJ, United Kingdom;

“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]. For staff engaged in interactions with the other Party, [Party] shall provide training specific to the Capacity Sharing Agreement in addition to existing competition law compliance training.
- 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 the other Party 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 Clause 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 scheduled 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] 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 Agreement or any of its provisions.

- 5.2 [Party] 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.
- 5.3 [Party] will appoint a Monitoring Trustee, who will possess appropriate qualifications and experience, as soon as is reasonably practicable and in any event by [6 weeks from the date of the acceptance of these Commitments], to monitor compliance with Clauses 4.1 to 4.4 of these Commitments. The appointment of a Monitoring Trustee by [Party] is subject to the approval of the CMA as to the identity of the Monitoring Trustee and the Monitoring Trustee's mandate in its entirety and:
- 5.3.1 the name of the proposed Monitoring Trustee and a second proposed Monitoring Trustee in reserve (should the CMA not approve the first proposed Monitoring Trustee) must be notified to the CMA as soon as is reasonably practicable and in any event by [4 weeks from the date of the acceptance of these Commitments];
- 5.3.2 the draft mandate must be notified to the CMA as soon as is reasonably practicable and in any event by [4 weeks from the date of the acceptance of these Commitments]; and
- 5.3.3 once the Monitoring Trustee has been approved by the CMA and appointed, [the Parties] must provide the CMA with a copy of the agreed mandate; and
- 5.3.4 the CMA shall have five working days from the date of notification under this clause to approve or reject the appointment (including the draft mandate) of the Monitoring Trustee.
- 5.4 [Party] will provide to the Monitoring Trustee such relevant internal information and documents as the Monitoring Trustee reasonably considers necessary, one calendar month in advance of the date each CMA Report is due for the purposes of enabling the Monitoring Trustee to fulfil its responsibilities pursuant to Clause 5.5.

Monitoring Trustee

- 5.5 The Monitoring Trustee will:
- 5.5.1 act on behalf of the CMA to ensure the Parties' compliance with clauses 4.1 to 4.4 of these Commitments;

- 5.5.2. be appointed by [Party] and [Party] on a joint basis at their own cost, in consultation with the CMA and subject to the CMA's ongoing approval;
 - 5.5.3. be appointed for a term of three years (the "Initial Term"), renewable for additional two-year periods (the "Additional Period") if the CMA, acting reasonably in light of representations from the Monitoring Trustee and the Parties, decides that it is necessary to maintain the Monitoring Trustee;
 - 5.5.4 act in accordance with a mandate, which is separate to these Commitments and is subject to the approval of the CMA;
 - 5.5.5. promptly provide the CMA with twice-yearly written reports ("CMA Reports") setting out the basis for the Monitoring Trustee's view that [Party] has or has not, as the case may be, complied with Clauses 4.1 to 4.4 of these Commitments.
- 5.6 The Parties will engage with the CMA three calendar months prior to the expiry of the Initial Term to enable the CMA to conduct its review of whether the commitment set out in this Clause 5 should be renewed for an Additional Period. Should the CMA consider that such renewal is required, this Clause 5.6 shall then apply three calendar months prior to the expiry of any such Additional Period.

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, save that Clauses 5.3-5.6 shall cease to apply following the termination of the mandate of the Monitoring Trustee, after expiry of the Initial Term or otherwise. The termination of the mandate of the Monitoring Trustee will be governed by the relevant provisions set out in that separate mandate.

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.