IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1216/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24 June 2013

Before:

MARCUS SMITH QC
(Chairman)
HERIOT CURRIE QC
DERMOT GLYNN

Sitting as a Tribunal in England and Wales

BETWEEN:

GROUPE EUROTUNNEL S.A.

Applicant

- and -

COMPETITION COMMISSION

Respondent

- and -

THE SOCIÉTÉ COOPÉRATIVE DE PRODUCTION SEA FRANCE S.A.
DFDS A/S

Proposed Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr Nicholas Green QC and Mr Alistair Lindsay (instructed by Pinsent Masons LLP) appeared for Applicant.

Mr Paul Harris QC and Mr Ben Rayment (Instructed by the Treasury Solicitor) appeared for the Respondent.

Mr Rob Williams (instructed by Reynolds Porter Chamberlain LLP) appeared for the Proposed Intervener, the Société Coopérative De Production Sea France S.A. ("SCOP").

Mr Meredith Pickford (instructed by Hogan Lovells LLP) appeared for the Proposed Intervener, DFDS A/S.

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THE CHAIRMAN: Welcome everyone, you have obviously seen the agenda that we circulated a few days ago, and we have also seen the very helpful submissions from all the parties. What we anticipate doing is ending on the question of timetable, which we see as the most controversial point to be determined. I wondered if we could deal with matters head by head in the following way starting, uncontroversially, with forum, which we can deal with very quickly, moving on then to a discussion of the significance of the French Decision, which we have seen adverted to in the papers, then going on to the question of whether we should be dealing with the matter by way of one appeal or two. Fourthly, a question of whether, in respect of an application or an appeal which is prospective, we can actually make orders in respect of such an appeal, then interventions, then confidentiality rings and then timetable. I will prompt you as we go through in case your pen could not keep up with me.

The only preliminary point I would like to make is that although I am sure the temptation will be great when we get to discussing timetable, we will not be interested in hearing submissions based upon the convenience of advocates for obvious reasons. Clearly, this is something which, whether this is heard in July or August or September, is going to require a great deal of work from everyone and, frankly, if we start bringing into play individual diaries we simply will not get finished, so, with great regret, those are points that we are just not going to be able to listen to today.

I am sorry, that was a rather long introduction, Mr Green. I take it the forum is uncontroversial?

MR GREEN: I assume so.

THE CHAIRMAN: Good.

MR GREEN: It is England.

THE CHAIRMAN: Yes, it seems absolutely clear. Next, more for information than anything else, the significance of the pending French Decision. In that I would include the question of when we can anticipate having it. We have seen in the papers reference to it not being available before late July, but actually I think we would be interested, for our part, in the other question, which is when it will be available?

MR GREEN: I can tell you what we know. We have been notified of the SCOP application. Our French lawyers took instructions about an hour ago. The present position so far as we are concerned is that we do not know when the hearing will be, nor when the judgment will be. We have been told that we are likely to be invited to attend, but we know nothing more than that.

THE CHAIRMAN: Before hearing anyone else in terms of when it can be expected, just how significant, Mr Green, would you say it is for us to have the French Decision before we deal with your appeal?

MR GREEN: *Prima facie*, the legality of the Decision depends upon the material before the decision maker at the date the decision was taken. There was an existing Paris court judgment at that date, and it was open to anyone to make submissions about it and what its meaning was at that time. That does not preclude a court hearing a judicial review from hearing material arising afterwards, but it would be the exception rather than the rule, and it would be perhaps unusual. So it is unclear to us at the moment what necessary relevance it will have. If one assumes for the sake of argument that the French court concludes that, in fact, there was no power of alienation, again that may beg questions as to what impact a French court ruling has on a competition authority's subsequent discretion. So it is not necessarily, in our view, a straightforward question, and until one sees the scope of the new putative French judgment, it is difficult to know what relevance it has. A judicial review classically is based upon the information before the decision maker at the relevant time.

THE CHAIRMAN: The party that I think has been pushing most the significance of the French Decision is SCOP. Mr Williams, do you have anything you want to say?

MR WILLIAMS: Yes, sir, in relation to matters of timing, the application is going to be heard, as far as we are aware, towards the back end of July, and it is anticipated that judgment will be given immediately thereafter. So the delay is not going to be, as we understand it, in obtaining judgment, it is actually the matter of hearing the application.

THE CHAIRMAN: From that I infer that no hearing has actually been fixed?

MR WILLIAMS: No, we do not have a date, sir.

In terms of the relevance, which I anticipate you were going to raise with me, the matter is connected with the argument which we foreshadowed in our submissions, which is a procedural fairness argument. So it is not simply the case that we will be seeking to bring forward the ruling and to rely on the ruling *ex post facto*, our appeal is going to raise a complaint that the legal opinions that the Commission had and relied on from DFDS and from GET were relied upon by the Commission and not shared with us. Had that material been shared with us then we would have obviously wanted to react to that material, and so the question of what the French court may now have to say about the ruling is relevant in that context. It is not simply an attempt to bring forward post-hearing evidence.

THE CHAIRMAN: That strikes me a point that you could well make now and without the French Decision.

MR WILLIAMS: Yes, sir, but our experience is that where procedural fairness challenges are raised, the question is always raised about what would have been the consequence of additional steps having been taken in the administrative proceedings and, as a result, what the French court has to say about the basis of and effect of its previous order will be relevant to the procedural fairness argument.

THE CHAIRMAN: Before Mr Green replies, does anyone else have anything to say on that particular point?

MR HARRIS: Yes, sir. The Competition Commission has not been kept in the loop as regards the new application or the precise nature of it, let alone when it will be handed down. However, if it is going to be on the timetable that Mr Williams suggests then we would respectfully suggest that the sensible course is to make sure that if and in so far as it is relevant it can and will be taken into account by this Tribunal in its deliberations on the two applications.

We hear what Mr Williams says about potential relevance to a procedural ground of appeal. That is not yet clear to us, but it might be. We also note that it is at least conceivable that it might be deployed as a material change of circumstance, which again would be something that the Commission would want to give serious consideration to, and would be relevant to issues before this Tribunal, including on timetable. We respectfully contend that although there is no perfect clarity either on date or substance, substantive matters within the Decision, that it should be before this Tribunal before matters are decided.

THE CHAIRMAN: It should be as a counsel of perfection, or should be as something which you would contend ought to be a significant factor in terms of the timetable that we arrange, which we have yet to discuss?

MR HARRIS: Yes, it should be within the context of a timetable that we say is already expedited, for the reasons I will develop later on.

THE CHAIRMAN: Yes. Mr Green?

MR GREEN: We are told in SCOP's skeleton that the hearing and indeed the ruling will be towards the end of July. Looking at the diary, the Thursday and Friday of that week, the 1st and 2nd August, and the following week is the 5th. So even on the least optimistic analysis of SCOP there will be a judgment if a hearing is convened after the end of July, and possibly that week of August, which is perfectly possible so far as we are concerned if it were convenient to the Tribunal.

As to the relevance and what is said about that, I do not see how it can be relevant to a procedural ground. If there is a procedural ground, then any uncertainty which existed

about the scope of the French judgment was an uncertainty which could be raised at the time of the administrative proceedings. If it is an assertion that the CC failed to provide legal opinions, then we have seen from their skeleton that they are asking for them now, and so far as we are concerned, we have got no objection to providing it into a ring. Then they can make the arguments necessarily on the basis of disclosed opinions.

It is plain their application is not contingent upon the French court's ruling because they are prepared to issue their application now, so they can say what they wish to say about it.

So with great respect, we do not think there is any reason to delay proceedings. There are two ways in which it can be dealt with. Either one can fix a date so that we avoid the end of July, so there will be a short period of time in which it can be dealt with, or the Tribunal could accept short written submissions be, as it is said, it goes to really quite a narrow issue.

THE CHAIRMAN: Thank you very much, Mr Green.

The third point on the agenda that I articulated on opening was the technical question of whether we should be dealing with it as one appeal or two appeals. In a sense, there is only one appeal before us at the moment, and, Mr Green, you have made very clear your client's desire to have this matter resolved very quickly. It would help, I think, if you were to articulate the advantages and disadvantages and whether you would be advocating your own appeal being heard on an expedited timetable leaving SCOP's appeal to come later, or whether that would simply be too disadvantageous to be a beneficial option to be considered.

MR GREEN: We would understand, and we appreciate, that from a practical perspective there are advantages in hearing the two appeals together, and in any event the Tribunal might wish to give a single judgment in relation to two appeals. *In extremis*, we would wish our appeal to be heard. We believe that we have strong grounds and we believe that we ought to be able to advance them sooner rather later. When it comes to timing issues, I will deal with why it is urgent for us. If the Tribunal were to order the putative appeal from SCOP to be heard in the same timescale as ours, then there is no reason why, if there is a bit hanging over at the end, it cannot be dealt with in writing. As I submitted a few moments ago, it would appear that, on the worst case scenario, there will only be a little bit which remains to be addressed after the end of July if we have a French court ruling towards the July.

I would respectfully suggest that the two should be dovetailed. There is a problem, I would suggest, with the Tribunal laying down orders in relation to an application which is not yet on foot, but with the co-operation of all parties I do not see why the Tribunal cannot indicate how it would deal with an appeal if SCOP are prepared to indicate when they are

going to serve it. Commonsense indicates this can be case managed sensibly to avoid the two appeals running out of syncopation with each other. So *in extremis* we would wish our appeal to be heard but we see no reason in practice why that should necessarily be the case.

THE CHAIRMAN: Speaking of case management, and it is a matter I will be raising with Mr Williams in due course, at the moment we are looking at a notice of appeal being served on either the 4th or 5th July from SCOP, but also with a desire on the part of SCOP to intervene in your appeal, Mr Green. Although I appreciate it is unusual, but then this is a slightly unusual case, one thing that occurred to us was whether one could not elide notice of appeal and notice of intervention on the part of SCOP and have, as it were, a single document that dealt with both SCOP's appeal and its intervention in GET's and I wonder if that might be a way of actually shaving a week or two off ----

MR GREEN: Yes.

THE CHAIRMAN: -- the timeframes. I notice on one of your proposed timetables, Mr Green, you had a deadline for statements of intervention which was 12th July, some short days after the Competition Commission's proposed defence.

MR GREEN: There is no problem conceptually with having a single document with two headings, which is what we would be contemplating, it seems eminently practical, we would agree.

THE CHAIRMAN: Mr Williams, perhaps you could address the one or two appeals point and that particular means of shortcutting matters.

MR WILLIAMS: There are undoubtedly going to be two appeals, sir. The question is really whether they ought to be heard together rather than separately. It is difficult to address this issue entirely separately from the issue of timetable, but our position is that the two appeals ought to be heard together for the reasons set out in our submissions. First, there is a very serious concern about substantial duplication of cost and procedural steps on our side. Thinking about two hearings involving substantially the same parties within a period of weeks of one another dealing with, to some extent at least, related issues arising out of the same decision.

We do make the point in our submissions, but I would emphasise that the SCOP and GET have liaised to avoid the duplication of grounds of appeal. To that extent they have divided labour between them and in those circumstances in our submission it would be entirely inappropriate to then prise the two appeals apart again and have two separate hearings of those appeals. That is the first point.

The second point is that there are areas of substantive overlap in the sense that both decisions are going to raise matters related to the remedy imposed by the Commission. Those matters do need to be considered and resolved in tandem with one another and again it would be inappropriate to hear argument and to resolve those issues separately from one another which, I think, would have to be the logical consequence of GET's submission. Of course, there is the obvious but important point that of the two appeals ours is the logically prior in the sense that SCOP will challenge the Commission's jurisdiction to consider the merger, and it would be in our submission entirely topsy-turvy, but also undesirable for the Tribunal to be considering questions of SLC and remedy before, if not in parallel with, questions of jurisdiction.

So, for a combination of reasons we say that these two matters do need to be heard together and it is really a question of when that ought to take place.

THE CHAIRMAN: Logically prior is perhaps true, the trouble is Mr Green has been rather quicker than you off the mark, and whilst there may have been co-operation between the two appellants the fact is he is ready to go and this is, in effect, his case management conference and the question is how one meshes your client in with that. What do you say about the notion of being able to serve a notice of appeal and a statement of intervention at the same time, which would be 4th or 5th July?

MR WILLIAMS: I have taken instructions; I do not think there will be a difficulty including that material in the same document. How one would formally set that up we have not quite thought about yet. But, as I have indicated in submissions, we have indicated that that would be a limited amount of content anyway and we do not think it would be enormously difficult to do that.

At the same time, we would like to concentrate on preparing our application as quickly as possible. We had thought that was the priority for obvious reasons and what we had proposed was that a short period of three working days afterwards for us to put in the intervention – we do not think that is going to increase costs or inconvenience anyone, at least as far as that contribution is concerned. Our preference is still to get the appeal done first, to put that in and to follow that up with an intervention because we do not really think there are any adverse implications. But we think we could put it in one document if the Tribunal thought for any reason that was advantageous.

THE CHAIRMAN: One document is advantageous, but of course the question of avoiding duplication, if you take that course, in a sense your intervention you will be rowing in behind GET in terms of the points they take and indicating, without duplication, where you

support and what additional points you have to make. Speaking for myself, the Tribunal would not welcome the fleshing out of points which are already articulated by GET in your own notice of appeal, we would rather take those as read and have the point stated once and once only. So, really, your notice of appeal would be confined to new grounds of appeal ----

MR WILLIAMS: No, no, that is what I was saying. It seems to us that in terms of the broader timetable, the Commission would want, in a sense, to get going with its defence as soon as we can get the documents in. We have said the deadline is next Friday, we are working to do it as soon as possible. We had thought that it would be most advantageous to concentrate on that document on the additional grounds, as you put it to me, sir, and then to deal with the intervention in a separate document once that was in place. That was the way we had approached it.

THE CHAIRMAN: I see. And that is going to be, as you say, either the 5th or before 5th if you can manage it, in terms of ----

MR WILLIAMS: That is right, yes. You did raise a question about the extent to which the Tribunal can make case management directions.

THE CHAIRMAN: Yes, indeed, in the case of an appeal that is pending but not made.

MR WILLIAMS: We do see the point that Rule 19 applies to proceedings, and obviously our appeal is not on foot yet. We had recognised that the Tribunal's order today would probably at least need to recognise that by saying: "Upon the SCOP undertaking to lodge any appeal against the Decision", the appropriate form of words to be finalised in accordance with the Tribunal's Rules, which would then in a sense bring us into play to that extent. We think, to a large extent, what we and the other parties are asking the Tribunal to do today is to take a pragmatic approach, which recognises that by sometime next week there are going to be two closely related appeals on foot, and it is in that spirit that I think these submissions have been made to the Tribunal on all sides. So if the Tribunal, having heard argument today, is able to indicate how those competing issues ought to be resolved we can only see that that is in the interests of all parties and we are grateful for the opportunity to address the Tribunal on the matter today rather than run into difficulties further down the road.

THE CHAIRMAN: Indeed, however we do it in an order, the aim is obviously to ensure that we reflect the fact that, although technically there is only one appeal before us, by the end of next week there will be two, so that point is well in mind and we are very grateful that you have attended here today for that reason. Mr Harris?

MR HARRIS: Sir, thank you. The Competition Commission is strongly of the view that there should only be one hearing of both appeals combined. I adopt the submissions made on this topic by Mr Williams. The key point, with respect, sir, is the fact that, as Mr Green has inevitably had to recognise, there is only going to be one Judgment. There cannot be the risk in this case of conflicting Judgments. There is going to be one Judgment by one Panel, which means that both appeals will have had to have been heard by the time of that Judgment. So it is to no avail for Mr Green to have his hearing first, divorced and separate from another appeal, which is going to have to be heard in any event before judgment in both can be given at the same time. So it makes no sense from a logical perspective.

We strongly endorse the submissions Mr Williams made about the duplication of resource and effort. That, of course, is not only on the part of the parties, but also on the part of the Tribunal, and I would like to add, if I may, and I hope the Tribunal will take this in the right spirit, that the CC is defending two challenges, and it also has limited resources, perhaps more limited than the rather fearsome looking legal teams that we already face against us across this room. We want to do a good, substantive job in meeting all the points, and that is not best served by having separate appeals.

Lastly, the third point is we have no difficulty with Mr Williams giving an undertaking that his appeal will be issued when it will be issued, and therefore there being case management directions now.

THE CHAIRMAN: I wonder if you could help me on the question of a combined document. If one, for instance, had SCOP's intervention statement at the same time as the appeal notice - I appreciate that is not what Mr Williams was contemplating, but it is something we are contemplating - that would ensure that you had certainty as to SCOP's position with regard to both appeal and intervention by, at the latest, 5th July. That presumably would be something the CC would welcome?

MR HARRIS: Yes, we are very content with that suggestion, sir.

THE CHAIRMAN: All right, as I understand it, we have four interveners. Two in a sense are pretty formal in that each appellant is seeking to intervene in the others. Just to tick that box, I assume there is no objection to GET intervening in SCOP's future appeal and vice versa? No, I hear no objection.

However, I think I would like both DFDS and CCICO to formally move their application to intervene. Mr Pickford, are you first?

MR PICKFORD: Thank you. Sir, members of the Tribunal, we have effectively three reasons as to why we wish to intervene in these proceedings. The first of those is that a core part of

the Competition Commission's reasoning - indeed the core part - in finding the merger situation in the present case will lead to a substantial lessening in the competition is that it will in the short term lead to the exit from the relevant short sea markets of my client, DFDS.

GET, in its application, seeks to unpick that decision, and so too, we hear from Mr Williams, will SCOP seek to do the same in due course.

The implications of these proceedings for my client are, therefore, both direct and profound. It could lead to their exit from the markets under examination, which is the very thing that the Competition Commission is seeking in its remedies to prevent, and we would suggest that the fact that our survival in the relevant markets is in issue could barely be a more direct and relevant basis for a sufficient interest to intervene. Notably GET, in its letter of 19th June, does not object to our intervention. Obviously that is not sufficient, but it is, coming from a party with such obviously opposing interests to our own, we would suggest an implicit concession as to the strength of our case in favour of the application. That is our first point.

I have two further reasons if they were required. I suggest that they are really the icing on the cake.

THE CHAIRMAN: We will hear the icing and then any objection.

MR PICKFORD: The second is that both GET and SCOP seek to obtain access to my client's confidential information that they were not permitted during the administrative proceedings before the Competition Commission. They seek an establishment of a confidentiality ring that goes beyond what they have already seen. We would suggest that it is obvious why the Competition Commission should have been so concerned about confidentiality during the proceedings. In particular, GET and my clients are direct competitors in the relevant markets, and any sensible competition authority will want to go out of its way to ensure that there was no unnecessary provision of information between competing parties.

Sir, we have a direct interest in ensuring that our confidential information is protected in these proceedings. So that is our second point.

The third point is simply that my clients and their actions are really at the heart of many of the grounds of appeal brought by GET. Clearly, we entirely accept that it is for the Competition Commission in the first instance to defend its Decision. We also suggest that it would be very unusual, in circumstances where our behaviour is said to be so central to the subject matter of the proceedings for us to be shut out and not able to observe and, if

necessary, make proportionate comments on what is said about us and our behaviour, should it be necessary to do so.

Sir, for those three reasons, we would say we have a very compelling case for intervention in these proceedings.

THE CHAIRMAN: Thank you, Mr Pickford. Can I ask if anyone is opposing that application? No.

Mr Pickford, your application is granted.

Is there anyone Chambre de Commerce to move their application to intervene? I have to say, when we read the letter from White & Case this morning, we were not sure, first, whether it was actually a proper intervention as opposed to an appeal, and if it was an intervention we were not really sure what CCICO brought to the party. There is no one to speak to those points. We will consider the position of CCICO.

MR HARRIS: Sir, if I may, the Competition Commission's position on the CCICO letter is that we cannot see that it brings anything at all to the party and that, as a maximum, they should only be given permission to intervene in writing and then in a completely non-duplicatory manner and at an appropriate juncture in the timetable.

In addition, there is no suggestion from the points that are made in the letter that it should ever be given access to anything within the confidentiality ring. That would be unnecessary, in our submission.

MR PICKFORD: Sir, if I might briefly rise to add, we do have an interest in the expedition of these proceedings for other reasons that I can explain when we come to timetable. Certainly we would seek to avoid any interventions that led to any delay in these proceedings. So, for that reason, we would effectively join the Competition Commission and possibly the views that the Tribunal intimated it might have about the lack of merits in that application. We would urge that it should be rejected.

THE CHAIRMAN: Thank you, Mr Pickford. Mr Green?

MR GREEN: I do apologise, just a couple of things. I wonder if the sensible course is for the Tribunal to clarify whether or not it is, in fact, a serious application to intervene. If it is, obviously it is not particularly timely, and that is to be regretted, they should have been here. It may be worth clarifying whether they are going to intervene, and if they are whether or not they should be limited simply to intervene in writing. But it might be a shame to shut somebody out who seriously wishes to intervene and has not yet, I am afraid, got his tackle in order.

THE CHAIRMAN: I do not know what the parties have seen, but we have a letter from White & Case dated 24th June, ostensibly making an application to intervene. I am assuming that was copied to all the parties.

MR GREEN: Yes, we have got the copy of 24th June. They do formally describe it as an application to intervene, and I do not see there is any reason why the Tribunal cannot do it on paper as opposed to orally.

THE CHAIRMAN: I understand.

MR WILLIAMS: Sir, for our part, we have not even seen the letter, so, to that extent, we would be reluctant to have the Tribunal dismiss the matter without us having seen it and without being able to make such representations as we might wish to.

THE CHAIRMAN: To the extent that there is an application before the Tribunal now, we refuse it. That is not to say that we are minded to close them out altogether if they were to renew the application on paper. For the reasons I gave earlier, we are quite sceptical as to whether this is a proper application to intervene in this case. At the moment the answer is no, and the ball is back in CCICO's court if they wish to renew the application in writing.

Confidentiality rings, which ties in with disclosure of documents. As I understand it, there are two sets of documents which SCOP is interested in seeing, which is the unredacted Decision and the two opinions which were placed before the CC in order to assist them with their decision. First off, is there any difficulty in making a confidentiality order in the usual terms which the parties can agree?

MR GREEN: No.

MR PICKFORD: No, sir, the only comment we would have on it is that I think there has been some suggestion that it should contain relevant external advisers. Obviously we agree to relevant external advisers. The question is who is relevant? Sometimes economists are permitted to participate in these rings. We would suggest there is no need for any economist to participate in these judicial review proceedings unless a compelling case can be made for them. So far no such compelling case has been made.

Given the extreme sensitivity of much of the information from my clients that will be required to be released to the confidentiality ring, we would seek to restrict it to the minimum extent necessary, and we would suggest that, on the present basis, is lawyers only.

THE CHAIRMAN: Mr Pickford, you will be aware, but no one else will, of the rider that we attached to a confidentiality order made last week regarding the ability to object to certain documents to certain named persons on the confidentiality ring. I wondered if that might be the way to go in this case, so that one has the usual range of persons on the confidentiality

list, but when documents are admitted to the ring, it is possible that the parties say, "But not to go to X" with a view to that matter then being challenged, if necessary, before the Tribunal.

MR PICKFORD: Sir, that is obviously one way to go, and in that respect my submissions would be, to coin a much abused phrase, laying down a marker for the position that we intend to adopt, but we suggest that, more generally, there simply is no need for any ring to extend beyond lawyers. No such case has been advanced before you today, and therefore we would encourage the Tribunal to proceed on that basis.

THE CHAIRMAN: I am reluctant to get drawn into being prescriptive about who should and who should not be on the list of persons admitted to the ring. In the first instance that is something which I think the parties need to reach a view on themselves and if agreement cannot be reached then, reluctantly, the Tribunal will get involved, but we expect the parties to be sensible about this. So I was minded to leave it there with a view that there would be one not two confidentiality rings given what has been said about the linkedness of the two appeals. We may have to revisit that on timetable if we split the actions, but at the moment we think one ring.

If that deals with the generality of the confidentiality ring, Mr Williams, do you have anything to say about documents that you want admitted to it right away?

MR WILLIAMS: Sir, as you have indicated there are two sets of documents. One is the confidential decision. I do not know whether it is appropriate for GET to open that issue given that this is their CMC, I am very happy to do it but I anticipate Mr Green may want to deal with the issue.

MR GREEN: I can deal with it now. The confidential Decision should be admitted into the ring, I would have thought that was commonsense, if it contains confidential information it needs to go into the ring. I would doubt there is going to be any dispute about that from anybody.

THE CHAIRMAN: No, it seemed to me it was a fairly straight forward matter. Perhaps, Mr Williams, before you address us I should see if anyone opposes the admission of these documents to the ring when it is agreed.

MR WILLIAMS: I had understood the Commission had reserved its position, so I do not know whether it is still reserving its position, or whether the document is going to go into the ring. At least in the context of the GET appeal, were that to be the course that is adopted, obviously SCOP would receive it in its capacity as an intervener, and the protection of the ring would be afforded. We had not anticipated that if that course were adopted there would be any objection to us then using the document for the purposes of our appeal. On the

contrary, we would have thought that actually it was advantageous in the sense that one might then be able to avoid some of the complexity that arises when a party files an application on the basis of a non-confidential document and then has to amend. So, if that is the way we are going then we are very content with that as an approach.

We have developed our submissions a bit further than that because the Commission was reserving its position, but perhaps it is helpful if you hear from Mr Harris.

THE CHAIRMAN: Mr Harris, that does seem very sensible to admit these now for all purposes. I do not know what you have to say to that?

MR HARRIS: Let me take, if I may, the points in order. We are content that there be a standard style confidentiality ring. We are content to engage constructively with the other parties as to the scope of the external advisers on the ring and we suggest that that should take place over the course of the next few days. If there is a difficulty then we will come back to the Tribunal. We take the same approach as to the documents that should go into the ring because the suggestion is being made by GET that it needs to have access to the entirety of the unredacted report, notwithstanding that in its skeleton argument for today it seeks to make a virtue of the fact that its grounds of appeal are "short" and the submission is made that they are all very self-contained and discrete, and they do not cover large amounts of what is in the report. So, as a matter of principle, we have difficulty in why the Commission should be asked to provide disclosure of the entirety of an unredacted report in response to grounds of appeal that are said not to cover the entire territory of the report.

We think that the more proportionate and sensible way of dealing with this is for GET to seek to explain to us within the bounds of a confidentiality ring why it is that it wants to see precisely what it wants to see, and then we will engage with them very constructively over the next few days just as we will as regards the scope of the order itself.

If there cannot be agreement then within the ring as to what parts of the report go into the ring then at that stage the Tribunal can be troubled again, if it comes to that, but that could be done in writing, perhaps in the same way as to the scope of the ring. So what we see is just because there is a confidentiality ring into which some confidential documents could be put does not mean that all of those confidential documents should necessarily be put into it. So that is really the point.

We do further draw a distinction between, on the one hand, GET and its access to confidential documents and, on the other hand, SCOP and its access to confidential documents, and that is for this reason, the SCOP has not yet identified its grounds of appeal and it has not produced a notice of application in contrast to GET, where we anticipate

being able to have this constructive and helpful dialogue as to what they need in order to advance the grounds of appeal that we have seen, and that we can understand. In sharp contrast in SCOP's case we do not really know what they are going to be saying. For the first time this morning we have received an outline indication of two possible grounds that they might be running, but we have not yet seen it. I should add, of course, that if and when SCOP produces its application, and if there are issues of principle or particular passages that have not then been resolved with GET – if – then we will, of course, engage very constructively with them and on an expedited basis in order to provide disclosure to them of what they may need in order to advance their grounds of appeal. All of this, sir, is done against the background of the Competition Commission being acutely conscious of its duties of candour as a public body within the context of a judicial review. We can see that there may be some aspects of the report that will need to go to GET's external advisers in the ring, and there may be some aspects of the report that will need to go to SCOP, but we say that the sensible course is not to put it all in straight away just because there is a ring.

THE CHAIRMAN: I quite take your point, Mr Harris, but the problem with that course is this, you will be spending so much time on constructive engagement with the other parties that an awful lot of time will be spent debating what should and what should not be unredacted for the purposes of the confidentiality ring that there will be a distraction from the very real pressure of getting the documents which form the articulation of substantive disputes in this matter ready in accordance with the timetable which, on any view, is going to be quite quick.

MR HARRIS: That is a matter, with respect, sir, that primarily falls within the ambit of the Competition Commission's deployment of its own resources. So if the Competition Commission – and these are my instructions – are prepared within a short timescale, I am only talking about the rest of this week, and if there has not been a resolution by the end of this week then you, sir, and the members may have to be troubled, but if the Competition Commission is prepared, notwithstanding all the other work it has to do, to engage first to see whether agreement can be reached, then in my respectful submission that should be the course that is adopted.

It is also the case that, of course, GET has been able to launch a really rather substantial notice of appeal without access to this material and if, and insofar as there are shades beneath my learned friend Mr Williams' submission that he might not be able to do his notice of application without access to the unredacted Decision then we say the proof there is in the pudding, GET has been able to do its perfectly sensibly without it.

There is an issue of principle in the case of SCOP as opposed to GET which is this is pre-action disclosure which we oppose, there is no reason for that. It is also unprincipled in the sense that the SCOP should not be allowed to have access to confidential and sensitive commercial material in order to decide what grounds of challenge it seeks to bring in the first place. So it is back to front in the case of SCOP, but in the case of GET it is just a more pragmatic aspect, and if we are prepared to do the liaising and engaging in the next few days, which are my instructions, then my submission is we should be allowed to do that.

THE CHAIRMAN: I quite take your point of principle again that this is an anticipatory appeal on the part of Mr Williams, but let me put it in a slightly more pragmatic way and see what the Competition Commission thinks there. If it is a question of there being a bigger gap between what the Competition Commission has to deliver by way of defence if the document is admitted to the ring now, as opposed to a smaller gap if there is debate through the course of this week, because obviously we are talking about five days here, what is the Competition Commission's position then?

MR HARRIS: May I just take instructions?

THE CHAIRMAN: Please do.

MR HARRIS: (After a pause) My submission in response has two parts. The first is that we do not see the need for that Morton's Fork, but that if somehow that were to materialise, which we do not see as being necessary, then we would rather have more time for the defence than we would to engage. One of the reasons the Competition Commission makes the submission about constructive engagement is because we are largely the defenders of the interests of other parties. Now, DFDS, who are here and can speak for themselves, and no doubt will do in due course, but there is also P&O and others – these are just the two headline parties, if you like, for these purposes – they are third parties to the appeals who have a great deal of extremely confidential material within the confidential report, and we have a duty to protect that confidentiality in their interest.

The position with P&O, slightly unhelpfully, is that they have informed us that they do have concerns, understandable about confidentiality, but they are not here today and they will not be able to articulate fully those concerns until later on this week. I think they said they would write to us by Wednesday. That is partly what is driving our thinking about "a few days", and, with respect, we do not see why a few days on this should make any difference to the amount of time that the Competition Commission has available for its defence, because the two things are logically divorced.

THE CHAIRMAN: Thank you, Mr Harris. Mr Pickford, I saw you rising to your feet?

MR PIKFORD: Thank you, sir. I have very little to add but just to make clear that our position, as one of the parties which has provided much of the confidential information which is in the report, is that we wholeheartedly endorse the position adopted by the Competition Commission. We quite see the concern that has been raised by the Tribunal about not diverting attention from substantive matters into some large satellite argument about what should or should not be disclosed. We say that as far as the Tribunal might be persuaded by the Competition Commission's approach that the time allowed should be short so that these matters can be addressed and dealt with and insofar as they are not addressed they can be ruled on paper swiftly thereafter. We would suggest that the discrete nature of the application that has been brought by GET does not require the wholesale disclosure of the entire report, including all of its annexes containing large quantities of my client's confidential information, much of which we would suggest is likely to be totally unnecessary for anyone and simply leads to risk of inadvertent onwards disclosure of information that would not exist if that information was not provided in that form. So we would wholeheartedly endorse the approach suggested by the Competition Commission in relation to this matter, which can be dealt with swiftly and in a practical way.

THE CHAIRMAN: Thank you, Mr Pickford. Mr Green, you can come last on this matter, if you do not mind. Mr Williams, obviously you will respond to what Mr Harris has had to say, but can your application be narrowed in a way to assist the Competition Commission in its approach on principle? For instance, do you need the annexes?

MR WILLIAMS: In a sense, sir, it depends whether you are asking me, what do we need to see in the context of our appeal and what do we need to see in the context of both of our appeal and GET's appeal. I could deal with them separately. Our over-arching point was, simply that between the two appeals there are going to be challenges to the findings made in section 4. Section 4 is obviously drafted against the background of section 3 which deals with the transaction, section 4 being jurisdiction, section 8 being the assessment of competitive effects, which is the subject of many of GET's arguments and the appendices related to that.

Appendix J would be directly relevant to the question of the effect of the French court's order which would be part of our appeal, and as far as I am aware appendix H is going to be relevant to GET's appeal.

So one quickly gets to a position where all, or very nearly all, of the substantive reasoning in the reports and many of the appendices becomes relevant to the grounds of appeal. It did

not strike us that at a CMC convened at this short notice, recognising the urgency of the matter, that it was going to be desirable, or even necessary, to start salami-slicing the report into paragraphs. We had approached the matter on the basis that there are going to be substantive bases for disclosure of the confidential material so that the parties can understand the CC's reasoning in full and the evidence that it has relied on.

I have already made the point, sir, but I will repeat it, that part of the reason for us bringing the matter forward is that we can simplify the proceedings and reduce costs and complexity for everyone, if possible, by taking into account this material in our notice. We have already given an indication of the areas in which we propose to challenge the Decision. It is not a question of seeking the material so we can get at points we would not be making otherwise. The Tribunal will be aware that in proceedings of this sort it is almost *de rigueur* to have two versions of the notice because the parties have not seen the reasoning in full when they put in their appeal. We just do not see that a second round of pleadings is going to be in anyone interests, whatever timetable we are working to.

So it was really in that spirit but on those substantive bases that we thought that disclosure at this point was appropriate.

We have given examples in our skeleton of the sorts of substantive points to which disclosure is relevant. I am not going to take up time taking you through that, but I hope they have given the Tribunal confidence that there are concrete targets for our application. As I say, this is not anything remotely resembling a fishing expedition.

Sir, we do say that it is both necessary and proportionate to order disclosure at this stage in GET's application, but also looking ahead to our application. I think that deals with the point, sir.

THE CHAIRMAN: Thank you very much, Mr Williams. Mr Green?

MR GREEN: There are two points that I would like to address. First of all, just to clarify GET's position, our Ground 1 in our notice of appeal is a procedural ground based upon an alleged failure on the part of the CC to provide adequate disclosure to us during the administrative proceedings to enable us to exercise rights of defence. You will have seen from the Decision that there are innumerable excisions and there were a very large number of documents that we did not see. Our ground does not depend upon disclosure now. It is based upon what we did not see, and were not given, during the administrative procedure. That is why we have not made an application for specific disclosure.

It is up to the CC to decide, in accordance with its ordinary administrative law duties, what it provides by way of disclosure and attaches it to its defence. That is the normal principle

laid down in *Ex parte Huddleston*, that the respondent comes to court with its cards face up on the table, and the CC is well aware of this, and I do not doubt that they will comply with it. Our case is not dependent upon our disclosure. It would be a mistake for the CC to think it is.

So far as the relevance of a ring is concerned, if a ring is going to be set up, it would appear logical to have confidence in it. Everybody will sign an undertaking to preserve the information, not misuse it, not hand it to third parties, and given the way in which these proceedings move forward, it would be sensible, in our view, for everybody being given access to the documents now. It just seems to make common sense. We do not see that DFDS should be excluded or that SCOP should be excluded, we ought to simply get on with it.

We do not contemplate having a debate at the moment with the CC about what should be in and what should not be in. We do not know what should be in because a lot of the report has excisions in it, and we do not know what is behind those excisions. We say introduce a ring, put the Decision into it now, the CC will put forward its defence and it will, in accordance with its ordinary duties, provide disclosure and we will take it from there. Our case does not depend upon disclosure.

THE CHAIRMAN: No, I understand. Thank you very much, Mr Green.

We will not make a ruling on that until we have heard from you on timetable. Just to inform you of what we propose to do, we propose to hear submissions on that and then withdraw to decide what course we are going to take. We have, however, considered potential timeframes.

MR WILLIAMS: Sorry to interrupt, I did not develop the argument in relation to the two discrete documents, in the sense that I thought we would focus on the report first, being the matter in which everyone has an interest. I am happy to develop those submissions. I am sorry if ----

THE CHAIRMAN: I did not understand there to be any difficulty with that.

MR WILLIAMS: I have not had that confirmed yet, but Mr Harris can no doubt enlighten me.

THE CHAIRMAN: Perhaps Mr Harris could indicate the CC's position on the opinions?

MR HARRIS: Yes, the CC's position is that this is principally a battle between on the one hand the SCOP and on the other hand DFDS and GET. It is DFDS and GET legal opinions that the SCOP seeks. When this was raised with us, I think post-publication of the report, we asked both GET and DFDS if they were prepared to give consent to the disclosure of the confidential legal opinions to the SCOP and they said no. It was in those circumstances that we considered our own duties and we took the view that there was no need for us, having

received them originally from GET and DFDS, to disclose those legal opinions. That is for a very simple reason, sir. That is because the essence of the point that is contained within appendix J that talks most pertinently about this matter is that there is considerable uncertainty about the scope of the French court's decision. It is because there is considerable uncertainty about the scope of the French court's decision that we could not, as the CC, be confident that imposing a divestiture order in the face of that court order would be sufficiently comprehensive or effective as a remedy for what we see as an SLC. Against that background we opted for a different remedy. In order to understand that reasoning, one does not have to see anything in the DFDS or GET legal opinions, all one has to do is understand that there is uncertainty about the scope of the French order. Of course, that point is now made by none other than the SCOP. It is because the SCOP itself recognises the very uncertainty in the French court order that it has gone to the French court in order to seek clarification of the French court order. That is what we are expecting at the end of July.

So, having been met with a refusal of consent by the principal parties and having assessed their own duties, we simply do not see why these are necessary. That is the position of the CC. We resist the disclosure of those opinions.

THE CHAIRMAN: Thank you, Mr Harris.

MR WILLIAMS: I have heard Mr Pickford whisper that he does object, so perhaps it is appropriate that I develop the application. I do not know what GET's position is going to be.

MR GREEN: We do not object.

THE CHAIRMAN: You do not object. Mr Pickford, you do object?

MR PICKFORD: I do object, yes.

THE CHAIRMAN: In that case I will hear you first, and then Mr Williams can deal with both the CC's and your objections in one go.

MR PICKFORD: Thank you. We do object to the application for specific disclosure for essentially six reasons. Firstly, these are judicial review proceedings, and disclosure in judicial review is the exception rather than the norm. As Mr Green has already pointed out, the Competition Commission has a duty of candour. That ordinarily obviates the need for any disclosure. It can be expected to attach to its response such documents as are necessary for this Tribunal to do its job properly. Any application for disclosure would ordinarily come after that.

The second point is that this is also a pre-action application, and again disclosure in those circumstances is the exception rather than the rule. Certainly, for its part, the High Court scrutinises such applications very closely under CPR 31.16 and requires a witness statement signed by a statement of truth explaining in detail why the application is necessary. We suggest that the Tribunal should be similarly circumspect about such applications.

The third point is that there is no proper explanation given by my learned friend in his skeleton argument as to why the documents are in fact necessary. There is not even a draft grounds of application for review against which to test the application for disclosure. There is just a vague, we would suggest, assertion of necessity. In that context, we would say that the application has not been sufficiently well made out.

The fourth point is this: the SCOP has provided, we would suggest, no assistance to the Tribunal in the form of any authority on when it is appropriate to grant applications for disclosure when they are the exception rather than the norm. That is, for instance, the authority of *Black v. Sumitomo* in the Court of Appeal, which is generally regarded as the leading authority on applications for pre-action disclosure, similarly, any authority, as adverted to by Mr Green in relation to the judicial review context. So we would suggest that the Tribunal is at something of a loss as to quite how it should approach the application.

Fifth, this application is made on the very day of the hearing. My clients were given no intimation prior to receiving the skeleton argument of my opponent that we were going to face such an application. There is no witness statement justifying its lateness, there is no explanation of why we were not properly notified. I have not yet had an opportunity to take instructions from those in Denmark on our precise view on this application which is now being made for the first time now.

For those reasons we would suggest that the application should not be granted.

The final point to make is that the Tribunal should not rely on confidentiality rings as being some kind of panacea to grant applications which otherwise would not be justified. Can I just remind the Tribunal, it will have seen it already, of the comments made in the skeleton argument of the Competition Commission referring to *Claymore v. OFT* where the Tribunal in that case noted that confidentiality rings have disadvantages, there is undoubtedly scope for error. The amount of information disclosed within them should be kept the minimum necessary to do justice in any case, they should not be overloaded.

So for that reason it would be quite wrong, as I have suggested, to rely on a confidentiality ring as any panacea. The application should be judged on its merits and it has not been properly made out.

THE CHAIRMAN: Thank you very much, Mr Pickford. Mr Williams, if you could deal with those five points as well as Mr Harris's, that would be very helpful. You will not need to deal with the pre-action disclosure points that Mr Pickford made, simply because he would be making this application in a week's time anyway and we recognise that reality. The other points I think you should address.

MR WILLIAMS: I am very grateful, sir. Mr Pickford complains that we have not referred to any authority in support of the application. That is not quite right because we referred to the *Sky* case in my submissions. I do have copies here which I was proposing to hand up if this issue became rather more involved. (Same handed) The relevant distinction between *Sky* and the present case, or the only relevant distinction, in my submission, would be the pre-action point. Sir, you have just indicated that one does not need to become bogged down in that for the reasons you have given. Could I just pick the judgment up at para.17, just to give you an idea of the sort of volume that was being dealt with there. It says in the first two lines:

> "… Mr Beard, whilst accepting that the application in the present case not an onerous - the material amounted to some 4 lever arch files of documents …"

So one is in rather different territory from the application that we have made today.

The Tribunal sets out the principles that it proposed to apply at para.21 down to 24, having set out the relevant rule in para.20, which is Rule 19.2(k), and it says in para.21 that it is common ground that the court should apply principles relating to judicial review as set out in *Tweed,* and so on.

Just picking up *Tweed,* at the end of the quote in para.2 of the judgment in *Tweed,* it says:

> "Such applications, characteristically, raise an issue of law, the fact being common ground or relevant only to show how the issue arises, so disclosure has usually been regarded as unnecessary and that remains the position."

Then it says:

> "In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions for disclosure of specific documents."

So in a sense what *Tweed* does it explains the exceptionality of disclosure in judicial review with reference to the types of disputes which arise. It is not saying that where a dispute arises where material is relevant and pertinent that the underlying material ought not to be disclosed in those circumstances. It is really para. 4 that we rely on – perhaps the Tribunal could read that? (After a pause) The Tribunal then really applies its own slant on that at

para. 24, and again if I could just ask the Tribunal to read that. (After a pause) Then you will see in para. 25 the President says: "Beyond such generalisations as these it is hardly useful to go …" and so on. So those are the general principles and one obviously then comes to an application of those principles in a given case.

Applying the principles set out in para. 24, the first is the nature of the Decision challenged. That is obviously in the present case a decision of the Commission which is evidence based and very reasoned in a detailed way and our challenge is going to be to the detail of those reasons in the manner which I have set out in my skeleton argument.

The issue here is whether and how far the order of the French Court was compatible or incompatible with the remedy which the Commission has imposed and in dealing with that issue the Commission relied on the legal opinions as we have identified in the skeleton argument, and it relied on both GET's legal opinion and on that of DFDS.

Moving on then to the principle in the final paragraph:

> "Where a particular document is significant to the decision being challenged, it is usually better to disclose the document as primary evidence rather than to attempt to summarise it."

Immediately before that sentence there is a question of whether the disclosure is onerous or not and plainly it is not in this case.

So those are the principles upon which our application is based. We say that there is a clear basis of these two documents and only two documents and, in fact, I can confine myself to one document, given GET's position on the principles in *Tweed*.

As I understand it, the Commission does not oppose the disclosure in terms, but it says: "We rely on the reasoning set out in our report." Well, sir, you have seen the way in which that issue was dealt with in *Tweed* and in *Sky*. The documents themselves are the best evidence of their content and, for the purposes of the ground of challenge articulated in the skeleton as to whether the Commission ought to have disclosed this material and whether it erred in its treatment of this material, the documents ought to be disclosed.

Coming on then to Mr Pickford's point. I have already dealt with his first point, that these are judicial review proceedings in which disclosure is the exception not the norm. It is not the exception in a case like this and, in any event, our application falls within the relevant principles.

I can skip over his second point which was about pre-action disclosure. He says that no proper explanation has been given. Really, this is bound up with the pre-action point in the sense that the Tribunal does not have a copy of our notice of appeal before it, but in my

submission we have explained clearly why we have an interest in these documents, and what issues they go to. It is right to say the Tribunal does not have a formal draft of the ground but the point, I hope, is clear to you, the Tribunal, as is the relevance of the documents to that issue.

Then Mr Pickford said we have not cited any authority – I have dealt with that point.

Fifthly, he said the application has been made on the day of the hearing, and no intimation was given, but I am pleased to see that it has not prevented Mr Pickford from making his six points, and so there is really nothing in that point, there is no prejudice to DFDS.

THE CHAIRMAN: Well, he did say he could not take instructions.

MR WILLIAMS: He says: "We have not been able to take instructions from Denmark" but this matter was raised with DFDS by the Commission last week, because, as Mr Harris explained, the Commission asked DFDS whether they were content for the disclosure to be given, they said "No" so obviously they are aware of SCOP's interest in this. It is right to say that, given the very compressed timetable, which has been adopted coming up to the CMC, we did not notify DFDS on Friday but, as I have said, Mr Pickford is here, and the business in Denmark is fully aware of the SCOP's interest in this material.

His sixth point was that the court should not rely on a confidentiality ring as a panacea. Just to be clear, we are not suggesting that this material needs to go into a confidentiality ring. It is a legal opinion but it has been provided to the Competition Commission, it is not clear why it is confidential. Plainly, Reynolds Porter Chamberlain and English legal counsel are going to need the input of French lawyers in dealing with what is a matter of French law.

So I am not sure that Mr Pickford has understood our application correctly. We have not suggested this material ought to go into the ring but, having said all of that, his point was that the court should not rely on the ring for the reason for giving disclosure it would not otherwise order. In my submission there is nothing in that point if we make out our application on the principles I have raised before the Tribunal.

THE CHAIRMAN: I think whether it goes into the ring or not is really a matter for the Competition Commission on which I do not think we want to express a view. What do you make of the point that arose incidentally out of Mr Green's submissions, which is that one should allow disclosure in JR proceedings to take place as the relevant pleadings emerge? In other words, it is for the Competition Commission to put into play those documents that, in the light of its defence, it considers are most appropriate, in light of the cards on table approach.

MR WILLIAMS: We recognise that is the course which would usually be adopted, but to repeat a point I have already made once or twice – apologies – given that we all find ourselves here with the opportunity to ventilate the matter before the Tribunal and given that DFDS are here, being the only party who now continues to object to this disclosure, and given that if we do receive the material it will potentially allow us to deal with it in our application, so simplifying the proceedings and reducing costs going forward. It seems to us that all of those points weigh very heavily in favour of dealing with the matter now rather than kicking the can down the road and dealing with it in due course. Of course, we recognise that absent the CMC that is the way in which the matter might have been dealt with. But, sir, we are where we are and it seemed to us most helpful to everyone concerned that we deal with it in this way.

THE CHAIRMAN: Thank you, Mr Williams. Mr Pickford?

MR PICKFORD: Sir, might I have permission at some point, I do not know whether Mr Green is going to make submissions, to address you on the *Sky* case, which obviously I did not have an opportunity to do.

THE CHAIRMAN: That is fine, if you could do that now and also deal with the point about instructions, and whether there have been anterior communications between the parties, particularly your client.

MR PICKFORD: The *Sky* case that is relied upon by Mr Williams, we would say is of no assistance to him, because it deals with the classical case where an application for disclosure is made following the submission by the respondent of its defence in the normal way, and so one can see that the hearing took place on 17th April 2008, and then at para. 6:

> "The Commission and the Secretary of State filed their defences in respect of both sets of proceedings on 28th March 2008."

So that was a case where the Tribunal had the benefit of both the application for review, the defence to it and could test the necessity for the disclosure application, disclosure being unusual, against those two concrete pleadings, critical in really assessing properly any such application. Here, my learned friend seems to make a different type of application in judicial review, which is an application for disclosure ahead of the respondent's defence, and we would suggest that that is what is exceptional here and therefore that the authority of *Sky* is of no assistance to him whatsoever.

In relation to the point on instructions, my instructions are that on 10th June this year the Competition Commission contacted those instructing me to ask whether we were content to disclose our legal opinion. My solicitors sought instruction from those in Denmark and

were told that they were not and they responded to the Competition Commission and conveyed that information to them. No intimation of an application to this Tribunal was ever made prior to this morning, and it is in relation to that that we have yet to obtain instructions from Denmark.

THE CHAIRMAN: I understand, thank you, Mr Pickford. Mr Green, if you have anything to add?

MR GREEN: We are happy to provide our opinion provided it goes into the ring. We do not want to see it used, for example, in French proceedings or elsewhere, but I doubt there is going to be any dispute about that. The only other point is this, that if there were an issue of French lawyers going into the ring, again we cannot see any difficulty with that occurring.

THE CHAIRMAN: Thank you very much. As I say, we will rule on that in due course.

Turning then to the question of timetable. Obviously there is a wide range of views and dates being canvassed by the parties. Perhaps I could say now that we have discussed this with a view to identifying dates which the Tribunal can manage, so that the parties know what we may be aiming at.

First off, our provisional view, and we will certainly hear, in particular, the Competition Commission on this, our provisional view is that a September date is too late for what are supposed to be really rather expedited proceedings and, in particular, we do take account of the fact that the operation or non-operation of the services is a matter that does need, at least on one party's view, to be resolved very quickly.

The dates that we have identified as potential dates for the hearing, and I say this without prejudice to the possibility of having September, but you know what I am going to say on that, are 29th, 30th July, and 1st August, or 13th 14th and 15th August. We have identified three dates. The understanding would be that the time estimate will be two days with a day in reserve, and we would rather sit long days on two days and have the third day genuinely in reserve, but those are the days we have marked out. We have not identified a date in September yet, but it might perhaps be appropriate if I heard those advocating a September hearing first before we get down to the nuts and bolts of timing, whatever the date of the hearing is. Mr Harris.

MR HARRIS: Thank you, sir, for that preliminary indication. The correct way of approaching this matter is as one of principle. The question really is: where does the prejudice arise if there is a hearing date in September as opposed to a breakneck preparation for a hearing at the end of July?

We respectfully contend that there is an absence of prejudice on the part of GET, but there will be prejudice if the Commission has to defend two full challenges by the end of July. I will take them in that order, if I may. The lack of prejudice on the part of GET, the suggestion is made in a very vague manner that there might be some adverse effect on GET's business, but with respect that suggestion rings completely hollow. There is no evidence before this Tribunal at all in support of a super-expedited timetable, that there will be an adverse impact on GET's business, full stop.

Further, there is no evidence that the adverse impact upon the business arises from the publication of the final report and, in this regard, it is important that the Tribunal remembers that the provisional findings, which of course are public, have been out in the market since 19th February, and yet My Ferry Link has not gone out of business, or ceased operating, or stopped providing tickets to consumers, or suffered a catastrophic loss in custom.

One might have thought that the people most concerned about adverse impact would be the employees, the individuals concerned, but of course, they are represented by the SCOP, and the SCOP does not say that there needs to be break neck expedition as to bring this hearing on by the end of July.

It is also relevant to bear in mind in this context what the remedy timetable is that faces both the parties and this Tribunal. The first thing that has to happen now that the final report has been published is that the order has to be drafted, the remedies order, but that has not yet been done.

The second thing that has to happen is there is a one month statutory consultation period on the draft order. Plainly, that has not been done. Thereafter, the remedy is only to take effect after six months, so we are at least seven months away from full implementation of the order, so there can be no serious suggestion that the business is going to have to cease at any stage before that.

The highest it can be put is that there may be potentially some sort of loss of confidence but, as to that, as I said a moment ago, there is no evidence at all and, in any event, there are two very clear ways in which the GET business can seek to reinstil confidence in or reassure its customers. Firstly, it can issue public statements as much as it likes to assure its own MFL customers that they will carry on honouring their tickets and the ferry business will not cease until the issue of remedy is finally resolved. In any event, in a situation like this, GET owns another cross-Channel asset, Eurotunnel. Even if there were some lurking sense of doubt in the mind of customers on the MFL arm of its business, it could provide further

reassurance by making available services or publicly reassuring people that services on the other arm of its business, the Tunnel, would be made available.

So that is the lack of prejudice on the part of GET. In contrast, however, we say that we will be prejudiced if we have to mount a full defence in such a short and constrained timetable.

May I remind you, gentlemen, if I may put it like this: there are going to be two challenges here. When one adds them together, such as we can tell about the SCOP challenge, it amounts to a root and branch attack on the entirety of the report. So it starts with jurisdiction and then it takes an issue with the counterfactual. It seems that at least GET, but probably also the SCOP, is not content with the analysis of substantial lessening of competition. We know that in addition GET attacks the modelling, the economic modelling in the report. We know that in addition GET attacks the procedure behind the report, how it was arrived at. Then, of course, both parties focus a substantial amount of their fire power upon remedy.

So we have got jurisdiction, substantive analysis, procedural analysis, economic analysis and remedies. There is nothing left. This is the entirety of the CC's report. That is a fearsome workload on any view, on any view of the world. Our position, let me be quite clear about this, the CC's considered position, responsible and considered position, is we will not be able to do justice to such a profound attack across so many fronts if the hearing is done at the end of July. We will simply not be in a position to do a fair and proper job. One wonders if, possibly, that is one of the reasons for which this timetable is being sought. As it is, we do agree with expedition. The timetable that we put forward is an expedited timetable. It will mean that there is a hearing in September. That is two and a half to three months after the application was issued. What we say is that is entirely consistent with other similar merger challenges.

I am going to deal with the similar ones first, and then I am going to deal with the completely dissimilar cases cited in my learned friend Mr Green's skeleton argument. The most similar ones are ones in which merger challenge is made to a completed CC report, not to an OFT referral decision, for example. I will come back to that. We have looked up the dates this morning when we were faced with this citation of authority. In *Somerfield v. Competition Commission* case, *Stagecoach v. Competition Commission* case, and *Akzo v. Competition Commission* case, the latter of which is, of course, extremely recent, the dates are follows: in *Somerfield* the notice of appeal was on 3rd October 2005, and the hearing was two and a half months later on 13th December 2005, not one part of

which falls within a recognised vacation period. So it is already two and a half months leaving aside any vacation interruptions.

In the *Stagecoach* case the relevant dates are the notice of appeal was 11th December 2009, and the hearing was three months later, on 9th March 2010.

In *Akzo v. Competition Commission* the summary of application for review, which was one imagines was more or less as the date of the notice of appeal was 22nd January 2013, earlier this hearing, and the hearing was 18th and 19th April 2013, so almost exactly three months. That, of course, was a case in which there were multiple interventions and confidentiality rings, so it has some clear resonance with the current case.

The point is not so much the detail of the date, but the fact is that in similar cases where Competition Commission reports were actually challenged the timescale, even on an expedited matter, has been three months on the one hand, three months on the other hand, and two and a half months, where there were no interruptions of vacation periods. In contrast with those relevant timetables, even in expedited cases with multi-parties, the cases that have been cited by my learned friend are of a completely different nature. Most of them are challenges to OFT referrals. They do not involve an in-depth analysis of a competition report in all its glory with its many appendices, which is what we are facing here today. It is a completely different level of workload.

In the case of *Merger Action Group*, that was a completely different context. That was said to undermine the entire financial fabric of modern society, and was highly urgent for that reason.

SRCL, the *Stericycle* case, that was just the remedies challenge, and there was some reason for extreme urgency there to do with a forthcoming contract round of negotiation, which would otherwise be lost altogether.

So the fact is that when one actually analyses timetables for expedited challenges to merger provisions, they have followed almost identically the very timescale that we now put forward as being a suitable expedited timetable, namely for a hearing in September.

It is obviously also the case, to echo some submissions I made earlier, that this timetable has to, in our respectful submission, be a joint timetable as between the two appeals. In that regard it is relevant that the SCOP has said that it is not in a position to proceed with a substantive appeal at the end of July, it needs to get its notice of appeal out, we heard all about that earlier on, and then it has also referred to the need for having regard to the French court order anticipated at the end of July. The timetable that is being provisionally floated, certainly the first of those, gives no latitude for that type of involvement.

For those reasons, we say that the only suitable timetable is to have one in September, but as to the precise date in September there is a degree of flexibility. The critical thing, if I may just re-emphasise this, is the analysis of prejudice - the lack of prejudice on the one hand to GET versus the clear prejudice to the CC if matters are over-expedited with this amount of work.

THE CHAIRMAN: So you are saying that in the public interest it should be September rather than August or July?

MR HARRIS: We are saying very much in the public interest, including because of the lack of prejudice on the part of GET. It is the public interest because we would be prejudiced in defending a proper competition decision, contrasted with the lack of prejudice on the part of GET if there is an expedited rather than super-expedited timetable.

THE CHAIRMAN: So am I correct in suggesting that you feel you just cannot do justice to your case, even though you have written a very long report which is being challenged - you cannot do justice to your case by a date which is at the end of July?

MR HARRIS: Absolutely. My clear instructions are that we cannot do a proper defence across the myriad amount of challenges that are going to be launched by the two appellants in conjunction if we are forced to do that by the end of July. Those are my clear instructions from the CC after mature reflection.

THE CHAIRMAN: Does the same go for my mooted dates in August?

MR HARRIS: Sir, may I just take a moment?

THE CHAIRMAN: Please do.

MR HARRIS: (After a pause) Thank you, sir, I am grateful. The position is that the middle of August is better obviously than the end of July, but it does not remedy the problem because it runs into a period of time where there a multiple availability problems. Here I am not talking about just the problems of counsel, that can potentially be overcome. What I am talking about here are members of the panel of the Competition Commission itself for the purposes of this case and associated economists, and internal solicitors and counsel. So the problem with those two weeks is that, in the real world, to go from the end of July into mid-August may not in practice be a meaningful extension of time, because there is a very great likelihood that one will never have all the relevant people around at the same time. So this is not just a point about counsel's diaries.

MR CURRIE: Mr Harris, could I ask a question about this: would it be simplistic to think that we are now at a stage where it is really a matter for you and your junior to grapple with what is in the report rather than to be discussing these matters with the team that made the

decision in the first place? I am struggling to understand what exactly it is apart from you and your junior analysing the report and looking at the attack that is made upon it that needs to be done.

MR HARRIS: With respect, Mr Currie, I would say that is a little bit simplistic. For a start, I think the very first ground of challenge is all about the procedure that was said to have been adopted. Mr Rayment and I were not involved in that degree of, if you like, the early stages of the procedures. That is something about which we have no knowledge and we will need full instructions, and there may need to be evidence.

As regards the remainder, Mr Rayment and I have had some degree of involvement, but this is an expert report prepared by an expert panel, and we did not sit on that panel. So, yes, we can see what is in the report, but we will plainly need to have the opportunity to take instructions upon what the meaning and effect of those matters is, and this takes time. This would be different. We would not be making the submission now if, instead of a kitchen sink appeal, we had met with a targeted one or two ground appeal. What we have got here is large legal teams on the other side now working completely in unison, we are told, and they have decided between them to challenge every single substantive aspect of an entire Competition Commission report. That is what makes the difference.

Mr Currie, with respect, we would say that is a huge amount of work, and six weeks is just too little to do it. Two and a half months is pushing it, especially when one of those is August, but nevertheless we are freely accepting that there is some degree of urgency and we will take upon ourselves that quite significant amount of work, but six weeks is simply too little.

MR CURRIE: Thank you.

MR HARRIS: We do speak here, both the Competition Commission and those of us on the front bench with some experience of how to defend a challenge of this degree of substance.

THE CHAIRMAN: Mr Harris, one point I would like you to address, because I anticipate that Mr Pickford will be making these points and I would like to hear what the Commission has to say, is what DFDS has to say about a timetable under agenda item 6 in their letter of 24th June, where they are rowing in behind GET in terms of a rather faster timetable?

MR HARRIS: If I have understood Mr Pickford's submissions correctly, he says that for understandable reasons, and I can make a specific point here, he wishes to have the written work done by the end of July/early August, even if there is not to be a hearing until September - I think that is the position that DFDS takes.

THE CHAIRMAN: We will hear obviously from Mr Pickford in due course. Certainly he advocating close of pleadings by at least the end of July. I confess that, when I read it, the suggestion was that a quicker rather than a slower timetable, if one can use those terms in this context, was favoured.

MR HARRIS: Yes. Perhaps I can take this in stages. We do not understand the position to be, and it has not been suggested in the materials before the Tribunal today, that the critical difference for DFDS remaining in the market will be as between a hearing at the end of July or as between one in September. As I read the materials that he has put forward on behalf of his client today, it is, "Let us make sure at least all the written work is done by July, even if the hearing cannot be until September". All the information that we have gathered during this process leads us to the view that DFDS is not going to exit if there is a hearing in September with a judgment fairly promptly thereafter, as opposed to one in July. So there is, at best, a minimal amount of additional prejudice to DFDS from stretching matters into September rather than the end of July.

As regards the specific suggestion that is being made about Mr Pickford's team not putting in, I think, on our timetable it was proposed, statement of intervention by 12th August, we would be, for our part, perfectly content to facilitate that by suggesting that we put in a defence by, instead of 5th August, 1st August. I say that, this is partly subject to seeing what is going to come in the SCOP appeal, so there is some degree of conditionality about this. The suggestion that he puts in a statement of intervention by 12th August, that could come forward by a week if that suits him. So there is that, but the critical point on this, before we look at the nitty-gritty of the dates is: where is the prejudice? It certainly has not been said by DFDS or GET, let alone with any evidence, that there is some critical degree of prejudice to them from not having a hearing at the end of July as opposed to one just a few weeks later in September.

THE CHAIRMAN: Thank you, Mr Harris. I suggest that we hear from Mr Williams next, followed by Mr Pickford and, if you do not mind, Mr Green, you can then take up the tail end and advocate what you want to by way of timetable.

MR GREEN: Certainly.

THE CHAIRMAN: Mr Williams?

MR WILLIAMS: Sir, for our part we have been working hard to file our appeal as soon as possible. We recognise that GET has broken some records in the manner in which it has brought its appeal forward, certainly for dealing with a matter of this complexity, but that really should not obscure the fact that when one is looking at the timetable for an appeal

process of this sort one is already dealing with what is, by ordinary judicial review standards, a very compressed timetable, whereby one has a period of one month for the preparation of a notice of application dealing with a decision which is in many respects more complex than many judicial review applications, and then a period of one month for the Commission to provide its defence to that application. I do not think anyone other than DFDS is suggesting we could or should be required to file our application earlier than the rules provide. We do not actually think the Tribunal has the power to require us to do so, but in any event we have indicated we are working to put it in as soon as possible, and that will be at some stage next week. We do not think really that makes any material difference to the timetable – a matter of days here or there.

As I said, we have not been dawdling, obviously we have been diverted into preparation for this CMC for the last few days but, assuming our appeal is lodged late next week, we just do not see how a hearing of that appeal could take place on the sort of timetable that gets proposed and which would happen on the earlier sets of dates the Tribunal has indicated earlier on. The Competition Commission, on that timetable, would need to prepare its defence in a week and then need to deal with interventions and skeleton arguments within a total period of three weeks. We do say, without being overly generous to the Commission, that with the best will in the world, that timetable simply is not workable and, in our submission, it is not appropriate, given the very serious interests which are at stake, for matters to be dealt with with that degree of over expedition.

We agree with the points Mr Harris has made about the sorts of decisions that have been dealt with more quickly, but it is obviously a matter for the Tribunal to make appropriate case management directions in this case. We do say that the right analogy is with cases like *Akzo Nobel* or the earlier *BSkyB* case, which took months rather than weeks. Of course, the Tribunal will have to take account of the fact that there are two applications in this case, which place an inevitable burden on the Commission.

THE CHAIRMAN: I am hoping you are going to minimise those by not duplicating with Mr Green, I must say.

MR WILLIAMS: I am sorry, sir?

THE CHAIRMAN: I am hoping that there will be a minimum of duplication and that the GET and the SCOP applications can be ----

MR WILLIAMS: It is not a matter of duplication, it is accumulation rather than duplication was the point I was making, sir. As I say, without being too generous to them, that is the reality. So we do say that given everything that needs to be done, one gets to an early September

hearing without wiping out August because of counsel availability or for any other reason. If they take until the end of July to prepare their defences, and one then interpolates interventions and skeleton arguments one very quickly gets to the back end of August at the very earliest, and the timetable which we put forward was the most expedient timetable we thought was practicable, which led to a hearing slightly earlier in September, but even that was, in our submission, extremely compressed by comparison with earlier similar cases, and taking into account that one of the three months was the August vacation period where perhaps difficulties obviously arise.

Again, without wanting to be overly generous to the Competition Commission we do see the force of what they say about the lack of prejudice. One would have thought that the key issue was the implementation of the remedy. The Commission has made its position clear as far as that is concerned.

As far as a general interest in certainty of outcome is concerned, the SCOP absolutely shares the desire for a certainty of outcome as soon as is reasonably practicable. As Mr Harris has said, the SCOP's employees have very serious interests at stake here, but that has to be balanced against the need to deal with the proceedings in a fair and proportionate manner. We say that GET's timetable simply does not come close to that.

In terms of the alternative timetable which the Tribunal has proposed, in our submission if one gets to late July/early August for the Commission's defence, then it becomes equally difficult to maintain a hearing date in the middle of August, because one has still got to deal with interventions and skeleton arguments. In my submission, and in my experience, those matters really cannot be dealt with in days here and there. A compressed timetable will allow weeks for each of those stages rather than days, and that is why one gets to the back end of August at the very earliest rather than the back end of July.

We have already dealt with the position in relation to the French proceedings. We have already explained what the timetable in relation to those is. Mr Green made three points about those. First, he said that the ruling would not be relevant to our fair process ground. I have already explained why we say that is not right. Issues will inevitably arise about what would the consequence have been of legal opinions being shared with the SCOP, and it is in that context that we say that the ruling is relevant. His other two points were to say that there were two solutions to this, the first is to expedite the French proceedings. We have already done that and I can assure the Tribunal that the July date that we have already given is the most expeditious date which the French court can offer us. His further alternative was to say: "This can be dealt with by follow-up written submissions", but that would not

be appropriate for an issue which is absolutely going to the heart of our application. We do say that neither of those solutions addresses the issue in relation to the French proceedings. I think that covers everything I wanted to say about timetable.

Just a footnote to all of that, DFDS are obviously here and they have been given permission to intervene in the GET appeal, it is a separate question whether they ought to be given permission to intervene in our appeal. That will obviously depend on the interest, the issues and what they have to say about those issues. As I stand here it does seem to us very much less likely that they will be able to identify a basis for bringing something additional to the party as far as those issues are concerned but, as I say, I am not addressing that now, I am simply saying that one should not structure the timetable on an assumption that the DFDS will be an intervener in our appeal as well, that is a matter for another day.

THE CHAIRMAN: I must say, Mr Williams, I was not anticipating having a further CMC consequent upon your appeal. I was anticipating making orders that would apply across both appeals.

MR WILLIAMS: As a practical matter, they are now going to be at the hearing to deal with the appeal ----

THE CHAIRMAN: Exactly.

MR WILLIAMS: -- but obviously it is incumbent on any intervener to avoid duplication and I simply make the point that the timetable should not assume that DFDS is going to need to produce additional material in our appeal because ----

THE CHAIRMAN: I understand, and I will hear Mr Pickford in a moment about what he has to say on these points. All I would say is that the intervention that we are granting we are minded to grant across both the appeals. Obviously, Mr Pickford will have well in mind the need for brevity and the need to avoid duplication and he will make such points as he considers appropriate, and if he goes beyond that and makes inappropriate points he can expect to be brought up short in due course, but I am confident that he will not.

MR WILLIAMS: Obviously, I make no criticism of Mr Pickford for not applying to intervene in an appeal which has not been lodged yet, I certainly was not taking a point about that. I was simply saying that the application is to intervene in the existing appeal, that was not a reference to the SCOP's appeal I do not think, and that is why I did not have anything to say about it at that point.

THE CHAIRMAN: I am grateful, thank you. Mr Pickford?

MR PICKFORD: I think I can probably be relatively candid in relation to the issue of timing. Obviously, we do not want the Competition Commission to suffer unduly in its preparation

because we would wish the Competition Commission to be able to defend its decision to the best of its ability, but certainly for our part, all else equal, we do have a preference for expedition, as the Tribunal has rightly recognised in our letter, and so our concern essentially was to offer as many practical suggestions as we could as to how we might be able to achieve that to a greater extent by shaving time off areas where it was not necessary to have such substantial time limits.

In relation to those, the first point substantively that arises is the date for the notice of review of SCOP. Mr Williams, I suggest, has taken a somewhat inconsistent position on the Tribunal's jurisdiction because he says so long as he gives an undertaking to the Tribunal to bring an application he can rely on Rule 19 of the Tribunal's Rules to obtain directions in relation to it, for instance in relation to pre-action disclosure. So he says there is no problem there in relation to jurisdiction. We would suggest that that carries across equally in relation to any directions that the Tribunal might wish to give in relation to an application which it is quite clear on all sides is of some urgency. If one sees the terms of Rule 19, they are that the Tribunal:

> "…may at any time on request of a party or its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in para. (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings."

So obviously there are proceedings in contemplation, but it does not say that there have to be proceedings necessarily afoot, and in relation to subsection (2), it then goes on to provide:

> "The Tribunal may give directions i.e. as to the abridgement or extension of any time limits whether or not expired."

So we would suggest that there is power to require an abridgement of time in an appropriate case. It is obviously going to be somewhat exceptional, the case where it would be appropriate, but we would suggest that this is an appropriate case.

MR WILLIAMS: I do not want to interrupt Mr Pickford, I did not develop the point because, conscious of the time, I did not want to create satellite issues if there were not issues. I have Court of Appeal authority here in the *Ryanair* decision. I am not trying to take anyone unawares, but I did not want to make matters any more complicated than they need to be. There is Court of Appeal authority that the Tribunal does not have power to abridge time in this way. I am happy to hand it up and to show you the paragraph. As I say, I did not want

to go back around the loop again if that was unnecessary. I apologise to Mr Pickford for not opening the point, but I was trying to ----

MR PICKFORD: If I could put it this way, I obviously have not had opportunity to look at the authority that Mr Williams is referring to because he has not provided it yet, but even if it were the case that there was no strict power to require an application to be put in earlier, we would suggest that if SCOP wants to come to the party and says that it is very important that it is, in terms of a participating party, at the same time, then it can be very strongly urged by the Tribunal to do what is necessary to enable it to join the party, and that could, amongst other matters include bringing its appeal in a more timely fashion than it is currently proposing, as GET was able to do.

THE CHAIRMAN: I understand, Mr Pickford. I think it would help us most if, at the moment, you could address us how you see the timetable working, on the assumption that we do not get anything from SCOP until 5th July – it may be before then, but if you assume the date is 5th July for their application – how you see matters spanning after that?

MR PICKFORD: Certainly. My calculation, actually, was that it was 4th July that their application was required by and I think that is consistent with what the Competition Commission anticipates as well, so I am not quite sure on what basis 5th July has been advanced.

MR WILLIAMS: Under Rule 64 you do not count the first day.

THE CHAIRMAN: You are saying 5th, are you, Mr Williams?

MR WILLIAMS: Yes, sir.

MR PICKFORD: Obviously, nothing will turn on whether it is 4th or 5th, but in any event the CC thought it was the 4th, and we thought they were right.

We would suggest that thereafter if the statements of intervention, as has been suggested already, that SCOP wishes to provide in GET's appeal can be submitted at the same time as its own appeal ----

THE CHAIRMAN: Assume that there will be an order along those lines for the purposes of your submissions.

MR PICKFORD: Also, on the assumption that, as Mr Williams has suggested, GET is unlikely to have anything substantive to add to SCOP's appeal - and even in so far as it does it can always liaise behind the scenes in order to advance anything it has to say additionally, literally within a day or so of the application having been brought because those two parties clearly co-operate on a daily basis in any event - we would suggest that if the Competition Commission were then given in the order of three weeks to put in their response to the

applications, that would take one to approximately 25th July. Then we could, for our part, put in our statement of intervention within six or seven days thereafter by the end of July. We could then go on to have a hearing potentially in mid-August, if that was appropriate, or in September if ultimately that is what the Tribunal decided was more appropriate. Certainly there is no reason why, at the very least, pleadings could not be settled by the end of July. As an alternative, it has been suggested by GET that skeleton arguments should stand for statements of intervention. We do not have any great objection to that either, and that could well potentially shave even more time off the time required.

THE CHAIRMAN: Mr Pickford, could you help me on this: you obviously will be supporting the CC in this matter.

MR PICKFORD: Yes.

THE CHAIRMAN: Do you anticipate that you will have a sufficient level of co-operation with the CC to be able to serve your statement of intervention at the same time as any time for the CC's defence, or would you want time between the CC's defence and your own statement of intervention?

MR PICKFORD: Sir, it is ordinarily the better course to have a short period after a public authority has served its defence in order to support as an intervener. One of the reasons for that, of course, is that the Competition Commission has to maintain some degree of independence. Should the matter be going back before it, it does not want to have prejudiced its position to deal with matters again. Obviously we would very much encourage the Competition Commission to communicate with us as much as it feels able, but we do not yet know quite how far it will feel able to do that, and therefore there would be concern that if we are required to submit something at the same time if, down the line, the Competition Commission felt unable particularly to share with us what it was doing. We would just have to do all of the work ourselves and potentially risk a lot of duplication by putting something in at the same time because we would not know what we could rely on them to say and what we could not.

THE CHAIRMAN: Whereas what you do is you do all the work yourselves, see what they put in and then delete the bits that are redundant in the light of what the CC has produced?

MR PICKFORD: Essentially, sir, yes.

THE CHAIRMAN: So you would be looking for, say, and extra two days after the CC's defence comes in to put your statement of intervention in.

MR PICKFORD: I would ask for three to go through that exercise, given that this is quite a substantial case, but, yes, at a minimum.

THE CHAIRMAN: Do I take it that obviously you do see a higher degree of urgency, you favour August over September if that is doable?

MR PICKFORD: Certainly my clients do, yes, sir.

THE CHAIRMAN: A point well made, Mr Pickford, thank you.

MR HARRIS: Sir, can I just add in relation to that last point, my experience of these matters is that if there is a super-expedited timetable then, in practice, one thing that suffers is any degree of liaison between the CC and other parties. It is just the way of the world. We would prefer to have a timetable in which there could be a modest and proper degree of liaison with interveners who support our defence, but if we are going to be bunkered down because of a super-expedited timetable, in practice it will not happen.

THE CHAIRMAN: I take your point, Mr Harris. Mr Green?

MR GREEN: Can I, first of all, just explain why this is a matter of considerable urgency to GET. The decision has created very considerable uncertainty. MFL is a fledgling business. This is not a case about a company seeking to acquire assets, this is a business which has just started. It started in spring 2012. It was cleared by the French competition authorities and its entire existence is now in jeopardy by virtue of the CC's Decision. It needs certainty. The longer this goes on, we risk losing staff from MFL, it impacts upon the share price, it impacts upon our ability to maintain relations with customers, both passengers and freight customers, who will be looking to book over a longer period of time.

The Tribunal may have become aware through the papers of the Sea France experience. They ceased trading without any warning, and that is a very harmful experience from our perspective. People will expect us to operate with a high degree of respectability to be able to give warning and deal with matters on a more measured basis.

It is very important, therefore, for my client to see this matter resolved one way or the other with expedition.

So far as the CC's position is concerned, our application for judicial review is very focused. Ground 1 is essentially a procedural ground. Ground 2 is a submission that the matter should have been investigated, but was not, and one will see that simply from examining what is omitted from the report. Grounds 3 and 4 ultimately boil down to a focus on two paragraphs in the Decision - 8.161 and 8.102. Ground 5 relates to a very small number of pages in the report about remedy.

Mr Harris's submissions ultimately boil down to, it is inconvenient to do it in the holidays because it appears that his staff and the Civil Servants may be away. I am afraid that is not a good reason. Everybody will suffer a degree of inconvenience. We, after all, some of us

act for French clients. We will cancel our holidays, if needs be. We will be ready to argue this case at either the end of July or in the middle of August. This is essentially a case about law, and it really does turn now on the front line lawyers' preparation for the hearing. There is really nothing in the CC's position. They do not have a right to adduce new evidence. There is no reason why witness statements should take a long time. I am afraid bleating just will not do.

So far as the SCOP is concerned, they have not yet issued their notice of application and it is a bit rum for them to dictate to us, who have moved with expedition. They, however, agree that they will be bringing two short grounds to the Tribunal's attention. The issue of the French court will be resolved by a hearing on either of the dates specified by the Tribunal, because SCOP's case is that they will have a judgment on the merits by the end of July.

So far as reasons for August not being suitable, they state in their skeleton that they would wish to avoid preparing skeletons in the vacation. Holiday entitlements are not a good reason, with the greatest of respect.

So far as all the lawyers are concerned, we do live with short timetables, we always do, and we will in this case.

DFDS's position: from an entirely different perspective, they take the same view as us. They require certainty.

The CC's position is that they will exit the market in the short term. They plainly need certainty. As is stated in the Hogan Lovells letter, in the event that the Tribunal were to make an order along the CC or SCOP's lines, so far as timetable is concerned:

> … "it may therefore be necessary for DFDS to apply to the Tribunal for a direction that the stay on implementation be lifted."

The last thing anybody wants is satellite litigation about the suspension of the CC's order. So, so far as we are concerned, we would prefer July. More people will be around for everybody to take instructions from, but the middle of August will be sufficient for our purposes if that is what the Tribunal orders.

THE CHAIRMAN: Mr Green, can I move from the general to the very concrete. Just how much time would you need between the date of the CC's defence and DFDS's statement of intervention, recognising that these might not come at the same time, in order to get the matter up and fairly present your client's case at a hearing? For instance, were we looking at an end of July hearing, then suppose one were to say 22nd July for the CC's defence and

24th July for the statement of intervention of DFDS, is that remotely doable if one had a hearing beginning on 29th July? It seems extremely tight.

MR GREEN: We prepared our notice of application in an extremely tight timetable. The issues are narrowly canvassed. We believe it would be feasible. We would burn the midnight oil, that is the long and short of it. We have managed to do it in a short timetable. We put a full notice of application in because we assumed we will not be putting in lengthy pleadings hereinafter. That is why our notice of application was fuller than perhaps would otherwise have been the case. So we can manage that timetable. We are really in the Tribunal's hands.

THE CHAIRMAN: Thank you, Mr Green. Mr Harris, I am going to let you reply, because I recognise that you have a duty to ----

MR HARRIS: I am very grateful. We say, with respect, Mr Green's submissions really miss the point. What he has to identify is the additional degree of prejudice that arises to his clients from not have having super-expedition, but having expedition. The critical month - what additional damage does his client suffer from having a hearing in September as opposed to a hearing in July? That is the critical issue. He completely fails to address it. That is number one.

Number two, he is unable to address it sensibly and coherently today because he has absolutely no evidence.

Number three, it is unsurprising that he has no evidence, because the provisional findings have already been public since 19th February, and one might have expected, if there are genres of the type of prejudice that he seeks now to conjure up before this Tribunal without any evidence, they would have already taken effect to some degree. Therefore, he would have an almightily difficult task in saying that prejudice that has already arisen to some extent is now critically pushed over the edge by one month. Instead of any of that, what we have is simple assertion from the Bar. We have assertion from the Bar that the share price might be affected. With respect, there is no evidence of that at all, and it features not once in any of the 80 or so pages of pre-CMC correspondence that my learned friend's team produced for us today. It is not mentioned at all, let alone any evidence.

There is no suggestion that there will be an additional critical loss of staff during the month of August - i.e. the distinction between the two dates - or there is some critical need for extra certainty during the month of August.

The fact remains that we are already proposing expedition. This super-expedition is simply not workable on our part, and it will not do fairness of justice in this case.

I would just like to add by way of a final remark a rebuttal. This has, firstly, got nothing to do with the availability of counsel seeking to avoid super-expedition, but it is also not a question of other members of the CC's staff or the panel in question being away on holiday. The point that I made earlier on is that the CC has limited resources and a full case load, and it has to do fairness and justice with its other case load as well. The people have to balance the use of its resources between this case and it being super-expedited, and the other cases. They will be working on other cases as well during August. So it is not fair to characterise this as just a complaint about holiday time during August. That is very far from the case.

THE CHAIRMAN: Mr Harris, one of the points that was made by Mr Green, and it really is a DFDS point, was that super-expedition, as you call it, is actually a bit of a proxy to avoid an application along the lines envisaged by DFDS in relation to a lifting of the stay on implementation?

MR HARRIS: I would say two things: firstly, there is no such application, and secondly, it will face the difficulty I have just identified, which is exactly the same substantive difficulty that Mr Green faces, that it would have to establish that the critical extra degree of this somewhat mythical prejudice arises from the month of August. There is not a safe basis upon which this Tribunal can proceed. Normally one would expect any application for expedition to be supported by evidence, let alone one that requires super-expedition, and in addition to which one which requires a critical focus upon a one month period to explain why that one month period makes all the difference.

THE CHAIRMAN: Frankly, Mr Harris, I am a little sceptical about the point about evidence. Everyone here knows that this Tribunal deals with all cases, but particularly merger cases, with what other courts would call expedition. So really all the parties could have expected that, at the latest, there would be a hearing of this matter in September. The real question is whether one moves sooner to that. One point that might assist us if you would address us on is the general significance of simple finality as quickly as possible.

MR HARRIS: Let me take both of those points in turn. The reason I labour the point about evidence is because on the facts of this case there has to be a critical focus upon one month as making all the difference. All the parties before you are saying, "Let us have expedition". I would not require evidence simply to make the about expedition because everyone agrees with that. What we do not have is any coherent submission, let alone evidence, for why a one month period makes the critical difference. That is the point. The second point is just ----

THE CHAIRMAN: Simply making the point about the general interest in finality as quickly as possible, irrespective of the facts of a particular case.

MR HARRIS: I have two points there. Again, every party seeks expedition, including because of the general reasons of finality and, in this case, the Commission has agreed, as it has done in other cases not to implement the remedy pending the outcome of the Tribunal, and everybody is certain about that. It ties in with the point that I was making before about how, if the MFL business wishes to give reassurance to its customers either directly or via the Tunnel business that it also operates, it can do so with the certainty that the remedy will not be implemented in the meantime. This is a balancing exercise, yes, I agree, that certainty of merger decisions is preferable, but that is why we want expedition. That is one of the reasons why we want expedition.

Is it so vital that it should break the back of the Competition Commission in the circumstances of the myriad of challenges? What Mr Green says about the shortness of his grounds of challenge is utterly belied by the length of his notice of appeal. So, with respect, that does not carry any weight.

My point is that it is too much to deal with in such a super expedited timetable – it would be hard enough on an expedited timetable.

THE CHAIRMAN: Thank you very much, Mr Harris.

MR GREEN: Just on the question, he said that there is no evidence – we put in an application for expedition in para. 14. We produced Mr Morrison, who swore a statement of truth precisely for the reason that we do not want it to be said that the company had not considered the importance of the application for expedition. This is not super expedition by the CAT's standards, this is fairly lengthy.

On the point of finality, my client cannot take planning decisions in relation to this business at the moment, that is why finality is needed.

THE CHAIRMAN: Mr Harris, do you want to come back on that before we rise? You do not have to.

MR HARRIS: No, sir.

THE CHAIRMAN: Thank you all very much, we will rise to consider what to do.

(Short break)

THE CHAIRMAN: Can I begin with disclosure and confidentiality rings. We have heard what has been said on confidentiality rings and, contrary to the indication I gave earlier and for the reasons that will appear in due course, we are minded at the moment to have a confidentiality ring that extends only to named external legal advisers.

As regards the legal opinions that are sought by SCOP, we consider that the Competition Commission can, if it wishes and if so advised, disclose them when they wish to in due course, but we make no order as to this; we expect, obviously, the Competition Commission to follow the usual 'cards on table' approach, but that is our order. If an application is made in respect of those then it can follow the service of the Competition Commission's defence, if the Competition Commission is not minded to disclose.

Thirdly, the Decision of the Competition Commission in this matter is to be disclosed in its entirety by 5 pm on 28th June 2013. I should explain why we have opted for that. The reason for the gap between the making of the order and the time for its fulfilment is this, we are not inviting applications but we did note what Mr Harris said about third parties not represented here having an interest in disclosure – I stress, we are not inviting any such application – it gives an opportunity for an application to be made prior to Friday if there is a problem with regard to disclosure. We stress that that should be an application made in writing and we will deal with it in writing ideally during the course of this week. Otherwise, the order is that the Competition Commission disclose by 5 pm on 28th.

Moving to the question of trial timetable. We have considered this very anxiously, and I have to say that but for Mr Harris' very firmly stated position that the Competition Commission simply could not be ready and that any sooner date would imperil its internal processes, we would have opted for an earlier date than September. But, given what Mr Harris has said, and having weighed the prejudice to the Competition Commission very carefully to the articulated prejudice to the other parties, we have, very reluctantly, come to the conclusion that we should have a September hearing in this case, but I would like to stress that we do not regard August or July hearings as 'super expedition', we have taken on board what Mr Harris said but it is really only because of what he has said that we have gone for the timetable that we have suggested.

On the basis of that, there will be a notice of appeal from SCOP on or before 5th July – we are not making an order in that respect but that, as we understand it, is the latest date on which SCOP can issue one. However we do make an order that there be a statement of intervention by SCOP in respect of GET's appeal by 5 pm on 5th July.

GET's statement of intervention in the SCOP appeal by 5 pm on 9th July. We abridge intervention by any other interested parties to two dates after the date of publication of the SCOP appeal on the CAT website, or the same time as GET's statement of intervention is due if that time is later.

Ordinarily, the Competition Commission's defence would be due four weeks after any notice of appeal is served, so in the case of GET that would ordinarily be 10th July, but in the case of SCOP, of course, it will be later. We propose that the date on which the Competition Commission serve a defence in both appeals is 5 pm on 26th July. One document would be preferred, but we leave that to the Competition Commission. We make no order as to form.

Given that to a large extent skeleton arguments are going to have to be incorporated into pleadings I indicate and make no orders to this effect, but I indicate that if the Competition Commission is minded to structure its defence incorporating matters which might otherwise be seen in a skeleton we have no objection to that because we are dealing with a fairly quick timetable, even for the September date.

DFDS's statement of intervention, including skeleton, by 5 pm on 31st July. The skeletons of GET and SCOP in response, to include any replies if so advised, 2nd September at 5 pm, and finally the Competition Commission's skeleton Wednesday 5th September at 5pm.

That leaves August free, which I hope will occasion mild celebration on the part of all the parties. A hearing is listed for 10th and 11th September. We give you warning now that you should budget for not having the 12th as a day in reserve. So the parties are going to have to think about timetabling and allocation of time between the parties, because the Tribunal will not hesitate but to impose a guillotine to ensure that those two days are met, but we will be prepared to sit, if necessary, early or late so the parties need to give some thought as to what hours they will invite the Tribunal to sit and how those hours should be divided up.

Now is the time for you to stand up to tell me what I have missed out, otherwise, thank you very much.

MR PICKFORD: Sir, I do not think it has been missed out as such, but I wonder whether we might make an anticipatory application to intervene in the SCOP application on the same basis as we made it in relation to GET's. If the Tribunal were willing to grant that now it means we can deal with that and not have to go through those steps again, but obviously we are happy to deal with it on paper in due course if the Tribunal prefer?

THE CHAIRMAN: Mr Pickford, ordinarily I would be very sympathetic to that, but I have in mind that we are going to walk into slightly trickier legal waters that I do not really want to walk into in terms of the orders that we can and cannot make with regard to a pending appeal.

MR PICKFORD: I understand, sir.

THE CHAIRMAN: It is better you put it in writing, but the indication you can get is that that application will likely be granted.

MR PICKFORD: I am grateful, sir.

THE CHAIRMAN: Thank you all very much.

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