COMMISSION

COMMISSION DECISION

of 30 October 1996

relating to a proceeding under Article 85 of the EC Treaty

(IV/34.503 — Ferry operators — Currency surcharges)

(Only the English, French and Dutch texts are authentic)

(97/84/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the EC Treaty to maritime transport [1], as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 19 (2) thereof,

Having regard to the Commission Decision of 12 September 1994, to open a proceeding in this case,

Having given the parties the opportunity to make known their views on the objections raised by the Commission in accordance with Article 23 of Regulation 4056/86, and with Commission Regulation (EEC) No 4260/88 of 16 December 1988 on the communications, complaints and applications and the hearings provided for in Council Regulation (EEC) No 4056/86 of the Treaty to maritime transport [2], as last amended by the Act of Accession of Austria, Finland and Sweden,

After consulting the Advisory Committee on Agreements and Dominant Positions in Maritime Transport,

Whereas:

[1] OJ No L 378, 31. 12. 1986, p. 4.
[2] OJ No L 376, 31. 12. 1988, p. 1.

I. THE FACTS

A. THE BACKGROUND TO THIS DECISION

(1) This Decision arises from investigations made in April 1993 under Article 18 (3) of Regulation (EEC) No 4056/86 at the offices of four ferry operators. During the investigations the Commission discovered documentary evidence showing that a number of ferry operators had agreed the common imposition of a currency surcharge on freight following the devaluation of the pound sterling in September 1992. Five operators, namely P&O European Ferries, Stena Sealink, SNAT, Brittany Ferries and North Sea Ferries, announced identical surcharges to be imposed on freight to be transported on United Kingdom-Continent routes, with a common introduction date and common method of calculation.

B. THE UNDERTAKINGS

(2) The undertakings which are concerned by the present procedure are roll-on, roll-off ferry (ro-ro) operators, who provide freight services on a number of routes between England and continental Europe:

— P&O European Ferries Ltd (P&OEF) is a subsidiary of the Peninsular and Oriental Steam Navigation Company (P&OSNC), P&OEF provides roll-on, roll-off freight services on the short-sea routes between Dover and Calais, the Western Channel routes between Portsmouth and Le Havre or Cherbourg, and, at the time of the infringement, on a North Sea route between Felixstowe and Zeebrugge and Rotterdam. In

addition, at the time of the infringement it had a pooling arrangement with the Belgian operator Regie Voor Maritime Transport (RMT) under which it provided services between Dover and Ostend and Zeebrugge. P&OEF has informed the Commission that its turnover on the relevant market in 1992 was UKL [. . .] (*).

— Stena Line UK (Sealink or SSL) is a wholly-owned subsidiary of Stena Line AB, a Swedish company with a consolidated turnover in 1994 of Skr 9,4 billion. Under the name Stena Sealink Line it operated services between Dover and Dunkirk, Newhaven and Dieppe, and Cherbourg and Southampton. It also previously provided services on the short cross-Channel route between Dover and Calais, under a pooling arrangement with Societé Nouvelle d'Armement Transmanche (SNAT) (1). SSL has informed the Commission that its turnover on the UK-France freight market in 1993 was UKL [. . .].

— Sea France (SNAT) is a wholly-owned subsidiary of GIE Transmanche which is itself owned as to 86,6 % by SNCF, the French national railway company. Formerly known as SNAT (see above), its total turnover in 1991 was FF 1 112 637 867.

— Bretagne Angleterre Irlande SA (BAI) is a French company which, under the name Brittany Ferries (BF), provides roll-on, roll-off freight services on Western Channel routes between Portsmouth and Plymouth and Caen, St. Malo and Roscoff. In addition, BAI(UK) Ltd, a United Kingdom subsidiary of BAI, also provides freight services on a Western Channel route, Poole to Cherbourg, through another subsidiary, Truckline Ferries. BAI's turnover in 1993, was FF 1,8 billion.

— North Sea Ferries (NSF) operates services on North Sea routes between Hull, Ipswich and Teesport and Zeebrugge and Rotterdam, and is a 50:50 joint venture between P&OSNC and Koninklijke Nedlloyd Groep NV. Its turnover in 1991 was £ 56 404 559.

(3) The actions of a number of other ferry operators who introduced currency surcharges in the relevant market, were examined by the Commission. These operators are not concerned by this procedure but are referred to at various stages below. The companies concerned were:

— Tor Line, a Dutch-based subsidiary of the Swedish company Tor Line AB, which is itself a subsidiary of the Danish operator DFDS, and which operates a service on the North Sea from Immingham to Rotterdam,

— Sally Line, a Finnish-owned company operating services from Ramsgate to Dunkirk and Ostend,

— Olau Line, which until recently operated on the Sheerness-Vlissingen route,

— Stena Line BV, a sister company of Stena Sealink which operates on the route Harwich-Hook of Holland.

(4) The combined market share of the five operators concerned by this procedure on the overall relevant market in 1992 is estimated to have been over 60 %, based on figures published in 'Cruise & Ferry Info', an annual trade publication, figures published by the UK Department of Transport, and figures provided by P&OEF.

The market

(5) The relevant market is the market for the provision of freight services by sea between the United Kingdom and France, Belgium and the Netherlands. It includes transport both to and from the United Kingdom.

Geographically, this market includes all services between, on the one hand, ports on the east and south coasts of England, and on the other, ports in northern France, Belgium and The Netherlands. It is possible to identify more narrowly delineated sectors within this market. In particular it can be broken down into three main sectors: short cross-Channel routes, western Channel routes and North Sea routes. There is a significant competitive overlap between the western Channel and the short cross-Channel routes, and between the short cross-Channel routes and the North Sea routes. This substitutability arises from the fact that the ports in question have good transport connections such that onward transportation to a variety of end destinations throughout the United Kingdom, or Continental Europe, respectively, is relatively easy and commonplace.

Transport of freight traffic between those ports could at the material time be effected only by means of ferry services, as the Channel Tunnel was not open at that time. The services in question were either roll-on, roll-off (ro-ro) or lift-on, lift-off (lo-lo). This includes, *inter alia*, driver-accompanied goods vehicles, unaccompanied trailers, containers, etc. The operators concerned by this Decision are all roll-on, roll-off ferry operators.

(*) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 24 of Regulation (EEC) No 4056/86 concerning professional secrecy.

(1) OJ No C 82, 19. 3. 1994, p. 7. This agreement is now discontinued.

It is estimated that the overall United Kingdom-Continent freight market in 1992, was approximately 2,9 million freight units, 59 % of which were on the North Sea, 30 % on the Dover Strait (short cross-Channel), and 11 % on the Western Channel. The operators concerned by this Decision had estimated market shares of approximately 49 % on the North Sea, 83 % on the Dover Strait, and 100 % on the Western Channel.

The concerted practice

(6) The concerted practice relates to the simultaneous imposition of identical currency surcharges by certain ferry operators on all roll-on, roll-off freight charges paid in sterling on certain United Kingdom-Continental routes in 1992.

(7) Following the devaluation of sterling by about 17 % on 16 September 1992, ferry operators with income in sterling and expenses in other currencies were obliged to decide how to respond to the possibility of reductions in the real value of their revenues and increases in real terms of their costs. Operators in the United Kingdom, for example, would have had a proportion of their income in sterling, while some of their costs such as fuel and spare parts would have been in other currencies. Operators in continental Europe would also have been affected if they had significant income in sterling, and also faced the prospect that customers would seek to switch their accounts to sterling or to other operators to take advantage of the devaluation. On the other hand, any operators with significant income in other currencies and costs in sterling would have benefited from the devaluation.

(8) Each ferry operator was therefore faced with a commercial decision. A range of possible options existed: For example, an operator could have raised its prices to take account of reduced revenue, or attempted to win customers from its rivals by not raising, or even lowering, prices. In fact, all of the normal commercial considerations which apply in a free market would have applied in this situation. The cost structures of the various ferry operators in the relevant market would vary significantly according to their size, places of operation, sources of supply, numbers of vessels, employees, etc. Their responses to the devaluation of sterling would not, therefore, have been expected to be uniform.

(9) In late September 1992, a number of international road haulage operators announced that they would be imposing currency surcharges on freight charges paid in sterling. This seems to have influenced the ferry operators in their response to the situation, as all the operators in the relevant market subsequently introduced a currency surcharge in one form or another. The parties to the infringement introduced surcharges on the same date, namely 1 November 1992, at identical rates, and with the same method of calculation. Three operators issued letters to their customers which were almost identically worded. The introduction of a currency surcharge is not, in itself, objected to by the Commission, as this was a commercial decision which each firm acting independently was entitled to take. However, the evidence clearly shows that almost all of the ferry operators in the relevant market contacted their competitors directly and discussed their intended response to the situation that had arisen.

(10) The surcharges announced on United Kingdom-France (Dover Straits and Western Channel) routes by Stena Sealink, SNAT, P&OEF and Brittany/Truckline Ferries were identical. The operators concerned had an estimated market share of 88 % on these routes in 1992.

(11) On United Kingdom-Belgium routes (Dover Straits and North Sea), both P&OEF and North Sea Ferries announced surcharges which were identical to the MAT scale for Belgium (a scale of surcharges which had been adopted by MAT Transport, a road haulage firm, in September 1992, hereinafter referred to as 'the MAT scales'. These provided for different scales of surcharges for transport to or from 13 European countries, including France, Belgium and the Netherlands. The amount of the surcharge to be applied for transport to or from any given country in any given week could be calculated using exchange rates published in the Financial Times of the preceding Friday.) It is estimated that these operators had a market share of over 50 % on these routes.

(12) United Kingdom-Holland routes (North Sea), North Sea Ferries announced surcharges which were identical to the MAT scale for the Netherlands, while P&OEF announced surcharges which were almost identical. These operators had an estimated market share of over 30 % on United Kingdom-Holland routes in 1992.

(13) All of the operators introduced their surcharges on 1 November 1992.

C. COMMISSION INVESTIGATIONS

(14) On 6 and 7 April 1993, Commission officials acting pursuant to Article 18 of Regulation (EEC) No 4056/86, carried out simultaneous investigations without warning at the offices of three of the undertakings to which this Decision is addressed: P&O European Ferries, Stena Sealink and Brittany Ferries. An investigation was also carried out at the premises of Sally Line and Truckline Ferries, a subsidiary of Brittany Ferries.

Following the investigations, requests for information under Article 16 of Regulation (EEC) No 4056/86 were sent to the undertakings named above.

D. EVIDENCE

(15) The main evidence on which this Decision is based includes:

(a) messages sent, mostly by telefax, between various operators relating to the introduction of, and calculation of, a currency surcharge;

(b) internal memoranda written by employees of P&OEF, Sealink and Brittany Ferries;

(c) admissions made by P&O European Ferries and Stena Sealink in their replies to the Commission's requests for information and in their replies to the Commission's Statement of Objections.

P&OEF and Stena Sealink

(16) Stena Sealink informed the Commission [1] that, on 29 September 1992, a meeting was held in Paris between Stena Sealink and SNAT at which, *inter alia*, the effects of the devaluation of sterling were discussed. Sealink stated that at this meeting, SNAT informed it that it feared losing customers because of dual currency accounts that they held with competitors, P&OEF in particular (customers having a choice of paying in French francs or sterling would choose sterling). Sealink stated that the Freight Director of P&OEF joined the meeting by prior arrangement with Sealink and the effects of the devaluation were discussed. According to Sealink, SNA stated that unless P&OEF took action to remove the anomaly created by the devaluation, it would be obliged to reduce its French franc rates. P&OEF's Freight Director agreed to discuss the matter with his Managing Director.

(17) Further meeting between Sealink, SNAT and P&OEF took place on 2 October 1992, to discuss proposals for rationalization of ferry services to compete with Eurotunnel. Currency surcharges were also discussed. According to P&OEF [2], 'the parties' discussion reached a number of basic conclusions — that it was necessary to impose a currency surcharge to ensure viable trading — that it was necessary to impose a currency surcharge to restore order to the market'. P&OEF stated that the three operators reached a common view that the imposition of a surcharge on an 'orderly timescale' was necessary to protect each company's interests. Moreover, P&OEF stated that, as the three operators present represented the larger operators, there was an expectation that their intention to adopt a surcharge would find favour with smaller operators such as Sally Line and Brittany Ferries.

(18) Stena Sealink stated that during the course of these discussions, SNAT repeated the statement it had made at the meeting in Paris that it would have to reduce its French franc freight rates to remain competitive, unless the United Kingdom operators increased their sterling rates. Sealink stated that it informed SNAT and P&OEF that it intended to introduce a currency surcharge, but that P&OEF did not wish to do so. However, P&OEF stated that it would contact other operators about the implications of a currency surcharge.

(19) On 5 October 1992, P&OEF sent a table of surcharges to Stena Sealink. P&OEF states that the purpose of sending this table was to provide Sealink with an indication of the type of surcharge that P&OEF was intending to adopt and that it followed on from the discussions of 2 October. (This surcharge table had in fact been sent to P&OEF by North Sea Ferries, and set out four sliding scales of surcharges, based respectively on the approximate exchange rates for Dutch, Belgian, French and German currencies at the time of the sterling devaluation.)

(20) In the event however, as P&OEF states, the ferry operators cooperated in the selection of different scales of surcharges, namely ones which were identical to the MAT scale (see point (11)).

(21) According to Stena Sealink, a number of telephone conversations took place between it and P&OEF during the week commencing 5 October 1992. In the course of these telephone conversations, the parties discussed the suitability of the MAT scales, the date on which each party would announce the imposition of surcharges, and the date of implementation thereof.

(22) On 12 October 1992, Stena Sealink sent a copy of the MAT Transport schedule of surcharges to SNAT and Stena Line BV.

[1] Stena Sealink reply to Article 16 request.

[2] P&OEF reply to Article 16 request

(23) On 14 October 1992, Stena Sealink sent P&OEF by telefax a copy of the letter it was proposing to issue to its customers on the following day announcing surcharges on all freight paid in sterling on all its Anglo-French routes from 1 November 1992 (1). The scale of surcharges proposed in this draft letter was identical to the MAT scale for transport to or from France. A manuscript note at the foot of this document indicated that Sealink's telefax was followed by a telephone conversation between P&OEF and Stena Sealink on 14 October 1992 in which P&OEF pointed out a factual inaccuracy in the letter and Stena Sealink indicated that it would be amended to correct the mistake.

According to P&OEF, the parties had agreed that Sealink should take the initiative in introducing the surcharge, and Sealink sent this draft letter to P&OEF in order to inform it of the surcharge which it was going to adopt, and the date upon which it would be adopted.

(24) Stena Sealink states that during the period around 15 October P&OEF telephoned to say that Sally Line would not implement a surcharge and asked Sealink to contact it. Sealink did so and was told that Sally Line did not wish to implement a surcharge.

P&OEF contacted Sally Line on 16 October 1992, and sent it a copy of the letter which had been issued by Stena Sealink to its customers, announcing the imposition of surcharges, on the previous day. P&OEF indicated to Sally Line that it intended to apply the same scale of surcharges. According to P&OEF, Sally Line accepted the need for a surcharge but did not consider that it could justify applying the MAT scale. On 22 October P&OEF again contacted Sally Line and told it that if it applied different surcharges this would create 'confusion and difficulties in the market place' (2).

Sally Line issued a letter to its customers on 23 October, the text of which was almost identical to those of P&OEF and Brittany Ferries; but the level of surcharges was lower and did not correspond to the MAT scale. Since there is no sufficient evidence that Sally Line's decisions on the introduction of surcharges, and the amount charged, were a result of collusion, Sally Line is not an addressee of this Decision.

(25) Stena Sealink states that from 19 October onwards it received a number of telephone calls from P&OEF during which adverse customer reaction to the announcement of the surcharges was discussed. On 22 October P&OEF enquired how the two companies could collect the surcharge if customers did not want to pay it. Sealink replied that it was necessary to impress upon customers that there was a clear intention to implement the surcharge and that that was what Stena Sealink was doing.

On 29 or 30 October 1992, in the course of a telephone conversation, P&OEF complained to Stena Sealink that SNAT was giving some freight customers a discount in order to compensate them for the increase in the comparative value of the French franc against sterling. According to Stena Sealink, after having checked the position with SNAT, it informed P&OEF, again by telephone, that although there were some such arrangements they would cease on the implementation of the surcharge on 1 November 1992.

Subsequently, on 5 November, P&OEF telephoned Stena Sealink and informed it that as a result of SNAT's actions, it had decided not to impose the surcharge on its larger customers. P&OEF then gave Stena Sealink, over the telephone, a list of about 35 to 40 such customers.

(26) A document dated 13 November 1992, found at its premises, indicates that P&OEF [...]. Another internal document indicates that from 23 November 1992, P&OEF [...].

(27) A document found at the premises of Stena Sealink, dated 24 November 1992, addressed to SNAT states [...].

(28) Another document found at Stena Sealink states that [...].

(29) According to P&OEF, it abandoned the surcharge in favour of a global renegotiation of 1993 rates with its larger customers. This is confirmed by documents found at the premises of P&OEF. However, the surcharge continued to be applied to other customers, and documents found at the premises of Sally Line indicate that P&OEF issued letters to its customers on its Felixstowe-Rotterdam/Zeebrugge services on 20 November 1992, in which it advised them of 1993 freight rate increases, and in which it stated: 'To avoid any misunderstanding Currency Surcharge will continue to apply as per the scale, effective from 1 November 1992, which was announced in our letter 19 October 1992'. Similar letters were issued on 23 November 1992, to customers on its Dover-Calais/Boulogne/Zeebrugge/Ostend services.

(1) Document found at the premises of P&OEF.
(2) Document found at Sally Line during the Commission investigation.

(30) A document dated 24 November 1992, found at P&OEF, states [...].

Brittany/Truckline Ferries

(31) P&OEF states that it contacted Brittany Ferries to inform it that P&OEF and other operators intended to introduce a currency surcharge on the basis of a common sliding scale. According to P&OEF (1), 'Brittany Ferries agreed the initiative' and P&OEF supplied Truckline Ferries with a copy of the letter P&OEF intended to send to its customers announcing the imposition of surcharges, together with a copy of the proposed sliding scale surcharges.

(32) Stena Sealink states that between 12 and 15 October 1992, it was contacted by Brittany Ferries and was asked what it would do regarding the devaluation of sterling. Sealink informed Brittany Ferries that it was going to implement a surcharge along the lines adopted by MAT Transport Ltd, effective from 1 November 1992, and applying to all customers without exception.

(33) An internal Brittany Ferries note (2) dated 16 October 1992, states:

'All the major operators, namely Sealink, P&O, Olau, Sally, etc. have either issued or are in the process of issuing the attached to all clients on both the Continent and United Kingdom. My understanding is that this will be rigorously applied without exception to all clients and would suggest that we issue the following on Monday' (19 October 1992).

Attached to this fax was a draft letter, which was almost identical to that which was subsequently issued by P&OEF on 19 October 1992, and a surcharge table corresponding to the MAT scale.

(34) On 21 October 1992, Brittany Ferries sent P&OEF a copy (3) of the letter Truckline Ferries had sent to its customers on the previous day announcing the imposition of a currency surcharge with effect from 1 November 1992. P&OEF states that this was in order to confirm its verbal indication that they had implemented the surcharge upon the basis of the MAT scale.

(35) As with P&OEF and Sealink, the Commission discovered no evidence during its investigations that Brittany Ferries had made any attempt to calculate its exposure to losses arising from the devaluation of sterling before deciding to use the MAT scale of surcharges. On the contrary, it is clear from a document dated 7 December 1992, discovered at the premises of Brittany Ferries, that no attempt was made to calculate surcharges directly related to the company's cost structure at the time they were announced. This document refers to a request for information received from the UK Office of Fair Trading (which had also received a complaint concerning the ferry operators' actions) and [...].

(36) An internal Brittany Ferries document (4) dated 26 October 1992, refers to P&OEF and Sealink and states [...] The author of the document argues that Brittany Ferries should be flexible in its implementation of its surcharges. The Commission's interpretation of this document is that an agreement had been reached between P&OEF, Sealink and Brittany Ferries that a currency surcharge would be introduced and that it would be applied to all customers.

North Sea Ferries

(37) According to North Sea Ferries, which is a joint venture between P&O and Nedlloyd, and which has board members in common with P&OEF, it and P&OEF adopted a coordinated approach to the issue of the currency surcharge introduction, with the date of implementation of the currency surcharge by North Sea Ferries (1 November 1992) being selected for it by P&OEF (5). North Sea Ferries states that its decision to impose a surcharge was taken on the same date in mid-October 1992 as P&OEF took its decision to impose a surcharge.

(38) NSF states that it was contacted by Stena Line BV on 12 or 13 October 1992, and was informed by it that it would introduce a surcharge. A copy of the scale was exchanged. This information was relayed to P&OEF the same day (6). NSF states that it did not inform Stena BV of its intended actions in relation to surcharges but since Stena Sealink was aware of P&OEF's intended actions on the North Sea it would also have been aware of North Sea Ferries' proposed course of action.

(39) In reply to a Request for Information sent to it by the Commission, Stena Line BV stated that on 12 October Stena Sealink sent it a copy of the MAT scale, and on the same or the following day Stena BV contacted North Sea Ferries to inform it that it would introduce a surcharge on a sliding scale. It also stated that it discussed the effects of the devaluation at some point between 2 and 14 October with North Sea Ferries (7).

(1) P&OEF reply to Article 16 request.
(2) Document found at the premises of Brittany Ferries.
(3) Document found at the premises of P&OEF.
(4) Document found at the premises of Truckline Ferries.
(5) North Sea Ferries reply to Article 16 request.
(6) Document found at the premises of P&OEF.
(7) Stena Line BV reply to Article 16 request.

(40) North Sea Ferries states that it indicated to Tor Line in early October its intention to introduce a currency surcharge and that Tor Line was encouraged to follow suit but no commitment was given.

Arguments of the parties

P&O

(41) P&O accepts that in October 1992 it participated in a concerted practice with SSL and SNAT. However, it argues that the surcharges were never implemented as intended and were abandoned at the beginning of November 1992 and had no effect on the market. There was no effect on 1993 rates. It also argues that its concerted behaviour cannot properly be said to have included Brittany Ferries, and that its coordination with its joint venture undertaking, NSF, cannot constitute an infringement of Article 85.

Sealink

(42) SSL accepts that together with SNAT it participated in a concerted practice with P&O and infringed Article 85 (1). However, it argues that the imposition of a heavy fine would not be warranted as the surcharges were not implemented. It also argues that it was entitled to consult with SNAT on matters concerning pricing under the terms of their pooling agreement. SSL applied a unilateral 5 % surcharge on 5 November 1992, with effect from 1 November 1992. SSL also argues that it could not be said to have engaged in a concerted practice with Brittany Ferries, as the contacts between them consisted only of one telephone call.

SNAT

(43) SNAT argues in its response to the Commission's Statement of Objections that it simply followed the initiative of its pool partner, Stena Sealink, and that it had no contact with any other ferry operator. The fact that a representative of P&OEF attended the meeting on 29 September 1992 was an exceptional occurrence and was at the invitation of Stena Sealink. SNAT says that it 'simply declared that it intended to take the measures necessary to maintain its market share, including lowering its French franc tariffs, if it was likely to lose its competitivity for clients who were benefiting from having the option of paying in francs or pounds sterling with competitors (translation)'. The second meeting on 2 October 1992 was held in order to discuss the possibility of a 'Super Pool' between the three operators and no fundamental conclusions were reached concerning currency surcharges. SNAT contends that these meetings do not constitute proof of a concerted practice between P&O, SSL and SNAT, and that in any case such a concerted practice could not have had as its object the restriction of competition, and could not have affected trade between Member States. SNAT says it had no knowledge of the exchanges of tables between SSL and P&O. SSL was responsible for sales and marketing in the UK under the terms of the pooling agreement and therefore SNAT left the details of the implementation of a surcharge to SSL. SNAT denies SSL's claim that the currency surcharges were instigated to meet its wishes.

(44) SNAT argues that the common implementation date and scale can be explained by the oligopolistic structure and transparency of the market.

(45) SNAT says that of its [...] clients, only [...] were invoiced in sterling, among whom [...] did not pay the surcharges, and [...] more paid but received the amount back in rebates. The surcharges were not applied after 31 December 1992 and were not incorporated into 1993 rates. 1993 rates were raised generally by 5 %, although individually negotiated rates with some large clients actually fell.

Brittany Ferries

(46) Brittany Ferries argued during the oral hearing that the market was oligopolistic and transparent. It stated that when deciding how to react to the devaluation of sterling it was essential to know how its competitors were going to act, so it took steps to find out, but had no agreement with them. Sealink announced its plans publicly on 16 October 1992, while Brittany Ferries happened to find out about P&O's plans during the course of a telephone conversation between one of its employees and an employee of P&O. Brittany Ferries argues that there was a convergence of interests — it wanted to find out what its competitors were going to do, while its competitors, who had already begun a concerted

practice, had an interest in passing a message on to Brittany Ferries. Brittany Ferries claims that the Freight Manager of Truckline Ferries, Mr [...], who is no longer with the company, may have had a copy of P&O's letter in advance. It was he who prepared a draft letter for the Managing Director of Brittany Ferries (UK), Mr [...], but he did not inform him that he knew of P&O's letter. Mr [...]' statement in reply to the Commission's request for information, that he had personally drafted the letter, might be explained by the fact that he was in a difficult position *vis-à-vis* his superiors, inasmuch as one of his employees had placed the company in a delicate situation.

(47) Brittany Ferries also argues that because the internal memorandum of 16 October 1992, quoted by the Commission in its statement of Objections, was incorrect in stating that Olau Line and Sally Line had decided to introduce surcharges, this proves that Brittany Ferries was not party to any agreement, otherwise it would have known that Olau Line and Sally Line were not participating. Brittany Ferries says that it applied the same surcharge as the others for 'psychological reasons'. Since some prominent road transport operators had introduced a surcharge, and since most of the ferry companies' clients were road transport operators, it seemed likely that they would accept the idea of surcharges being introduced by the ferry operators.

(48) In its reply to the Statement of Objections P&O states that its managing Director, Mr [...], contacted Mr [...] to inform him of the action P&O, SSL and SNAT intended to take. It states that it regarded Brittany's response not as a binding commitment, but rather an informal indication that, for its own independent commercial reasons, Brittany was minded to follow the commercial lead of the principal operators. Although Truckline subsequently confirmed that this approach was to be implemented, P&O did not consider it had obtained prior commitment.

(49) Brittany Ferries states that the surcharge affected only 10 % of its haulier clients and that it was applied only until 1 January 1993. However, Brittany Ferries issued a letter [1] to its customers on 30 November 1992, in which it stated that the currency surcharge would be incorporated into its rate structure in addition to rate increases for 1993.

North Sea Ferries

(50) NSF concedes that it cooperated with P&OEF in October 1992 in the preparation and planned introduction of a currency surcharge scale but argues that this did not amount to a concerted practice. It argues that Article 85 should not apply to the coordination that took place, as it and P&OEF have a common parent company, P&OSNC.

(51) NSF also argues that the coordinated approach was abandoned shortly after the introduction of surcharges, and had no economic impact on the market.

The Commission's assessment of the parties' arguments

(52) The Commission notes P&OEF's and SSL's admission that they infringed Article 85 by engaging in a concerted practice with each other and SNAT. The Commission rejects SNAT's argument that it had no knowledge of contact with any ferry operator other than its pooling partner, SSL. Although the purpose of the meetings held on 29 September 1992 and 2 October 1992, was not primarily to discuss currency surcharges, it is admitted that the surcharges were discussed in the presence of representatives of all three companies. The Commission acknowledges that SNAT and SSL were entitled to consult each other concerning the surcharges given that their services are pooled, but the contact with P&OEF is a clear infringement of Article 85 (see paragraphs 55 to 59). While the Commission can accept that SNAT may have had no direct contact with other ferry operators after 2 October 1992, the evidence indicates that it had indirect contact with P&OEF at least, via its pooling partner SSL.

(53) With regard to Brittany Ferries, the evidence shows that there was contact between both P&OEF and SSL and Brittany Ferries. The parties have argued that since contacts were minimal these cannot constitute a concerted practice. The Commission cannot accept this. If companies are willing to cooperate with each other in reacting to market situations then lengthy consultations may not be necessary. SSL argues that its contact with Brittany amounted merely to one phone call. In the circumstances, one phone call was probably sufficient given, that P&O had also been in touch with Brittany and that Brittany, by its own admission, was eager to find out what its competitors planned to do about the devaluation of sterling.

P&O's letter to customers was evidently passed to Brittany Ferries and Brittany Ferries sent P&O a copy of the letter Truckline Ferries had sent to its customers on the previous day, announcing the imposition of a currency surcharge with effect from 1 November 1992. P&O states that it was in order to confirm its verbal indication that it had implemented the surcharge.

[1] Document found at the premises of Truckline Ferries.

BF has argued that because the internal memorandum of 16 October 1992, quoted by the Commission in its Statement of Objections, was incorrect in stating that Olau Line and Sally Line had decided to introduce surcharges, this proves that BF was not party to any agreement. The Commission would interpret this document simply as an indication that the parties assumed that other companies would fall in with their plans. Both P&O and SSL were in contact with Sally Line at that time.

An internal Brittany Ferries document, written by a member of BF's sales staff, refers to P&OEF and Sealink and states [. . .]. The author of the document argues that Brittany Ferries should be flexible in its implementation of its surcharges. The Commission's interpretation of this document is that BF had instructed its sales staff that it had been agreed with P&O and SSL that the surcharges were to be applied without exception to all clients.

(54) In respect of North Sea Ferries, the Commission cannot accept NSF's and P&O's arguments that the relationship between them precludes an infringement of Article 85. The parties themselves have stated that North Sea Ferries is able to determine its own day-to-day commercial policy independently from its parents, P&O and Nedlloyd [1]. It follows that it is not part of the P&O organization and must be viewed as a separate actor on the market. The parties do not deny that collusion took place in this case.

II. LEGAL ASSESSMENT

Article 85

(55) Article 85 (1) of the EC Treaty prohibits as incompatible with the Common Market all agreements between undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions.

(56) In order to establish the existence of a concerted practice, it is sufficient that the undertakings knowingly substitute practical cooperation for the risks of competition that might otherwise develop [2]. A concerted practice requires direct or indirect contact between the competitors having the object or the effect of influencing their conduct on the market or of disclosing the conduct which they themselves have decided to adopt or contemplate adopting on the market [3]. It is clear from the evidence that the parties engaged in direct discussions aimed at settling on a common course of conduct in relation to the introduction of currency surcharges. It is also clear that these discussions took place at senior levels between the parties, with the managing directors in particular being directly involved.

(57) In light of the level of contact between the operators and the exchanges of information between them in relation to the imposition of a surcharge, it is clear that the similarities between the surcharges imposed by several of them did not result from the transparency of the relevant market, as some of the operators have suggested. In particular, the information which was known to each of the parties to the infringement about the activities of the other parties, was known, not as a result of consultation with common customers, but instead as a result of direct exchanges of information between them.

(58) In order for Article 85 to apply, it is necessary that the agreement or concerted practice between the parties has the object or effect of restricting competition. The clear object of the arrangement between the parties was to bring about the imposition of a common currency surcharge with effect from the same date. There can be no doubt that this arrangement amounted to a concerted practice, the object of which was to fix trading conditions by the parties thereto.

(59) The arrangement between the operators clearly falls within Article 85, notwithstanding the difficulties experienced by the operators in actually applying the surcharges announced to their customers [4]. While it may be the case that the surcharges were not implemented in precisely the form which had been announced by the operators in mid-October 1992, the result of the operators' cooperation was nevertheless to influence the trading conditions in the relevant market.

[1] NSF reply to Statement of Objections, point 3.9; P&O reply to Statement of Objections, point 3.10.

[2] Judgment of the Court of Justice of 14 July 1972 in Case 48/69, *ICI* v. *Commission*, [1972] ECR 619, paragraph 64.

[3] Judgment of the Court of Justice of 16 December 1975 in Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, *Suiker Unie et al* v. *Commission*, [1975] ECR 1663, paragraph 174.

[4] Commission Decision 86/398/EEC ('Polypropylene') (OJ No L 230, 18. 8. 1986, p. 1), where activities were found to infringe Article 85, notwithstanding that the target prices agreed between the parties to the infringement were never in fact achieved.

Effect on trade between Member States

(60) Given the importance of the undertakings concerned in the market for freight services by sea between the United Kingdom and northern France, Belgium and The Netherlands, there can be no doubt that the arrangement had at least a potential effect on trade between Member States.

(61) A concerted practice between the major suppliers of a particular service will, by its very nature, affect the pattern of trade between Member States which would have emerged in the absence of any such practice. This is especially clear where the service in question is an international transport service. In the present case, the parties concerned account for a large proportion of the service market in question and are established in different Member States. A diminution in competition between them is likely to deflect demand from one to another and thus alter the pattern of trade in that service between Member States. There is also at least a potential secondary effect in that an increase in the price of transport services is likely to depress demand for those services, thereby diminishing trade in goods between the United Kingdom and continental Europe.

Conclusion

(62) On the basis of the above, the Commission considers that P&O European Ferries, Stena Sealink, SNAT and Brittany Ferries participated in a concerted practice contrary to Article 85 of the EC Treaty by agreeing the amount of a currency surcharge which would be applied to roll-on, roll-off freight services between the United Kingdom and France.

(63) The Commission also considers that P&OEF and North Sea Ferries participated in a concerted practice contrary to Article 85 by agreeing the amount of a currency surcharge which would be applied to roll-on, roll-off freight services between the UK and Belgium and the Netherlands.

FINES

Article 19 (2) of Regulation (EEC) No 4056/86

(64) Under Article 19 (2) of Regulation (EEC) No 4056/86, the Commission may by decision impose on undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently they infringe Article 85 (1) of the Treaty. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

Gravity

(65) A concerted practice by which the most important operators in the market for transporting freight by roll-on, roll-off ferry, have attempted to introduce a uniform increase in price, constitutes a serious breach of Community law. The operators have argued that the surcharges were justified in that they were faced with substantial losses if they did not increase their sterling prices. The Commission does not deny that any operator acting independently was entitled to introduce currency surcharges if it considered it necessary. It is clear from the evidence, however, that P&OEF, Stena Sealink, SNAT, Brittany Ferries, and North Sea Ferries attempted to eliminate uncertainty concerning the actions of their competitors, by agreeing to introduce identical, or almost identical, surcharges. Most of the operators have argued either that the surcharges were not implemented at all or that they were only partially implemented. The Commission can accept that the introduction of surcharges was only partially successful, largely due to the resistance displayed by customers to the introduction of surcharges. The fact that it was not entirely successful does not make it a less serious infringement. A deliberate and manifest infringement of one of the clearest aspects of the prohibition laid down in Article 85 (1) must be regarded as serious.

(66) The Commission considers that the ringleaders in the concerted practice were clearly P&OEF and Stena Sealink. The other operators played a relatively minor role.

Duration

(67) The Commission considers the concerted practice to have begun from 2 October 1992 as far as P&OEF, Sealink and SNAT are concerned, since its origins appear to lie in the meeting held on that date, with Brittany Ferries and North Sea Ferries joining in mid-October 1992. The evidence indicates that the surcharges were applied to smaller customers whose market power was less than their larger competitors, and that they remained in place until 31 December 1992. As stated in paragraph 28, a document found at Stena Sealink states that [...] Another document found at Stena Sealink, addressed to SNAT, states [...] Documents found at the premises of Sally Line indicate that P&OEF issued letters to its customers on its Felixstowe-

Rotterdam/Zeebrugge services on 20 November 1992, in which it advised them of 1993 freight rate increases, and in which it stated: 'To avoid any misunderstanding currency surcharge will continue to apply as per the scale, effective from 1 November 1992, which was announced in our letter 19 October 1992'. Similar letters were issued on 23 November 1992, to customers on its Dover-Calais/Boulogne/Zeebrugge/Ostend services. Another internal P&OEF document indicates that from 23 November 1992, P&OEF [...] A further document found at P&OEF states [...]. SNAT admits that [...] of its [...] clients invoiced in sterling paid the surcharges, and says that the surcharges were not applied after 31 December 1992, which implies they were paid up to that date. Similarly, Brittany Ferries states that the surcharge affected 10 % of its haulier clients and that it was applied until 1 January 1993.

The Commission is prepared to accept that the infringement ended at the end of 1992.

(68) The Commission does not consider that the infringement in this case merits very substantial fines. Although what the companies concerned intended to achieve constituted a serious breach of Community law, in practice the simultaneous introduction of currency surcharges proved to be only partially successful. However, merely symbolic fines would not be appropriate either, given the blatant nature of the infringement. The Commission also considers that P&OEF and Stena Sealink should be fined a greater amount than the other parties in view of the fact that they were the principal organizers of the concerted practice.

(69) The Commission acknowledges the fact that Stena Sealink in particular provided a full and frank reply to the Commission's request for information following its unannounced investigations. However, it considers that a reduction of the fine would not be appropriate in this particular case, given that the cooperation came only after the Commission's investigations had brought the infringement to light, and that Stena Sealink was one of the principal organizers of the concerted practice. This is in line with the policy outlined in the Commission's recent notice regarding reductions in fines in cartel cases [1],

HAS ADOPTED THIS DECISION:

Article 1

P&O European Ferries, Stena Line UK (Stena Sealink), Sea France (SNAT), Brittany Ferries and North Sea Ferries have infringed Article 85 (1) of the EC Treaty by participating from early to mid-October 1992 until 31 December 1992 in a concerted practice by which the leading roll-on roll-off ferry operators in the UK-Continent freight market contacted each other secretly so as to discuss and determine their reaction to the devaluation of sterling in September 1992.

Article 2

The following fines are hereby imposed on the undertakings named herein in respect of the infringement found in Article 1:

(i) P&OEF, a fine of ECU 400 000;

(ii) Stena Line UK (Stena Sealink), a fine of ECU 100 000;

(iii) Sea France (SNAT), a fine of ECU 60 000;

(iv) Brittany Ferries, a fine of ECU 60 000;

(v) North Sea Ferries, a fine of ECU 25 000.

Article 3

The fines shall be paid within three months of the date of notification of this Decision to the following account:

Account No 310-0933000-43
Commission of the European Communities
Banque Bruxelles-Lambert
Agence Européenne
Rond-Point Schuman/Schumanplein 5
B-1040 Brussels.

After three months, interest shall automatically be payable at the rate charged by the European Monetary Institute on its ecu transactions on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely, 7,5 %.

Article 4

This Decision is addressed to:

— P&O European Ferries
Channel House
Channel View Road
Dover
GB-Kent CT17 9TJ;

— Stena Line UK
Charter House
Park St.
Ashford
GB-Kent TN24 8EX;

— Sea France
3, rue Ambroise Paré
F-75475 Paris Cedex 10;

— Brittany Ferries S.A.
Port de Bloscon
F-29680 Roscoff;

— North Sea Ferries
Postbus 1123
NL-3180 AC Rozenburg ZH.

[1] OJ No C 207, 18. 7. 1996, p. 4.

This Decision is enforceable pursuant to Article 192 of the EC Treaty.

Done at Brussels, 30 October 1996.

For the Commission
Karel VAN MIERT
Member of the Commission