



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23 July 2004

SUNDBUSSERNE A/S
Jernbanevej 10A
DK-3000 Elsinore
DENMARK

For the attention of Mr Nicolai
MOLTZAU

Subject: Case COMP/A.36.570/D3 – Sundbusserne v Port of Helsingborg
(Please quote this reference in all correspondence)

Dear Mr Moltzau,

I refer to your complaint registered in the Commission on 3 July 1997 pursuant to Article 3(2) of Council Regulation n°17/62 of 6 February 1962¹, regarding alleged infringements of Article 82 by Helsingborgs Hamn AB (HHAB).

By this decision, I inform you that, for the reasons set out below, there are insufficient grounds for granting your application.

In a letter dated 18 February 2003, Mr Lowe informed you that the Commission, according to Article 6 of Regulation (EC) 2842/98 of 22 December 1998² intended to consider that there were insufficient grounds for acting on your application.

The preliminary conclusion was in particular based on the fact that the Commission considers that there is insufficient evidence to state that HHAB has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty by charging excessive and discriminatory port fees. As regards the allegation on excessive pricing, and bearing in mind that the burden of proof is on the Commission to show the existence of excessive pricing, the Commission drew the preliminary conclusion that there is not sufficient evidence to conclude that the port charges have no reasonable relation to the economic value of the services provided by the port to the ferry-operators.

By letter dated 28 April 2003, you submitted a reply to the Article 6 letter, in which you maintain the allegations of abuse of dominant position by HHAB.

¹ OJ L3, 21.2.1962, p. 204/62.

² OJ L 354, 30.12.98, p. 18.

A non-confidential version of the Article 6 letter was sent to HHAB on 25 March 2003 and a non-confidential version of Sundbusserne's reply to the Article 6 letter was sent to HHAB on 27 May 2003. Further, a non-confidential version of HHAB's comments on the Article 6 letter and on Sundbusserne's reply to the Article 6 letter was sent to Sundbusserne on 23 September 2003.

As regards development since the comments submitted by HHAB and Sundbusserne to the Article 6 letter, it should be noted that HHAB³ has made additional submissions notably completing information submitted earlier and providing clarifications. Since most of these submissions do not contain any new information, they are not further considered in this decision.

I. THE FACTS

I.A. THE PARTIES

I.A.1. The port of Helsingborg

1. The port of Helsingborg is located in the Southwest of Sweden, at the narrowest point of Øresund between Sweden and Denmark. The port located in Denmark on the opposite side of Helsingborg on the Sound is the port of Elsinore. Both Helsingborg and Elsinore benefit from excellent geographic locations - these ports provide the shortest crossing distance (4 km) between Sweden and Denmark.
2. The port of Helsingborg has good rail and road connections. It is a very diversified port which is engaged in many different types of activities. In addition to ferry activities (the most important), the port of Helsingborg can handle practically all types of cargo, such as containers, general cargo and bulk (including oil). It is composed of four harbours :
 - The North Harbour is dominated by ferry services to Denmark.
 - The West Harbour (inaugurated in 1985) is used principally for handling unitised cargo (containers); it also includes a coal terminal.
 - The South Harbour represents a more diversified operation than other areas of the port by virtue of four very different ship-handling facilities: a train ferry terminal (DanLink terminal), a multipurpose terminal, a grain terminal and an oil terminal.
 - The deepwater Bulk Harbour is the port's southernmost facility, built to serve the major chemical plant of Kemira Kemi AB that owns the harbour, in which Helsingborgs Hamn AB (HHAB) provides the port operations since 1991 in joint agreement.

³ Letters from HHAB of 18 November 2003 (Document 542, File B 14) and 4 February 2004 (Document 540, File B 14).

3. As of the end of the 1980s (Railway Agreement signed on 29 October 1984), the South Harbour was gradually transformed to become the train ferry terminal for goods on the direct route Helsingborg-Copenhagen. A tunnel was dug under the city to connect the northbound and southbound railway systems. Passenger wagons (together with foot passengers, cars, trucks and trailers) continued to use the Helsingborg-Elsinore route ("HH-route) departing from the North Harbour. These transformations entailed considerable investments in the years between 1985-1990 borne by the municipality of Helsingborg. As of 30 June 2000, the train ferry terminal DanLink is no longer in use as the trains are using the Øresund Bridge.
4. The port of Helsingborg is the biggest ferry port in terms of volume and second biggest in terms of value (after Stockholm) in Sweden and is among the biggest ferry ports in the world (according to its web-site). In 2001, approximately 12 million passengers⁴, 7,5 million tonnes of cargo, and 2,3 million vehicles passed through the port of Helsingborg.

The ferry traffic in the port of Helsingborg

5. Most of the traffic in the port of Helsingborg is ferry-traffic on the HH-route. In 2001, some 50.000 vessels called at the port of Helsingborg, out of which the ferries accounted for 45.000 calls, 90% (due to the frequent ferry service on the HH-route). In addition to Scandlines, there are two other ferry operators on the HH-route, Sundbusserne (transporting only passengers) and HH-Ferries⁵. The number of calls (arrivals) made by each ferry operator were: Scandlines 22.120 (60/day), Sundbusserne 10.120 (30/day) and HH-ferries 12.440 (35/day). The importance of the ferry traffic is also shown by the fact that out of the total volume of cargo passing through the port of Helsingborg (7,5 million tonnes), the majority (4,5 million tonnes) is transported on the ferries (onboard lorries).
6. The market shares of the three ferry operators active on the HH-route, Scandlines, Sundbusserne and HH-Ferries, are as follows :

	Passengers	Vehicles
Scandlines	[CONFIDENTIAL]	[CONFIDENTIAL]
Sundbusserne	[CONFIDENTIAL]	[CONFIDENTIAL]-
HH-Ferries	[CONFIDENTIAL]	[CONFIDENTIAL]

7. They all operate from the North harbour: Scandlines uses berths (no 301-302) in Södra Hamnen (South harbour); Sundbusserne adjacent berths (no 203-204) in Inre Hamnen (Inner harbour), whereas HH-Ferries uses a berth (no 410) further away in the Sundsterminalen (Sound terminal).

⁴ In comparison, the threshold for international seaports (category A) is set at 1,5 million tonnes of cargo and 200.000 passengers in the Trans-European Transport Network (TEN) decision (Decision n° 1692/96/EC, OJ L 228, 9.9.1996, p. 1, as amended by Decision n° 1346/2001/EC (JO L 185, 6.7.2001, p. 1).

⁵ HH-Ferries was acquired by Steneo AB, a company within the Stena sphere, to which also Scandlines AB belongs, in 2001. This acquisition was approved by a decision of the Swedish competition authority on 14 March 2002. The change in ownership has, to the Commission's knowledge, not had an impact on the services offered by HH-Ferries.

8. For the sake of completeness, it may be noted that apart from the three ferry operators active on the HH-route, there is only one other ferry operator providing regular ferry services calling the port of Helsingborg. This is DFDS (Scandinavian Seaways), which operates a cruise ferry service between Copenhagen and Oslo, and its ferries call at Helsingborg once a day (at Sundsterminalen). This is, however, a rather different service compared with the ferry service on the HH route in that DFDS operates a cruise ferry, which is a larger vessel operating on a much longer route, between Copenhagen and Oslo. In the light of the different characteristics of the DFDS ferry service compared with the 'shuttle' operations on the HH-route, DFDS is not regarded as one of HHAB's customers on the relevant market (see section II.A.1. below).
9. Consequently, the Södra Hamnen, Inre Hamnen and Sundsterminalen, to the extent it is used by HH-Ferries, with the above mentioned berths are parts of the North harbour which are relevant in this case. To this end, port services and facilities provided in these parts of the North Harbour by HHAB to ferry operators on the HH-route are to be taken into account. Therefore, costs relating to other parts of the North harbour, such as the Ocean Hamnen and the City Hamnen which are not used by the ferry operators on the HH-route, should not be included among the costs relating to ferry operators.

I.A.2 The parties

I.A.2.1. Helsingborgs Hamn AB

10. Ports in Sweden are to a large extent municipal ports which are often operated by companies owned by the municipalities. While port tariffs used to be regulated by the State in the past, certain deregulation of port operations in Sweden took place in the early 1980's when the tariff regulation was abolished and ports could freely set their tariffs.
11. The City of Helsingborg decided on 26 May 1987 that the port operations, including cargo-handling activities should be transferred as of 1 January 1988 to a wholly owned subsidiary, namely Helsingborgs Hamn AB ("HHAB"). The assets, however, were not transferred to HHAB at that time. Most of the assets of the port of Helsingborg were transferred from the City of Helsingborg to HHAB at the end of December 1993 and June 1994 (assets related to the rail ferry terminal, DanLink), except the land which remains the property of the City.⁶ HHAB is therefore the owner of all assets on land such as gangways, ferry ramps, cranes and buildings, whereas the City of Helsingborg owns the land, quays, docks, breakwaters and terminal areas. All assets not owned, but used by HHAB, are leased from the City of Helsingborg, however HHAB is responsible for their maintenance⁷.
12. HHAB is a Swedish limited liability company wholly owned by the City of Helsingborg. HHAB is fully responsible for the running of the port, i.e. the construction and maintenance of the port facilities, the provision of facilities and

⁶ Document 398, File B4, section 3, p 8-9.

⁷ Cf. Document 422, File B5, section 2.2, p 5.

services to vessels using the port, such as ferries, and the determination of the fees that each user of the port has to pay for those facilities and services. HHAB has an average yearly turnover of about 340 MSEK (37 Million €) over the period 1995-2000. In a city with 110.000 inhabitants, HHAB, which employs approximately 250 people, is among the eight biggest undertakings. See in attached Appendix 1 the financial results of HHAB from 1993 to 2001.

I.A.2.2. Sundbusserne

13. The complaint against HHAB has been lodged by Sundbusserne A/S ('Sundbusserne'), which is a Danish limited liability company owned to 100% by Moltzau Tankrederi Aktieselskab AS, a Norwegian limited liability company. The business activity of Sundbusserne is the operation of ferry services for passengers between Helsingborg and Elsinore.
14. Sundbusserne has been operating from the port of Helsingborg since 1958. In 2001, it provided ferry services (exclusively for foot passengers) on the HH-route using 2 passenger ferries (3 during the Summer season)⁸. Its ferries operate a 20-minute shuttle service, departing every 30 minutes.
15. Sundbusserne transported 1.584.283 passengers in 2001. Its turnover in 2000 and 2001 was about [CONFIDENTIAL].

I.B. THE COMPLAINT

I.B.1. Complaint lodged by Sundbusserne to the Commission

16. Sundbusserne lodged a complaint to the Commission on 3 July 1997 alleging that HHAB has infringed Article 82 of the EC Treaty by means of levying excessive port charges for services provided to ferry operators, and cross-subsidisation, and possibly also by refusing access to certain requested documents and by its way of negotiating:
 - port charges are deemed to be excessive because they exceed the costs borne by HHAB for the provision of services to the ferry-operators, as well as the port charges in other comparable ports (in comparison, Sundbusserne paid for the financial year 1996, four times as much in Helsingborg as in Elsinore for the same use of the port facilities);
 - the high port fees charged to the ferry operators (using the North Harbour) are used by HHAB to cross-subsidise markets in the South Harbour, the West Harbour and the Bulk Harbour where HHAB charges low prices for the services supplied;
 - HHAB's refusal to grant access to certain documents requested by Sundbusserne, and subject to a separate proceeding before the Administrative Court of Appeal in Sweden, and its way of negotiating are

⁸ In 2001 it reduced by one the number of its ferries.

questioned by Sundbusserne asking whether they may in themselves constitute infringements of Article 82 of the EC Treaty.

17. As regards the allegations on excessive port charges, Sundbusserne considers that it should fully bear the costs relating only to Sundbusserne's use of the port (specific costs), plus a share of common costs having reference to its use of the port (relevant common costs). Sundbusserne also notes in the complaint that the HHAB's costs for the provision of services to it are to a large extent fixed, i.e. constant irrespective of the number of calls of the vessels or the number of passengers transported onboard.
18. In its letter of 28 April 2003, Sundbusserne did not comment on the preliminary conclusions drawn by the Commission in the Article 6 letter, as concerns an alleged cross-subsidisation by HHAB and whether HHAB's refusal to grant access to certain documents requested by Sundbusserne and HHAB's way of negotiating would constitute infringements of Article 82 of the EC Treaty. In its letter, Sundbusserne focuses upon the claim that the prices actually charged to Sundbusserne for port services in the port of Helsingborg are excessive since they are unfair in themselves when compared to the costs (plus a reasonable profit) of providing the services. According to the reply, this is confirmed by the comparison with prices charged to Sundbusserne by the port of Elsinore in Denmark.
19. The Commission is also handling a complaint by Scandlines, which was filed on 2 July 1997 against HHAB concerning port fees, which is subject to a separate proceeding.
20. During the proceedings, the Commission has encouraged the parties to try to reach a mutually acceptable agreement on port fees, which has, however, failed.
21. The complaint of Sundbusserne was sent to HHAB, followed by several requests for information under Article 11 of Regulation 17 to HHAB and to other concerned parties.

I.B.2. National proceedings at the Administrative Court of Appeal in Göteborg and the Swedish competition authority

22. Sundbusserne has been paying the port fees according to the reduced tariff (for ferries and passengers ships with regular calls to Danish ports at the Sound) in the public price-list of HHAB⁹. In Spring 1997, Sundbusserne claimed that the charges by HHAB were too high notably in comparison with other similar ports, and stated that it would withhold 50% of the passenger fees until the parties would reach an agreement (see section I.C.3.2). Subsequently, Sundbusserne also requested access to HHAB's book-keeping (notably to the IMR "Internal Monthly Report").
23. Access to the IMR documents was denied by HHAB claiming that some of the information constituted business secrets. As a result, Sundbusserne brought an action against HHAB before the Administrative Court of Appeal in Göteborg. Scandlines was also involved in this proceeding. In its judgement of 26 June 1998, the Administrative Appeal Court of Göteborg decided that HHAB had the right to deny

⁹ Document 511, File B10, section 3.4., p. 14

access to Sundbusserne and Scandlines to the IMR documents as these were held to contain confidential business secrets.

24. HHAB also submitted, on 14 May 1998, an application to the Swedish Competition Authority alleging, in respect of Sundbusserne, that the latter together with Scandlines were co-ordinating their conduct (horizontal price co-operation) in order to obtain as low port fees as possible, and thereby infringing the Swedish competition act. In its decision of 26 June 1998, the Swedish Competition Authority decided not to deal with the complaint in view of the investigation by the Commission in this matter.

I.C. SERVICES AND CHARGES BY HHAB

I.C.1. Services and facilities provided by HHAB

25. HHAB provides a number of services and facilities to users of the port, which comprise notably access to the port (including dredging and maintenance of breakwaters), traffic control, access to quay and traffic infrastructure in the port area and facilities for mooring. While these services are normally provided to all users of the port, certain services, notably pilotage, towage, cargo-handling and warehousing, are provided on request.
26. The above port services could be regrouped into services relating to :
- the vessel itself (irrespective of what is transported onboard the vessel, i.e. these services do not vary depending on whether the ship is empty or full, according to what and how much is transported onboard);
 - and what is transported onboard the vessel.
27. This distinction is also in line with the Green Paper on Sea Ports and Maritime Infrastructure.¹⁰
28. The services which relate to the vessel mainly correspond to the services and facilities on the sea-side (hereinafter “the sea-side”), i.e. when the vessel arrives in the port area until it is moored at the quay, and comprise notably:
- traffic control,
 - pilotage and towing,
 - use of fairways for entering and leaving the port,
 - use of navigational aids (lighthouses, beacons, buoys and piers),
 - access to berths, quays, anchoring and mooring facilities in the port during the call.

¹⁰ Green Paper on Sea Ports and Maritime Infrastructure, COM(97) 678 final of 10 December 1997, paragraph 79.

The manner and extent to which these services are provided depends on the type and size of vessel entering the port (tanker, liner, ferry...) and are normally provided for each call.

While the provision of quays, berths, anchoring and mooring facilities in the port during the call may be considered land-side facilities, they should be included in this category because they relate to the vessel, rather than to what is transported onboard.

29. The services which depend on what is onboard the vessels mainly correspond to the services and facilities provided on the land-side (hereinafter “the land-side”), i.e. after the vessel is moored, and notably comprise :
 - provision of loading/unloading and embarking/disembarking facilities, such as cranes for the freight onboard the cargo vessels, ramps and gangways to embark/disembark passengers/vehicles onboard the ferries;
 - cargo-handling;
 - warehousing;
 - access to fresh water, bunkering, sludge and garbage disposal.
30. The services above provided respectively on the sea-side and the land-side also include the maintenance of the corresponding facilities (for instance dredging and maintenance of the breakwaters on the sea-side).
31. The provision of sea-side facilities to all vessels (i.e. both ferries and cargo vessels) calling at the port is to a large extent the same, albeit with some degree of difference. For example, the use of a quay depends on the size of the vessel; bigger vessels take up more space than smaller vessels, and the use of traffic control tends to depend on factors such as the traffic density and the weather conditions. However, the type of land-side facilities needed differs considerably between the ferries and the cargo vessels (and also between the different cargo vessels and between the different ferries).
32. HHAB stated that “this case concerns the provision of this basic service of being given access to a port or berthing in an existing port. If examining this service provided by HHAB it does not, except as described below, differ depending on whether there are mainly lorries, cars or passengers travelling with a ferry landing in the port. Regardless of whether the vessel entering the harbour is carrying only passengers (c.f. Sundbusserne) or passengers and vehicles (c.f. Scandlines) the following facilities are there in order to make sure that the berthing is sufficiently safe: dredging, breakwater, lighthouse, traffic controlling and quay (the quay being the necessary condition for providing the service of access to port). The only difference between a large vehicle carrying ferry and a passenger carrying ferry is that the former requires a larger ramp and an approach-ramp (approach area). Thus, the shipping companies buy the same service, access to the port, regardless of how many vehicles, if any, they are carrying. The shipping companies carrying vehicles,

however, buys more “value added” services than the companies carrying only passengers”.¹¹

I.C.2. Services and facilities provided and charged by HHAB within the port fees

33. All services and facilities on the sea-side (with the exception of pilotage and towage which is charged for separately) are provided and charged by HHAB through the port fees to all vessels calling at the port. As regards the services and facilities on the land-side, only some are covered by the port fees, while others, such as stevedoring and warehousing, are charged for separately.
34. According to HHAB, the services it provides and charges in the port fees comprise access to the port (including maintenance of breakwaters and dredging), access to quay and related traffic infrastructure in the port area (including maintenance), facilities to secure the vessel, traffic control, 24 hours technical and electrical service (e.g. for ramps, gangways, pumps etc.), access to fresh water, electricity etc. Additional services, such as towing¹², cargo-handling and warehousing, are paid for separately, if used¹³. In addition to the above, HHAB naturally also performs administrative tasks and, as the infrastructure manager, allocates terminals and other facilities to individual operators, supervises the safety in the port etc.

I.C.2.1. Facilities and services provided and charged by HHAB to ferry operators on the HH-route through the port fees

35. The three ferry operators use the North Harbour which is close to the city centre, where they operate from different terminals and use different quays and berths. The ferry operators normally do not use any of the additional services provided by HHAB, such as towage. [CONFIDENTIAL] charges separately by making special arrangements agreed on a case-by-case basis¹⁴. It may also be noted that the ferry operators on the HH-route carry out their own operations using their own personnel. No employee of HHAB is directly involved in the ferry-operations of Sundbusserne.
36. The sea-side services and facilities provided by HHAB and covered by the port fees to the ferries include the provision and maintenance of all sea-side facilities and services, including the quays, fenders, quay walls and berths (towage and pilotage being charged separately). In this respect, there is no difference between the ferries and other cargo vessels.
37. The land-side facilities provided by HHAB to ferry operators, however, differ considerably from those used by cargo vessels. While cargo vessels use cranes and other equipment for loading/unloading cargo, the ferries use ramps and gangways for embarking/disembarking vehicles and passengers. The three ferry-operators do not

¹¹ Document 484, File B7, section B.1.1, p. 13, fifth paragraph.

¹² Towage services are provided at request of the vessels by Helsingborg Bogser AB, a subsidiary (100%) of HHAB.

¹³ Document 482, File B7, page 4, section 2.1.

¹⁴ Document 530, File B11, section 2.2, p. 2

use the same port facilities on the land-side and only part of these facilities used by the ferry-operators on land is provided by HHAB.

38. Of all the facilities provided by HHAB to the ferry-operators, only some are actually covered by the port fees, as the provision of most facilities on the land-side is covered by separate leasehold agreements. The main leasehold agreement between HHAB and Sundbusserne concerns the renting of the passenger terminal building “Gamla Tullhuset” in the port of Helsingborg. In addition, there is an agreement on the area to be used for flagpoles and two agreements on parking and storage space. As regards the land-side facilities provided to Sundbusserne, the port fees only cover the provision of the fixed gangway.

I.C.2.2. Facilities and services provided and charged by HHAB to cargo vessels within the port fees

39. Apart from the sea-side facilities, different land-side facilities are provided, notably relating to the loading/unloading of cargo. HHAB can handle practically all kinds of cargo, and each part (harbour) of the port is specialised in a different type of cargo. The type of loading/unloading facilities and equipment required depends notably on the volume and type of cargo in question, e.g. the equipment needed for loading/unloading containers differs from that of bulk. The provision of these facilities should be covered by the port fees (cargo fees, see section I.C.3. below), whereas the cargo-handling services for the actual loading/unloading of cargo to/from the vessels should be charged for separately (including the cost of labour).

I.C.3. Port fees charged by HHAB

40. HHAB charges port fees to the users of the port for the provision of all facilities and services on the sea-side, with the exception of pilotage and towage, and for some facilities and services on the land-side.

I.C.3.1. Basic structure of tariffs

41. The port fees are laid down in the port’s tariff which is published on an annual basis by HHAB. HHAB applies a two-part tariff, which consists of a “fixed fee” depending on the characteristics of the vessel and the number of calls, plus a variable fee based on the volume of traffic (passengers, vehicles and cargo) transported onboard the vessels. This type of pricing practice is commonly applied in ferry ports (see section II.B.2.2 point d). The port fees in HHAB are divided into: A. Ship fees, B. Passenger/Vehicle fees and C. Cargo fees :

A. Ship fee (“Fartygshamnavgift”) (applicable to all vessels entering the port)

The ship fee, charged per vessel entering the port of Helsingborg, is expressed per unit of the ship’s gross tonnage (GT) as per international tonnage certification¹⁵ and varies according to the type of the vessel (tankers, liners, ferries).

¹⁵ The gross tonnage is defined as $K \times V$, where V is the volume of the vessel and K is a coefficient determined in an annex to the International Convention on Tonnage measurement of Ships (1969). The gross tonnage represents the maximum capacity of the vessel expressed as a weight function of the volume.

A minimum fee per vessel is specified.

B. Passenger and vehicles fees (applicable to ferries)

Every passenger and vehicles arriving or departing by ferry is charged individually.

C. Cargo fee (“varuhamnavgift”) (applicable to cargo vessels)

The cargo fee varies according to what is transported onboard the cargo vessels on the basis of the different categories of material specified in the port’s tariff. (See Appendix 2 for the evolution of the port fees from 1989 to 2001)

42. A charging system based on ship fees, i.e. fees for the vessel calling the port, and fees for what is transported onboard (what HHAB refers to as “goods fees”), i.e. fees for passengers, vehicles and cargo, is commonly used in ports with ferry traffic. However, the explanation provided by HHAB as to what port services and facilities are covered by the ship fee and the goods fee respectively is not entirely clear.
43. According to HHAB, the services provided under the ship fee are “...access to the port which requires, inter alia, maintenance of breakwaters and water areas such as dredging, access to quay and related traffic infrastructure in the port area which requires maintenance, facilities to secure the vessel, traffic control, 24 hours technical and electrical service (e.g. for ramps, gangways, pumps etc.), access to fresh water, electricity (used quantities are charged separately) etc.”¹⁶
44. As regards the goods fees (passenger, vehicle or cargo fees), HHAB states that “...the services provided under the goods fee is as described above but the fee is dependant on volume of goods.” Furthermore, HHAB states that “the requirement for maintenance of the port facilities varies according to a number of factors including the load of the ships. The work in respect of traffic control varies in relation to the traffic density. In some cases, fees are charged without a split-up in the invoices between various types of fees, but the fees are still based on services provided.”¹⁷
45. The Commission has looked at all services and facilities provided and assumed that if there is an underlying rationale behind the charging system, it would appear that the charging of ship fees, which are based on the gross tonnage of the vessel (the maximum capacity of the vessel depending on the size of the vessel), should correspond to the provision of the facilities and services on the sea-side. The other fees, which depend on what and how much is transported on board (passengers and vehicles fees for ferries, cargo fees for cargo vessels), should then correspond to the provision of port facilities and services on the land-side.

¹⁶ Document 482, File B7, section 2.1., p. 4.

¹⁷ Document 482, File B7, section 2.1., p. 4.

I.C.3.2. Port fees actually charged by HHAB to the ferry operators active on the HH-route

46. As regards the ship fees, the ferry-operators active on the HH-route are charged only once per day and per vessel (category 1.3.1 of the tariff applicable to “ferries and passenger vessels with regular calls to the Danish ports at the Sound”). The ship fee is based on the ship’s gross tonnage (GT) but a minimum tariff is specified. The ferries are also charged per unit of passenger and vehicle transported.
47. HHAB states that the ferries operating regular traffic to/from Danish ports on the Sound have historically been subject to lower passenger fees than other ships due to the relatively higher number of passengers (creating higher income for the port) and the relatively low ticket price for passengers compared to other routes. HHAB further argues that it actually shares the risks and opportunities with the ferry operators as the structure of the port fees is linked to the actual volume of traffic (the more traffic, the more income for the port and vice versa).¹⁸
48. As stated above, several users of the port benefit from special agreements with HHAB whereby they do not pay the full amount of port fees indicated in HHAB’s official tariff. This was also the case for some of the ferry operators on the HH-route, based on increases in the volume of traffic transported by the ferry operators.
49. In March 1997, Sundbusserne alleged that the port fees were too high, and decided to withhold 50% of the passenger fees until the parties reach an agreement, as explained below. Subsequently Sundbusserne also filed a complaint to the Administrative Court of Appeal in Göteborg against HHAB’s refusal to grant access to certain financial documents (see section I.B.2 above).
50. Sundbusserne did enter into negotiations with HHAB in April 1997 in order to reduce the port fees (even though it had not obtained access to the requested documents). HHAB did, however, refuse to negotiate as long as Sundbusserne withheld parts of the passenger fees, and threatened to bring the matter to court, indicating that a legal process could involve security measures. Sundbusserne thus, under protest, paid the withheld amount, as security measures could jeopardize Sundbusserne’s possibilities to continue its operations, but continued to withhold 50% of the passenger fees. Subsequently, HHAB informed Sundbusserne that it had not intended to threaten Sundbusserne by security measures which could jeopardize the ferry operations. New discussions took place in May 1997, where HHAB repeated its earlier refusal to negotiate as long as the withheld amount was not paid and threatened with court actions and possible security measures, and stated that it expected Sundbusserne to pay according to the tariff as long as the negotiations were ongoing. HHAB further explained that a ‘rebate-system’ was being prepared, but that the work with this rebate-system would not continue if Sundbusserne refused to pay the withheld amount and current fees. Sundbusserne thus again, under protest, paid the withheld amount and decided to pay the current fees under protest because the security measures could jeopardize Sundbusserne’s operations, and because it wanted to await HHAB’s rebate-system. In June 1997, HHAB presented the principles for a volume-based ‘rebate-system’, which for Sundbusserne in 1997 only

¹⁸ Document 332, File B2, section 2.2., p. 4-5.

involved a marginal reduction of a potential volume increase. Sundbusserne thus did not accept this proposal¹⁹.

51. In March 1998, HHAB made another proposal to the three ferry operators Scandlines, Sundbusserne and HH-Ferries for a rebate system on the port fees for the period 1997-2000 based on volume increases. According to HHAB, the offer was possible as the number of passengers had increased more than expected in the previous years, and it was hoped that such a rebate system would lead to lower ticket prices which would help to meet the additional competition from the Øresund bridge²⁰. Sundbusserne rejected the proposal because (i) it was based on assumption of volume increase, (ii) it required the withdrawal from its action against HHAB before the Administrative Court of Appeal in Göteborg, (ii) the rebates were not sufficient; and (iv) the ship fees were not included in the proposal (which could thus be raised dramatically)²¹.
52. In October 2001, HHAB made a new proposal to Sundbusserne concerning reduced port fees, i.e. proposing a discount on passenger fees once HHAB reached a total income of 112 million SEK on the HH-route. Sundbusserne did not accept the proposal since it was only aimed at volume increases, which in the case of Sundbusserne would mean only a marginal discount. Sundbusserne presented a counter-proposal that the passenger fee be reduced from 2,05 SEK to [CONFIDENTIAL] SEK and that Sundbusserne should be reimbursed for [CONFIDENTIAL] % of the fees paid retroactively (this reimbursement should not be inferior to what the proposal in 1998 would have implied for Sundbusserne). HHAB rejected this counter-proposal. According to Sundbusserne, attempts in 2001 to agree on port fees failed because “HHAB is only interested in discussing rebates on volume increases” and not what Sundbusserne considers the real problem, namely HHAB’s pricing²².
53. The invoices to Sundbusserne are established by HHAB on the basis of 1996 tariffs, which differ slightly from the current official price list (see [Appendix 2](#)).

I.C.3.3. Port fees actually charged by HHAB to cargo vessels

54. Cargo vessels are normally subject to ship fees and cargo fees as laid down in the port tariff. However, HHAB has concluded several special agreements with cargo vessel operators which provide for reduced port fees. Under these agreements some customers pay a lump sum in port fees without any distinction between the types of fees.

¹⁹ Document 1, File B1 (the complaint, part V, pages 39-41).

²⁰ Document 504, File B9, Annex 1 (the proposed agreement).

²¹ Document 504, File B9, pages 1-2.

²² Document 504, File B9, page 3.

II. LEGAL ASSESSMENT

II.A. MARKET DEFINITION AND DOMINANCE

55. In the Article 6 letter, the Commission has drawn the preliminary conclusion that:

- The relevant market in this case is the market for the provision of port services and facilities in the port of Helsingborg to ferry-operators transporting passengers and/or vehicles on the Helsingborg-Elsinore route (the HH-route).
- HHAB, as the sole provider of port facilities and services for ferry services transporting passengers and/or vehicles on the HH-route, holds a dominant position within the meaning of Article 82 of the EC Treaty on the relevant market.
- The relevant market constitutes a substantial part of the Common Market.

56. In its reply to the Article 6 letter²³, Sundbusserne agrees with the definition of the relevant market and with the preliminary conclusions drawn by the Commission that HHAB holds a dominant position on this market and that the relevant market constitutes a substantial part of the common market.

57. In its comments on the Article 6 letter, HHAB maintains its position about the definition of the relevant market.²⁴ HHAB does not bring further arguments, but in previous submissions to the Commission, HHAB contended that the market is the market for the provision of infrastructure for transport from the Swedish part of the Sound to the Danish part. According to HHAB, the market at least includes other ports around the Sound and also the Øresund Bridge.²⁵ HHAB therefore argues that it does not hold a dominant position on this market. In addition, HHAB claims that “even if the Bridge is not taken into account when the relevant market is defined, it is a fact that the Bridge is very relevant as a threat to HHAB. This threat as such hinders HHAB from charging excessive or unfair prices, as this would result in a repercussion on HHAB.”²⁶

II.A.1. The relevant market

58. As set out by the Commission in the Article 6 letter²⁷, the relevant market in this case is the market for the provision of port services and facilities in the port of Helsingborg to ferry-operators transporting passengers and/or vehicles on the Helsingborg-Elsinore route (the HH-route).

²³ Reply to the Article 6 letter, 3rd paragraph of page 1

²⁴ Document 582b, File B15, section 1, p 2.

²⁵ Doc 484, File B7, section B.1. and doc 530, File B11, section 5

²⁶ Doc 582b, File B15, Section 3.1., p 8

²⁷ See section II.A.1. of the Article 6 letter.

59. The Port of Helsingborg and the Øresund Bridge (which is located about 60 km South of Helsingborg between Malmö and Copenhagen) do not operate on the same product market. The reason is that the customers (in this case, the ship-operators who require provision of port infrastructure services and facilities at Helsingborg) cannot use the bridge infrastructure instead of the port infrastructure. On the market for the provision of port infrastructure and facilities, the Øresund Bridge is not a substitute for the port infrastructure. The Bridge does not compete with the port of Helsingborg on the market for the provision of port infrastructure facilities, but with the ferry operators on the downstream market for the provision of transport services to passengers, vehicles.
60. Unlike what HHAB has alleged, Danlink and DFDS are not regarded as HHAB's customers on the relevant market:
- Following the termination of the Danlink rail service on 30th June 2000, as a result of which there is no rail connection on the Helsingborg-Copenhagen route, it is not necessary to consider rail transport as all rail traffic now uses the bridge between Malmö and Copenhagen.
 - DFDS (Scandinavian Seaways) is a cruise ferry-line between Copenhagen and Oslo. DFDS calls only once per day in Helsingborg. Most of the passengers and vehicles transported by DSDS are carried between Copenhagen and Oslo and only a very limited volume is added at Helsingborg. As regard the port charges, DFDS is not submitted to the same tariff conditions as the ferries active on the HH-route. DFDS has a special agreement with HHAB²⁸.
61. As concerns the provision of services by HHAB in Helsingborg, at least two neighbouring but different markets can be identified: one is related to the provision of port facilities and services to ferry-operators active on the HH-route (the relevant market) and the other to the provision of port facilities and services to ships loading and unloading cargo at Helsingborg.
62. As developed in the Article 6 letter²⁹, there is no other Swedish port that can be a substitute for Helsingborg for the provision of port facilities and services to ferry-operators active on the HH-route.
63. As regards the market for the provision of port facilities and services to cargo vessels, there are genuine alternatives to the port of Helsingborg (all major cargo ports in and around the Øresund region: Copenhagen, Frederikshavn, Gothenburg, Trelleborg, Halmstad and Malmö³⁰), which supports the assumption that HHAB does not hold a dominant position on this neighbouring market.

²⁸ [Doc 311, File B2, p. 5.]

²⁹ See section II.A.2. of the Article 6 letter.

³⁰ The substitutes could even be extended to include Stockholm, Oslo, Helsinki, and Esbjerg and other Nordic ports depending on the nature and final destination of the cargo.

II.A.2. HHAB holds a dominant position on the relevant market

64. In assessing the position of HHAB on the relevant market, there is no evidence whether the Øresund Bridge's pricing represents a binding constraint on HHAB. In any event, it does not exert a direct competitive constraint on HHAB and there is no evidence that it would prevent HHAB to "behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."³¹
65. For the purposes of the present decision and as set out in the Article 6 letter³², it is therefore assumed that HHAB holds a dominant position on the relevant market. It is the sole provider of port facilities and services for ferry services transporting passengers and/or vehicles on the HH-route. There is no possibility for any other undertaking to enter the upstream market as regards the provision of port facilities and services at Helsingborg.

II.A.3. Substantial part of the common market

66. Finally, as established in the Article 6 letter³³, the relevant market defined as the market for the provision of port facilities and services in the port of Helsingborg to ferry-operators transporting passengers and/or vehicles on the HH-route constitutes a substantial part of the Common Market.

II.A.4. Conclusion

67. The Commission reiterates the elements considered in the market definition in section II.A. of the Article 6 letter and concludes that:
- The relevant market in this case is the market for the provision of port services and facilities in the port of Helsingborg to ferry-operators transporting passengers and/or vehicles on the Helsingborg-Elsinore route (the HH-route).
 - It is assumed, for the purposes of this decision, that HHAB holds a dominant position within the meaning of Article 82 of the EC Treaty on the relevant market.
 - The relevant market constitutes a substantial part of the Common Market.

II.B. ABUSE OF DOMINANT POSITION UNDER ARTICLE 82 OF THE EC TREATY

68. HHAB is an undertaking within the meaning of Article 82 of the EC Treaty. It is a limited liability company, fully responsible for the running of the port and the determination of the port fees.

³¹ Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, at para. 38.

³² See section II.A.3. of the Article 6 letter.

³³ See section II.A.4. of the Article 6 letter.

69. Sundbusserne alleges that HHAB has infringed Article 82 of the EC Treaty by means of levying excessive port charges for services provided to ferry operators, and cross-subsidisation, and possibly also by refusing access to certain requested documents and by its way of negotiating.

II.B.1. HHAB's pricing policy as regards the port charges

70. The Commission reported, in section II.B.1 of the Article 6 Letter, the explanations provided by HHAB as concerns its pricing policy as regards the port charges. According to HHAB:

(i) the port business must carry its own costs, "in particular in consideration of the considerable investments in the port for the benefit of ferry operators" ;

(ii) all customers should be treated equally ;

(iii) the port fees should not entail any link to any specific service or facility in the port;

(iv) the cost calculations for the port facilities must reflect the current value (replacement value) of the assets.

71. HHAB argues that "it is imperative to see the port as a whole as one business unit" whereby all activities and services provided are interconnected³⁴. The different activities "cannot be split up and regarded as separate markets."³⁵ It would thus not be correct "to single out an individual investment and its current user/customer and argue that the cost should be allocated only to this customer or its proportionate part of HHAB's total revenues".³⁶ HHAB explains that its different lines of business and the corresponding revenues are continuously changing over time. "Hence investments in one part may have to be paid by revenues generated in another part of the port – this will inevitably change over time."³⁷

72. Moreover, according to HHAB, "investments made in one part of the port may be the result of changes in the demand of services in other parts of the port."³⁸ For instance, HHAB argues that it was forced, in 1984-85, to undertake a number of non-ferry related investments (e.g. building of a new container terminal, the West Harbour) in order to provide further space for ferry-operations³⁹. "Hence, although a new container facility has been built, the costs therefore should not be allocated to container traffic only where such investment to a large extent was caused by an

³⁴ Document 332, File B2, section 2.1., p 3.

³⁵ Document 332, File B2, section 2.1.

³⁶ Document 332, File B 2, section 2.1., p 3-4

³⁷ Document 332, File B 2, section 2.1., p 3

³⁸ Document 332, File B 2, section 2.1., p 3

³⁹ Document 422, File B5, section 2.9., p 9-10 ; Document 340, File B2, (History of the port and HHAB, non confidential version)

increase in ferry traffic requiring additional space and thus driving a move of the container handling”.⁴⁰

73. According to HHAB “costs are naturally taken into account every time when HHAB sets the port charges”. “When new port charges are set, the investment costs – the cost of capital and costing depreciation – constitute the basis for the charging process. Every time HHAB has decided on the port charges, charges in competing and other ports have been taken into consideration”. In the context of the yearly budget process of HHAB, the expected ferry traffic volumes, and other revenues are also taken into account. However, “a precise mathematical model for the cost calculation, has not been practised every year as a formula for calculating the port charges”.⁴¹
74. According to HHAB, its “...general policy is to apply the tariff and not allow any discount on the port charges”. However, “HHAB has occasionally entered into special agreements with ferry operators under which they do not pay the full amount of the port charges indicated in HHAB’s tariff⁴². HHAB has also entered into special agreements with other port users, i.e. cargo vessel operators, whereby the latter do not pay the full amount of port fees under the tariff. The special agreements are dealt with under sections I.C.3.2 and I.C.3.3.

Sundbusserne’s comments

75. Sundbusserne did not specifically comment on this section of the Article 6 letter related to the report by the Commission of the explanations provided by HHAB as concerns its pricing policy as regards the port charges.
76. However, as regards the principles of cost price calculation, Sundbusserne considers that it should fully bear the costs relating only to Sundbusserne’s use of the port (specific costs), plus a share of common costs having reference to its use of the port (relevant common costs)⁴³. In its complaint, Sundbusserne noted that HHAB’s costs for the provision of services to it are to a large extent fixed, i.e. constant irrespective of the number of calls of the vessels or the number of passengers transported onboard.

Assessment by the Commission of Sundbusserne’s comments

77. The Commission cited, in section II.B.1. of the Article 6 letter, the explanations provided by HHAB about its pricing policy concerning the port charges. The Commission did not take position on each of HHAB’s statements in the Article 6 letter (such as, for instance, the comments made by HHAB outlined in paragraph 72 above).

⁴⁰ Document 332, File B 2, section 2.1., p 3-4

⁴¹ Document 457, File B6, p. 2

⁴² Document 332, File B2, section 4. p 5.

⁴³ Reply to the Article 6 letter, second paragraph of page 5.

78. The method of charging a ship fee, which depends on the characteristics of the vessel (tonnage or size or length of the vessel) and goods fees (passenger, vehicles or cargo fees), which depend on what and how much is transported onboard is commonly used by most ferry ports (see further below section II.B.2.2 section d).
79. It seems that Sundbusserne argues that the port charges would not be cost-based. The fact that the port charges would be non cost-based does not constitute, as such, an abuse under Article 82 of the EC Treaty. The question of the relation between the port charges and the costs incurred by HHAB in providing services and facilities to the users of the port will be examined in section II.B.2. (Unfair/excessive pricing).

II.B.2. Unfair/excessive pricing

80. The complainant argues that the port charges are excessive in relation to port fees in other comparable ports. Sundbusserne also argues that the prices are excessive in relation to the costs borne by the port for the provision of the services to the ferry-operators.
81. Article 82 of the EC Treaty prohibits as incompatible with the common market insofar as it may affect trade between Member States, the abuse by one or more undertakings of a dominant position within the common market or in substantial part of it, consisting of “directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions”.
82. In *United Brands*⁴⁴, the European Court of Justice (hereafter “ECJ”) has set out a definition of what may constitute an excessive or unfair pricing abuse under Article 82. In paragraph 250 of that judgment it stated that “*charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse*”.
83. The Court did not specifically set out how the “economic value” of a product should be determined, although it stated in paragraph 251 of its judgement that “*the excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which could disclose the amount of the profit margin*”.
84. The Court further stated in paragraph 252 that “[t]he questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products”.
85. It is important to note that the decisive test in *United Brands* focuses on the price charged, and its relation to the *economic value* of the product. While a comparison of prices and costs, which reveals the profit margin, of a particular company may serve as a first step in the analysis (if at all possible to calculate), this in itself cannot be conclusive as regards the existence of an abuse under Article 82.

⁴⁴ Case 27/76, *United Brands v Commission* [1978] ECR 207

86. The Commission will follow the methodology set out by the Court in paragraph 252 of the United Brands judgement. The Commission will therefore assess the costs actually incurred by HHAB in providing the products/services in question (the costs of production) and make a comparison with the prices actually charged (section II.B.2.1). The Commission will then assess whether the prices are unfair when compared to prices charged to other users or by other ports (section II.B.2.2), or whether the prices are unfair in themselves (section II.B.2.3).

II.B.2.1. Comparison between the costs actually incurred and the price charged

a) Allocation by HHAB of its costs to ferry-operations

87. In order to follow the approach set up by the Court, the port has been required “to produce particulars of all the constituent elements of its production costs” related to the ferry operations.⁴⁵
88. At the request of the Commission, HHAB has explained its pricing policy as regards the port charges and provided an allocation of its costs to ferry operations (including the train-ferry operations (Danlink) and the services provided to DFDS) for the year 1996.⁴⁶

Costs	Amount (in MSEK)	Comment
Depreciation costs	70	1 for buildings, 28 for Machinery, 41 for ground facilities
Cost of capital	64	10% of 50% of 1278 MSEK
Direct operational expenses	4 ⁴⁷	
Overhead expenses	18	(147/329 = 45%) of 42 MSEK
Total	156	

89. In 1996, according to HHAB, the costs related to ferry operations would amount to 156 MSEK, which exceeds the gross revenue derived from ferry operations (147 MSEK). The total costs figure is also compared by HHAB to the revenues generated by ferry-operations from 1993 to 1997 (114 MSEK to 143 MSEK) in order to suggest that the ferry-operations are not profitable in the long run.
90. In the Article 6 letter, the Commission showed that the full application of the cost allocation principles used by HHAB (not only to the ferry-operations but also to the other activities of the port) would, according to the Commission's estimations, give the following results for the year 1996⁴⁸ :

⁴⁵ Ibid, paragraph 256.

⁴⁶ [Document 325, File B2]

⁴⁷ HHAB has confirmed that this value, calculated in 1997, corresponds to the average direct operating costs of the previous years. It has indicated that the amount of these costs (which are related to the operations of the three ferry-operators, plus DFDS and Danlink) “is now a little low but is still used as a minimum amount in the model” (Document 530, File B11, section 4.4, p 6. [Document 526, File B11]).

⁴⁸ The figures of the first column, related to ferry-operations and of the 3rd and 6th lines of last column (total overhead costs, total depreciation costs) have been directly provided by HHAB. The others are derived by difference from data provided by HHAB (depreciation costs and cost of capital for the

1996	Ferries	%	Others	Total
Revenues	147,0		[CONFIDENTIAL]	[CONFIDENTIAL]
Direct Operating costs	4,0		[CONFIDENTIAL]	[CONFIDENTIAL]
Overhead costs	18,0		[CONFIDENTIAL]	[CONFIDENTIAL]
Total operating costs	22,0		[CONFIDENTIAL]	[CONFIDENTIAL]
Op. profit (before depreciation)	125,0		[CONFIDENTIAL]	[CONFIDENTIAL]
Depreciation costs	70,0		[CONFIDENTIAL]	[CONFIDENTIAL]
Capital costs	63,9		[CONFIDENTIAL]	[CONFIDENTIAL]
Result	-8,9		[CONFIDENTIAL]	[CONFIDENTIAL]
Profit/turnover	-6,1%		[-120 %; -80%]	[- 80%; -40 %]

[Document 325, File B2] MSEK

91. The Commission considered, based on the above table, that this allocation of the costs by HHAB cannot be realistic and reflect the level of the costs actually incurred by HHAB to provide facilities and services to the ferry-operators and to the other users of the port of Helsingborg. If it were so, HHAB would face bankruptcy, something which is not reflected in its audited financial reports.
92. The Commission has then set out, in section II.B.3. of the Article 6 letter, which aspects of the cost allocation made by HHAB look questionable. The Commission took the preliminary view that:
 - The fixed assets leased from the City of Helsingborg⁴⁹ should not be included in the base for calculation of the depreciation costs and cost of capital incurred by HHAB. In counterpart, the operating costs borne by HHAB should include the rent paid to the City for these assets and the maintenance costs of these assets.
 - In order to reflect the costs actually incurred by HHAB, the book values of the assets owned by HHAB should be used instead of the replacement values. The depreciation costs would then correspond to the figures registered in the audited financial reports of the company.
 - The cost of capital should be calculated on the basis of the financial result and the equity instead of half the replacement value of the assets of the port as done by HHAB. The cost/remuneration of the capital would then amount on average to [40 - 60] MSEK per year between 1994 and 2000, for the whole company, instead of [160 - 190] MSEK.

Sundbusserne's comments on the allocation made by HHAB of its costs to ferry-operations and on the Commission's assessment of this cost allocation

93. Sundbusserne states that it "fully agrees with the Commission that the allocation of costs made by [HHAB] does not appear to be realistic and cannot reflect the level of the costs actually incurred. Sundbusserne is pleased knowing the Commission so strongly expresses its opinion on this matter, by stating that if it were so [HHAB]

other users) and from the official financial report and the IMR reports for the year 1996, on an aggregate basis.

⁴⁹ These assets correspond to land areas, quays, docks, and channels, breakwaters and terminal areas that were not transferred in 1993-94 from the City of Helsingborg. These assets are leased from the City of Helsingborg.

would face bankruptcy. [HHAB] has not until the Commission investigation accepted that its prices are not related to costs”.⁵⁰

Assessment by the Commission of Sundbusserne’s comments

94. Sundbusserne agrees with the Commission’s preliminary conclusion that the allocation of the costs submitted by HHAB does not appear to be realistic and cannot reflect the level of the costs actually incurred by HHAB to provide facilities and services to the ferry-operators and to the other users of the port of Helsingborg.
95. In its comments to the Article 6 letter, HHAB maintains that, for the purpose of making a fair allocation of costs, the City and HHAB should be looked upon as one entity⁵¹. As regards the value of the assets, HHAB maintains that the replacement value of the assets should be applied when making a fair allocation of the costs. According to HHAB, a calculation of costs based on replacement values is applied in many large manufacturing companies. This method of calculating costs is a tool for determining the actual price, but many other factors should be taken into consideration such as “the owner’s goals, market conditions, financial needs, etc”.⁵² “HHAB reiterates that its cost model is conservative in that only 50% of the replacement value is used and that prices taking such replacement values into consideration, allows HHAB to secure reasonable funds for future investments.” This argument will be addressed in paragraph 201 below.
96. For the detailed reasons set out in sections II.B.2. and II.B.3. of the Article 6 letter, the allocation by HHAB of its costs to the ferry-operations is rejected and is not used further in the present decision in the determination whether the port charges are excessive.

b) The Commission's allocation of HHAB’s costs to ferry-operations

97. As stated above there are aspects of HHAB’s cost allocation that seem questionable. The Commission has therefore sought to establish an approach that would reflect a more realistic level of the costs incurred by HHAB to provide the relevant services. This allocation aims at assessing the level of the costs incurred by HHAB (the production costs), according to whether they are related to services provided to the ferry-operators active on the HH-route (Scandlines, Sundbusserne and HH-Ferries) or to the other activities of the port.
98. As HHAB did not provide a realistic allocation of its costs to the ferry-operators, the Commission has sought to make an approximate calculation and allocation of these costs, based on data made available by the port, mainly from the audited financial reports.
99. It must be stressed that this is only an *approximate* cost allocation made for the purposes of addressing the present complaint. In particular, it has not been possible to

⁵⁰ Reply to the Article 6 letter, last paragraph of page 5.

⁵¹ Document 582b, File B15, section 2.1.

⁵² Document 582b, File B15, section 2.2.

determine with certainty all relevant incurred costs. The Court has recognised in United Brands the “considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its setup, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other”⁵³.

100. It should be noted that most of the costs of the port are fixed costs and that the variable costs (i.e. costs that would vary with the number of calls by the ferry-operators or the number of passengers/vehicles transported onboard the ferries) are minor. Furthermore, most costs (the overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg) had to be treated as distributed costs. These indirect costs are not allocated by HHAB between the different categories of users of the port and the Commission and this renders the task of allocating these costs very difficult. The Commission has applied a key of repartition of those costs between the different users of the port. However, as explained in section 3 of Appendix 3.1, the choice of which key to apply is not evident and that choice naturally affects the outcome. However, for the purposes of the present decision, the Commission has proceeded based on assumptions that are in any event more favourable to the complainant.
101. In addition, due to a lack of precise data and to the intricacy existing between the services and facilities provided by HHAB within the port charges and those provided within specific agreements, it has not been possible to segregate out of the approximate total costs (all costs incurred by HHAB which have been attributed to all services provided to the ferry-operators active on the Helsingborg-Elsinore route), the costs incurred attributable to services covered by the port charges. See Section 2 of attached Appendix 3.1.
102. The Commission reviewed its approximate calculation for the present decision. Detailed explanations about this revision are provided in Appendix 3.1 of the present decision. The revised approximate cost/price analysis is set out in Appendix 4.2 [*WHICH IS CONFIDENTIAL*].

c) The ferry-operations would seem to generate profits which cover losses generated by other operations in the port.

103. According to the Commission's amended approximate cost/price analysis, the ferry-operations would seem to generate profits whereas in general, the other operations of the port generate losses. In the period 1994-2000, operating income/turnover varied between [40% - 60%] and [50% - 70%] for the ferry-operations and between [-30%; - 17%] and [2% - 15%] for the other operations.

Sundbusserne's comments

104. As regards the principles of cost price calculation, Sundbusserne considers that it should fully bear the costs relating only to Sundbusserne's use of the port (specific

⁵³ Ibid, paragraph 254.

costs), plus a share of common costs having reference to its use of the port (relevant common costs)⁵⁴.

105. Sundbusserne indicates⁵⁵ that it “assessed the cost price for its use of the Port of Helsingborg by going through the accounts of the general ledger. The calculation showed that Sundbusserne was paying almost four times the cost price” (including a 10% profit margin).

Assessment by the Commission of Sundbusserne’s comments

106. Efforts were made by the Commission to calculate separate revenues, costs and profits for the ferry-operations on one side and the other activities in the port on the other side. The three ferry-operators were not treated individually in the approximate cost allocation, due to a lack of precise data. However, direct costs borne by HHAB in the provision of port service to the three ferry-operators have been identified and a fair share of common costs was allocated to the same three ferry-operators (see section 3 of Appendix 3.1), as argued by Sundbusserne.
107. Sundbusserne seems to refer to the cost-price calculation set out in section 4.2. of its complaint.⁵⁶ In its calculation, Sundbusserne has allocated 1.5% of HHAB’s costs that it considers being relevant for the services provided to it by HHAB (common costs, depreciation costs, leasehold of assets to the City of Helsingborg). The 1.5% figure would represent Sundbusserne’s contribution to HHAB’s total revenues. Based on the results of this cost-price calculation, Sundbusserne argues that it is paying almost 4 times the costs incurred by HHAB in providing port services to it.
108. In addition to the fact that this cost-price allocation only relates to Sundbusserne, there are differences of treatment of specific elements with the approximate cost allocation made by the Commission, which render difficult a detailed comparison between the two sets of calculations. It seems however that some costs are not taken into account by Sundbusserne (such as the maintenance costs of the leased assets) and overall, HHAB’s costs allocated by Sundbusserne to its operations appear to be low.
109. In the table below, the EBIT/turnover ratios calculated by the Commission in its approximate cost allocation set out in Appendix 4.2 [WHICH IS CONFIDENTIAL] are converted in Price/Costs ratios as used by Sundbusserne⁵⁷. It appears that, on average, the ferry-operators (Scandlines, Sundbusserne and HH-Ferries) would pay 2.6 times the costs incurred by HHAB in providing port services to them.

⁵⁴ Reply to the Article 6 letter, second paragraph of page 5.

⁵⁵ Reply to the Article 6 letter, third paragraph of page 5.

⁵⁶ Documents 21-26, File B1.

⁵⁷ Like in Sundbusserne’s calculation, no financial cost nor contribution to HHAB’s overall profit are taken into account. However, unlike in Sundbusserne’s calculations, a profit margin of 10% is not taken into account in the approximate cost allocation made by the Commission and therefore in the calculation of the Price/Cost ratios.

	EBIT/Turnover	Price/Cost
1994	[CONFIDENTIAL]	2,23
1995	[CONFIDENTIAL]	2,18
1996	[CONFIDENTIAL]	2,49
1997	[CONFIDENTIAL]	2,92
1998	[CONFIDENTIAL]	2,82
1999	[CONFIDENTIAL]	2,88
2000	[CONFIDENTIAL]	2,65
Average		2,60

110. Despite differences between the Commission's and Sundbusserne's approximate cost/price calculations, it seems that they provide very similar outcomes and that there is no real dispute between the Commission and the complainant as regards the results of these calculations, i.e. that the ferry-operations seem to generate profits which cover losses generated by other operations in the port.

Conclusion

111. On the basis of the approximate cost/price analysis set out in Appendix 4.2 [WHICH IS CONFIDENTIAL], the ferry-operations seem to generate profits which cover losses generated by other operations in the port.

d) Assessment of the difference between the costs actually incurred and the price actually charged

112. On the basis of the approximate cost/price analysis set out in Appendix 3 of the Article 6 letter, the Commission noted that the revenues (through the port charges) derived from the ferry-operations would seem to exceed the costs actually incurred by the port to provide services and facilities to these users.

113. The same finding can be made on the basis of the attached amended approximate cost/price analysis set out in Appendix 4.2 [WHICH IS CONFIDENTIAL]. It should be noted that the calculations in this amended approximate cost/price analysis account for all HHAB's revenues derived from the ferry-operations (the aggregated port charges invoiced by HHAB to Scandlines, Sundbusserne and HH-Ferries, plus the amounts charged to them pursuant to specific agreements) and all costs incurred by HHAB which can be reasonably attributed to services provided to the ferry-operators active on the Helsingborg-Elsinore route.

114. As explained in section 2 of Appendix 3.1, following the Court in United Brands, a comparison should be made between the contested port charges and the costs incurred by HHAB in providing the services provided against these port charges. As the costs to be covered by the port charges are necessarily lower than the total costs, it can be concluded, as in the Article 6 letter, that the revenues derived from the ferry-operations (through the port charges) would seem to exceed the costs actually incurred by the port in providing the services and facilities against these port charges.

115. In paragraph 156 of the Article 6 letter, the Commission argued that the comparisons of the profitability of different ports made at the overall company level⁵⁸ are of limited use, because they amalgamate all sort of revenues and costs, whereas each port differs substantially from the others in terms of its activities, the volume of its assets and investments, the level of its revenues and the costs of each activity.
116. In paragraph 167 of the Article 6 letter, the Commission drew the preliminary conclusion that the mere fact that revenues may exceed costs actually incurred is not sufficient to conclude that the difference is "excessive" in the meaning of the first question posed by the Court in paragraph 252 of the United Brands judgement. In any event, the Commission considered that even if it were to be assumed that the difference is "excessive", the Commission would have to proceed to the next question as laid down in United Brands in the same paragraph, in order to determine whether the prices charged to the ferry-operators are unfair, either in themselves or when compared to other ports.

Sundbusserne's comments

117. In its reply to the Article 6 letter, Sundbusserne states that "based on the calculation the commission finds that the charges are excessive in relation to the costs actually incurred by [HHAB] to provide the services."⁵⁹
118. Sundbusserne does not agree with the Commission's preliminary conclusion set out in paragraph 167 of the Article 6 letter, that even if it were to be assumed that the difference between the revenues derived from the ferry-operations through the port charges and the costs incurred is "excessive", the Commission would have to proceed to the next question as laid down in paragraph 252 of the United Brands judgement whether the prices charged to the ferry-operators are unfair, either in themselves or when compared to other ports⁶⁰.
119. Sundbusserne considers that the test set out in paragraph 252 of the United Brands Judgement is an alternative to the test set out in paragraphs 250-251 of the same judgement⁶¹. Sundbusserne argues that "the reason for the Court of Justice to make an alternative test (paragraph 252) was that the Commission failed to require United Brands Company to produce particulars of all the constituent elements of United Brands Company's cost. Thus there was no basis on which excess could be determined. Consequently, if the Commission had assessed the United Brands Company's cost of production, excess could have been determined only by making a comparison between the price and the cost of production (paragraph 251). If the

⁵⁸ On the basis of the figures set out in tables of Appendix 4 of the Article 6 letter, it appears that the net income/turnover ratio and the return on equity for Helsingborg are lower than for Malmö and Göteborg. The operating cash-flow/turnover and the gross margin (income before taxes/costs ratios) are however higher for Helsingborg than for Malmö and Göteborg. This is because the costs are lower in Helsingborg (see the cost/turnover ratios).

⁵⁹ Reply to the Article 6 letter, 2nd paragraph of page 6.

⁶⁰ Reply to the Article 6 letter, 4th paragraph of page 3.

⁶¹ Reply to the Article 6 letter, 4th paragraph of page 4.

excess determined would have had no reasonable relation to the economic value of the product supplied, the price charged would have been abusive (paragraph 250).”⁶²

120. According to Sundbusserne, “Based on the calculation made by the Commission it is evident that charges are excessive in relation to the costs actually incurred by [HHAB] to provide the services. As the excess determined has no reasonable relation to the economic value of the product supplied (cost of production including reasonable profit), the price charged is unfair and as such abusive.”⁶³

121. As regards the profitability of different ports, “Sundbusserne agrees with the Commission that it is difficult to draw conclusions from comparisons with the ports of Malmö, Göteborg and Ystad. The comparison made in the application showed however that some important key ratios (profit in relation to income and costs respectively) were higher for [HHAB] than for other ports”.⁶⁴

122. “When assessing the cost price, Sundbusserne found it reasonable that it contributed to a return on investments of approximately 10%.”⁶⁵

Assessment by the Commission of Sundbusserne’s comments

123. In the United Brands judgement, the Court referred to several possibilities to determine whether prices are unfair:

- In paragraph 251, the Court mentions the possibility, “*inter alia*”, to make a comparison between the selling price of the product in question and its cost of production, which could disclose the amount of the profit margin.
- In paragraph 252, the Court makes clear that the questions to be determined are “*whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products*”.
- In paragraph 253, the Court acknowledges that there may be “*other ways [...] of selecting the rules for determining whether the price of a product is unfair*”.

124. In this light, the Commission finds that the most appropriate methodology in the present decision is the one set out by the Court in paragraph 252 of the United Brands judgement.

125. The questions to be determined are as follows:

⁶² Reply to the Article 6 letter, page 3-4. Sundbusserne also refers to its submission of 10 May 2000 (doc 500, file B9).

⁶³ Reply to the Article 6 letter, 4th paragraph of page 9.

⁶⁴ Reply to the Article 6 letter, 1st paragraph of page 10.

⁶⁵ Reply to the Article 6 letter, 3rd paragraph of page 6.

- (i) “whether the difference between the costs actually incurred and the price actually charged is excessive and, if the answer to this question is in the affirmative,” (emphasis added)
- (ii) “whether a price has been imposed which is either unfair in itself or when compared to the price of competing products.”
126. Sundbusserne considers that a positive difference between the price charged and the costs incurred, exceeding a reasonable margin, is sufficient to conclude that the price is unfair within the meaning of Article 82.
127. In paragraph 252 of the *United Brands* judgement, the Court made a clear distinction between, on the one hand, the question whether the difference between the price and the production costs – the profit margin – is “excessive” and, on the other hand, the question whether the price is unfair. Had it been otherwise, there would have been no reason for the Court, once the first question has been answered in the affirmative, to proceed to the question whether the price is unfair in itself or when compared to the price of competing products.
128. A comparison between the price charged and the costs incurred (in the present case, the *approximate* incurred costs) can only serve as a first step in an analysis of excessive or unfair pricing. The *United Brands* judgment made clear (in paragraph 250) that such an abuse can only be established where the price bears no reasonable relation to the economic value of the product concerned.
129. In this case, the question whether the price is unfair in relation to the economic value of the service will be examined in a second step.
130. With regard to the first question posed by the Court in *United Brands*, on the relation between the price and the costs, unlike what Sundbusserne states in its reply to the Article 6 letter⁶⁶, the Commission did not come in the Article 6 letter to the preliminary conclusion that “the charges are excessive in relation to the costs actually incurred by [HHAB] to provide the services”. In paragraph 167 of the Article 6 letter, the Commission clearly stated that “the mere fact that revenues may exceed costs actually incurred is not sufficient to conclude that the difference is “excessive” in the sense of the first question posed by the Court in the *United Brands* judgement”.
131. Sundbusserne considers that “a return on investments” of approximately 10% would be reasonable. However, Sundbusserne did not define precisely which type of return on investments it is referring to. In its cost/price allocation in section 4.2. of its complaint⁶⁷, Sundbusserne seems to equal profit margin (expressed as a percentage of the production costs) and “return on investments”, which is not correct. The generic term “return on investments” actually corresponds to different key ratios⁶⁸ which are

⁶⁶ Reply to the Article 6 letter, 2nd paragraph of page 6.

⁶⁷ Documents 21-26, File B1

⁶⁸ Such as, for instance, the “Return on Capital Employed” (ROCE) ratio defined as the ratio “Operating Profit/Operating Assets” or the “Return on Equity” defined as the ratio: “Income Before Taxes/Equity”. In Appendix 4.2, the Commission has calculated the “Return on Equity” at the overall company level.

intended to indicate how well a business uses those funds invested in it, expressing profit as a percentage of the total capital used to generate that profit. The difficulty involved in calculating this ratio is deciding which profit and which capital employed are taken into consideration.

132. In addition, Sundbusserne did not provide any explanation or justification for the 10% figure, be it the profit margin (expressed a percentage of the production costs) or the return on equity. Without any basis, 10% cannot be retained as the reference for a “reasonable” profit or return on equity. It is well known that some sectors are structurally more profitable than others, depending on many factors.
133. Even a comparison between the profitability of different ports made at the overall company level would be of limited use, as argued in the Article 6 letter, because a detailed analysis reveals that each port differs substantially from the others in terms of its mix of activities, the volume of its assets and investments, the level of its revenues and the costs of each activity. If, like in the port of Helsingborg, some activities of a port are run at a loss, these will mask the possible profits derived by ferry-operations when considering the overall profits of the port.
134. There would be insuperable difficulties in this case in establishing valid benchmarks which would imply that, for the port taken as reference, the profits (and the equity) related to the ferry-operations are segregated from those of the other activities. Such a comparison would need the same amount of effort for each port as the one required for the port of Helsingborg, with similar uncertainties as regards the precise level of the costs, profits and equity attributable to the ferry-operations.
135. In addition, such a comparison between the profits of the ferry-operations in different ports would be too dependent on the markets on which they operate, the individual cost structure of the companies (possible economies of scope and scale, existence of cost efficiencies), the level of their investments, how these are financed as well as internal decisions as regards the remuneration of the share-holders.
136. In any event, even if it were to be assumed that the profit margin of HHAB is high (or even “excessive”), this would not be sufficient to conclude that the price charged bears no reasonable relation to the economic value of the services provided. The Commission would have to proceed to the second question as set out by the Court in *United Brands*, in order to determine whether the prices charged to the ferry-operators are unfair, either in themselves or when compared to other ports.
137. In those conditions, the arguments brought by Sundbusserne supporting that the price is unfair in relation to the economic value of the service (determined, according to Sundbusserne as the cost of providing the services plus a reasonable margin) will be examined below in section II.B.2.3.

Conclusion

138. On the basis of the approximate cost/price analysis set out in Appendix 4.2 [*WHICH IS CONFIDENTIAL*], HHAB’s revenues (through the port charges) derived from the ferry-operations would seem to exceed the costs actually incurred by the port to provide services and facilities to these users.

139. The Commission will in the following first examine whether the port charges can be considered unfair when compared to port charges in other ports (section II.B.2.2.) and then, whether the port charges can be considered unfair in themselves (section II.B.2.3.).

II.B.2.2. Assessment of whether the port charges are unfair when compared to prices charged to other users and prices charged by other ports with ferry traffic

a) Condition for a valid comparison between prices charged by other ports

140. In the Article 6 letter, the Commission explained that it is not possible to draw any conclusion from comparisons with other ports, as regards the level of the respective fees, for the following reasons:

- While the method of charging a ship fee, which depends on the characteristics of the vessel (tonnage or size or length of the vessel) and goods fees (passenger, vehicles or cargo fees), which depend on what and how much is transported onboard is commonly used by most ferry ports, each of them applies its own specific charging system. In particular, the repartition between the ship fee and the goods fee is not necessarily the same in different ports. The relative importance of the two types of fees therefore varies, i.e. there are ports where the ship fee is higher while the goods fee is lower compared to other ports.
- Most of the ship-owners that call a certain port regularly, such as ferry operators, have individual agreements with the port in question whereby they pay less than the price indicated in the official tariff on which such a comparison is based, or on a different basis (lump sum).
- The list of the services provided on the land-side and on the sea-side within the port charges varies between ports. The comparison is made more difficult by the existence of separate agreements between the ports and the port users (as for HHAB) for the provision of these services.
- Each port differs substantially from the others in terms of its activities, the size of its assets and investments, the level of its revenues and the costs of each activity.

141. The Commission took the view that such a comparison would need the same amount of effort for each port as the one required for the port of Helsingborg and, given the constraints set out above, would be very unlikely to allow the Commission to draw any conclusions of relevance to the determination of whether there has been abusive conduct.

Sundbusserne's comments

142. Sundbusserne claims that, as its “use of the port of Elsinore is almost identical to the use of the Port of Helsingborg, [...], the price for the use of the port of Elsinore provides a unique possibility for a comparison.”⁶⁹

Assessment by the Commission of Sundbusserne's comments

⁶⁹ Reply to the Article 6 letter, 2nd paragraph of page 10.

143. It may be possible in the abstract, to make a comparison between different figures representing prices of products or services. The problem is to assure that the comparison is valid and that the result of the comparison is meaningful. It must be ensured that the figures which are compared are really comparable. The conditions under which such a comparison is made are therefore of the utmost importance.
144. If it were possible to find a substitutable product or service provided by competitors on the same relevant market, the price of such a product/service on this market could serve as a reference for the price of the product/service in question (to be compared with the contested price). However, such a reference cannot be found in this case, since HHAB holds a monopoly position on the relevant market.
145. According to case law and the decisional practice of the Commission, the contested price may however be compared to (i) other prices charged by the dominant company on a market different from the relevant market or (ii) prices charged by other firms providing similar products/services on other relevant markets.
146. In the former alternative above, two profitable prices that the company in a dominant position charges for the same product/service, respectively on the relevant market and on another market, may be compared. This would notably address the situation of an undertaking charging, for the same product/service, higher prices on a market where it holds a dominant position than on other markets where it faces competition. This approach was followed by the Commission in *General Motors*⁷⁰ and *British Leyland*⁷¹ and implicitly endorsed by the Court in *United Brands*. Such a comparison is made in section II.B.2.2.b) below where the prices charged by HHAB to the ferry-operators on the relevant market (where HHAB holds a monopoly position) is compared to the prices it charges to cargo vessels, on a competitive market.
147. The approach in the latter alternative was upheld by the Court in *Bodson v Pompes funèbres des régions libérées*⁷². In this case, the Court referred to the possibility, in order to determine whether the prices charged by concession holders are excessive, to make a comparison between those prices (offered on a market which is not competitive) and “prices charged elsewhere” (on a market which is not covered by the public concession and which is therefore open to competition).
148. Reference can also be made to the judgement of the court in *François Lucazeau and others v SACEM and others*⁷³. SACEM is a national copyright-management society dealing with musical works which also manages the repertoires of national societies of other Member States. The markets concerned were not clearly defined, but the Court seems to have considered that each Member State constituted a separate relevant market. The Court explained that: “When an undertaking holding a dominant

⁷⁰ Commission Decision of 19 December 1974 O.J. [1975] L 29/14

⁷¹ Commission Decision of 2 July 1984 O.J. [1984] L 207/11

⁷² Case 30/87 *Bodson v Pompes funèbres libérées*, Judgement of 4 May 1998 [1988] ECR 2479, see paragraph 31

⁷³ Joint cases 110/88, 241/88 and 242/88, Judgement of 13 July 1989 [1989] ECR 2811, see paragraph 25

position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States”.

149. It can be deduced from the latter case above that a comparison of the prices must be made on a consistent basis. This notably implies that:

- the products/services provided must be comparable; and
- the charging systems must allow a meaningful comparison.

b) Comparison between the port fees charged by HHAB to the ferry-operators and to the cargo vessels

150. As explained in section II.B.2.2.a) above, a comparison may be made between two prices charged by a dominant company for the same product/service, respectively on the relevant market (where it holds a dominant position) and on another market. The prices charged by HHAB to the ferry-operators could therefore be compared to the prices charged by HHAB to the cargo vessels in the port of Helsingborg. It must be recalled that as regards the market for the provision of port facilities and services to cargo vessels, there are genuine alternatives to the port of Helsingborg which supports the assumption that this market is competitive⁷⁴.

151. The Commission conducted such a comparison which is a good illustration of the difficulties met in comparing port charges applied to different customers. In particular, the fact that several cargo vessels have individual agreements whereby they pay a lump sum in port charges without distinction between the types of fees complicates to a certain degree this comparison.

152. The Commission has compared the services provided by HHAB to the cargo vessels and to the ferry-operators and has found that:

- The provision of sea-side facilities to the two categories of users (i.e. both ferries and cargo vessels) calling at the port is to a large extent the same.
- However, the land-side facilities provided by HHAB to ferry operators differ considerably from those used by cargo vessels. Even though stevedoring (which corresponds to actual loading/unloading of cargo, including manpower) and warehousing services provided by HHAB are charged separately by HHAB to the cargo operators, the provision and the maintenance of land-side facilities (see section I.C.1 above) differ considerably between the ferries and the cargo vessels. While cargo vessels use cranes and other equipment for loading/unloading cargo, the ferries use ramps and gangways for embarking/disembarking vehicles and passengers. Further, it should be recalled that a distinction has to be made between different cargo types, e.g. containers and oil, since they require different

⁷⁴ See above section II.A.1. “The relevant market”.

equipment and thus have their own specialized terminals in the port of Helsingborg. The type and the level of investments also differ between the cargo vessels and the ferry operators.

153. The overall services provided by the port to the ferry-operators and the cargo operators are not equivalent. It is therefore not possible to compare the level of the total port charges respectively paid by these two categories of users. The only conceivable comparison would be between the ship fees paid by the two categories of users, since they would correspond to the provision of services and facilities on the sea-side which are broadly equivalent.

154. Based on the tables below, the Commission found that Sundbusserne pays less per call and per unit of gross tonnage than the other vessels. This is due to the fact that the cargo-vessels (and the other ships calling at the port) pay a ship fee to HHAB for each call whilst the ferry-operators are charged a ship fee only once per day and per vessel (Sundbusserne makes about 10 calls per day and per vessel).

[CONFIDENTIAL]

155. When the fact that the ferry-operators pay only once per day per vessel has been taken into account, the average ship fee per unit of gross tonnage⁷⁵ is actually highly advantageous to Sundbusserne.

[CONFIDENTIAL]

156. Even if the services provided by HHAB to the cargo vessels and to the ferry-operators were equivalent and the port fees charged to the ferry-operators higher than to the cargo vessels, this would not enable the Commission to conclude that the former are excessive. The fact that the cargo operations are run at a loss would imply that the price charged to the cargo-operators could not be taken as a reference for the port charges⁷⁶.

157. There is therefore no evidence that the port fees charged by HHAB to the ferry-operators are unfair when compared to the port fees charged by HHAB to the cargo vessels.

c) Comparison with the port of Elsinore

158. In the Article 6 letter, the Commission considered a comparison with the port of Elsinore, given that this port could be the most likely candidate to serve as a point of comparison to the port of Helsingborg for the following reasons:

- The ferry-operations constitute nearly the sole activity of the port of Elsinore.

⁷⁵ Calculated as the ratio “ship fees/(number of calls x tonnage of the vessel)”

⁷⁶ In *United Brands*, the Court considered that the Commission had not sufficiently proven that prices were excessive, as it was not apparent that the prices taken for reference (the prices charged to Irish customers) were profitable (see paragraph 261 of the judgement).

- Since it is active on the HH-route Sundbusserne naturally calls the same number of times per day in Elsinore as in Helsingborg, with the same vessels.
 - The traffic (passengers, vehicles) transported by the ferries which is embarked/disembarked is the same in Elsinore as in Helsingborg.
159. It appears that the port charges (ship fees, plus goods fees) paid by Sundbusserne to HHAB in Helsingborg are on average 2,7 times higher than the charges it pays in Elsinore (see table in attached Appendix 5[WHICH IS CONFIDENTIAL]). Both the ship fees and the goods fees are higher, the difference, however, being larger for goods fees (x 3,4) than for ship fees (x 1,3).
160. In the Article 6 letter the Commission set out that the cost structure of the Helsingborg and Elsinore ports are very different (for instance, the port of Elsinore only employs 11 persons whereas HHAB has 250 employees).⁷⁷ The level of the costs in Elsinore is much lower than in Helsingborg⁷⁸ (according to estimates by the current manager of the port, total costs amount to MDKK 6,1, which corresponds to MSEK 7,5 and which have to be compared to the total operating costs of HHAB related to ferry-operations > 50 MSEK). The infrastructure of the port of Elsinore is much less developed than in Helsingborg, both on the sea-side and on the land side. This results in much lower maintenance costs in Elsinore than in Helsingborg. Elsinore, as a state-owned port, does not depreciate its assets.
161. HHAB explained that the situations in Elsinore and in Helsingborg are not comparable as far as the port charges are concerned. HHAB argued that the investments in the two ports have differed substantially over the years, and that, Elsinore is geographically better protected against the prevailing winds and water streams in the area, as a result of which no breakwaters are necessary to protect the berths, while the port of Helsingborg on the other hand, had to make investments in this respect.⁷⁹
162. The Commission drew the preliminary conclusion that in any event, the fees applied in Elsinore would be too low to be applied as such to the port of Helsingborg as a basis for comparison, because the total revenues derived from the port charges in Elsinore (about 45 MSEK, including Sundbusserne) would not cover the costs borne by HHAB to provide its services to ferry operators (which amount to approximately 50 MSEK, cost of capital excluded).

Sundbusserne's comments

163. Sundbusserne considers that the port of Elsinore is a very relevant port for comparison with the port of Helsingborg as regards the provision of port services to

⁷⁷ Document 732b, File A20, section 1.2., p 2

⁷⁸ Document 732b, File A20, section 3., p 4

⁷⁹ Document 332, File B2, section 1.8., p 21

ferry operators, notably because its “use of the port of Elsinore is almost identical to the use of the Port of Helsingborg [...]”⁸⁰

164. Sundbusserne does not agree that the cost of providing services to the ferries is so significantly different in Elsinore and Helsingborg that a comparison of the two sets of charges is of no value. “According to Sundbusserne, the costs cannot differ that much for the same use of the ports”.⁸¹
165. The fact that the port of Elsinore only employs 11 persons whereas HHAB has 250 employees is not relevant, according to Sundbusserne. HHAB “has of course more people employed but this does not change the basic fact that the parts of the ports that Sundbusserne use is identical. If, for instance, the Bulk Harbour develops further and [HHAB] employs another 50 people, Sundbusserne’s use of the port (and port personal) will not change.”⁸²
166. The Commission’s argument that the infrastructure of the port of Elsinore is much less developed than in Helsingborg, both on the sea-side and on the land side, which results in much lower maintenance costs in Elsinore than in Helsingborg is irrelevant, according to Sundbusserne, because the parts of the ports that Sundbusserne uses are identical.⁸³
167. Sundbusserne claims that HHAB’s argument that “investments in the two parts have differed substantially over the years” is totally irrelevant for Sundbusserne’s use of the ports. Still the parts of the ports that Sundbusserne use are identical.”⁸⁴

Assessment by the Commission of Sundbusserne’s comments

168. As explained above in section II.B.2.2.a), one may compare the contested price to prices of comparable products offered by other companies on a different relevant market. In the case at hand, a comparison may be made between the prices charged at Helsingborg and the prices charged at Elsinore.
169. However, it is questionable whether the services provided in the two ports could be regarded as equivalent. It cannot be considered sufficient to argue, as Sundbusserne does, that its own use of the two ports is identical. It cannot be considered, in particular, that the two ports provide the same basic services, namely the access to berths (and fairways) and access to embarking/disembarking facilities.
170. The port of Helsingborg has a much more developed infrastructure spread around a much larger area than Elsinore. The North Harbour consists of several different Harbours with several quays. The three ferry operators on the HH-route use in total 5

⁸⁰ Reply to the Article 6 letter, 2nd paragraph of page 10.

⁸¹ Reply to the Article 6 letter, 4th paragraph of page 11.

⁸² Reply to the Article 6 letter, p 10-11.

⁸³ Reply to the Article 6 letter, 2nd paragraph of page 11.

⁸⁴ Reply to the Article 6 letter, 3rd paragraph of page 11.

different berths in various parts of the North Harbour: Scandlines uses two berths in Södra Hamnen, Sundbusserne nowadays uses two berths in Inre Hamnen (whereas it uses only one berth in Elsinore) and HH-Ferries one berth in Sundsterminen. The port of Helsingborg has not had any difficulties in accommodating new ferry operators, such as HH-Ferries when it started operating in 1997, or to allocate additional berths for the existing ferry operators, including berths for mooring ferries which are not in use.

171. Even if the port services provided to ferry-operators active on the HH-route at Helsingborg and Elsinore were equivalent, at least the conditions of supply would differ between the two ports. It appears that the cost structure of the Helsingborg and Elsinore ports are very different, as explained in the Article 6 letter. The differences in the production costs are caused by factors which do not appear to relate to a possible so-called X-inefficiency, i.e. a cost-inefficiency arising from the fact that the two companies hold a dominant position on each of the two respective relevant markets.

- The Port of Elsinore, as a State-owned port, does not depreciate its assets, which makes a difference in the cost-structures of the two ports and possibly in the prices.
- In Elsinore, the Danish State owns the land and the installations of the port and the State-owned port does not have therefore to pay any rent to the owner of the land, unlike in Helsingborg (in Helsingborg, the leasehold paid to the City amounts to about MSEK [CONFIDENTIAL] per year). This also makes a difference in the cost-structures of the two ports and possibly in the prices.

172. Most of the costs in Helsingborg (the overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg) are distributed costs ("common costs" as named by Sundbusserne) i.e. indirect costs, a fair share of which must be allocated to each user of the port. Even if a higher number of employees at Helsingborg should not affect the price paid by the ferry-operators, as Sundbusserne rightly noted - provided that these employees are not used in the ferry-operations -, the other "common costs" are higher in Helsingborg than in Elsinore and also therefore, the share of these costs that must be allocated to the ferry-operations.

173. In its comments to the Article 6 letter, HHAB refers to a decision of 18 June 1997 taken by the Danish competition authority following a complaint by Stena Line and Larvik Line. This decision concerned alleged excessive port charges in Frederikshavn (Northern Denmark), and it concluded that the revenues and expenditures for Elsinore were the lowest of all compared ports. A preparatory note relating to this decision of the Danish competition authority of 17 June 1997⁸⁵, mentions that the various ports, essentially state-owned, do not levy port charges considering their own costs and market expectations.

174. In any event, as set out in the Article 6 letter, if the revenues derived from the port charges in Elsinore were to be used in the Commission's approximate cost/price

⁸⁵ Document 349, File B2.

analysis, the port charges would hardly cover the costs borne by HHAB to provide its services to the ferry operators.

175. In this respect, the table below compares the revenues derived from the port charges at Elsinore to HHAB's costs allocated to the ferry-operators by the Commission (see attached Appendix 4.2 *[WHICH IS CONFIDENTIAL]*). The costs do not include the financial costs or the capital costs. In this table, the revenues (through the port charges) of the port of Helsingborg are replaced with the revenues of the port of Elsinore (through the port charges, including Scandlines⁸⁶). This is strictly equivalent to applying to Helsingborg the tariff grid applicable at Elsinore, since the volumes of traffic and the numbers of calls by the ferries active on the HH-route, on which both charging systems are based, are exactly the same in the two ports.

[CONFIDENTIAL]

176. It can be concluded from this table, that the tariff applied in Elsinore is too low to be applied as such in Helsingborg, because it would hardly allow HHAB to cover its costs incurred in the provision of services to the ferry-operators.

177. In conclusion, there is no evidence that the port fees charged by HHAB to the ferry-operators are unfair when compared to the port fees charged to them by the port of Elsinore.

d) Comparison with port fees charged in other ports

178. As explained in the Article 6 letter, there are difficulties in making meaningful comparisons with other ports, as regards the level of the respective fees.

- The list of the services provided on the land-side and on the sea-side within the port charges varies between ports. It cannot be considered that all ports provide and charge for the same basic services, namely the access to berths (and fairways) and access to embarking/disembarking facilities:
 - Some ports have a much more developed infrastructure than others and are therefore able to provide more extensive services. Also the particular geographic and other circumstances in ports vary, which may affect the basic services provided, e.g. some ports require dredging to ensure access to the port.
 - The users do not necessarily use the same services and facilities within the same port and this often varies also from one port to another, e.g. depending if the user is based in the port or just calling the port in question. Users that have their base in a given port often invest in their own equipment and/or installations in this port.
 - In Helsingborg, a large part of the total services and facilities provided by HHAB to the ferry-operators on the land-side is charged for under specific agreements, separate from the port charges. In other ports, the provision of

⁸⁶ Scandlines does not pay port charges to the Port of Elsinore but to Scandlines Denmark A/S but it was assumed that those were revenues of the Port of Elsinore.

these services and facilities (or part of them) is charged within the port charges. The list of the services and facilities provided to each individual customer in each port and charged within the port charges is actually different from one port to the other. These differences render a comparison of the services provided by different ports against the port charges very difficult.

- While the method of charging a ship fee, which depends on the characteristics of the vessel (tonnage or size or length of the vessel) and goods fees (passenger, vehicles or cargo fees), which depend on what and how much is transported onboard is commonly used by most ports, each port applies its own specific charging system and there are discrepancies in the specifications of the charging systems. For instance, the ship fees are usually based on the capacity of the ship, however, the measurement used for calculating it varies between ports (e.g. gross or net tonnage of the vessel or geometric volume).
- Moreover, the repartition between the ship fee and the goods fee is not necessarily the same in different ports. There are ports where the ship fee is higher and the goods fee lower than in others.
- In most cases, main customers, in particular the ones that call frequently at a port, such as ferry operators, have separate individual agreements (like Scandlines and Sundbusserne with HHAB) for the provision of the port services, whereby they pay less than the official price on which such a comparison is based or on a different basis (lump sum or rebates). The official tariff does not therefore represent what these users are actually charged.
- Ports might differ substantially among themselves both in terms of economies of scope and scale, which respectively relate to the number of activities and the scale of production.

179. Against this background, the Commission has nevertheless drawn up a comparison of the official tariffs published by several European ports relating to their port charges vis-à-vis ferry operators. The detailed comparison is set out in Appendices 6.1 to 6.3 *[THE LATTER BEING CONFIDENTIAL]*.

180. The comparison is made between the prices Sundbusserne would pay in the different ports concerned according to their official tariff, without any rebate. The ship fee is calculated per vessel and per call (for a typical Sundbusserne' vessel) and per year. It has, however, to be recalled that Sundbusserne pays at Helsingborg only once per call and per vessel.

181. The tables attached as Appendices 6.2 and 6.3 *[WHICH ARE CONFIDENTIAL]* confirm that there are discrepancies in the different charging systems and in the repartition between the ship fee and the goods fee. All ports charge a ship fee and most ports a passenger fee and vehicle fees for cars and busses, whereas the practice differs in respect of cargo transported on lorries. In respect of the latter, some ports only charge a vehicle fee per lorry (irrespective of the cargo carried), some charge only for the cargo carried and some for both the lorry and the cargo carried.

182. On the basis of this comparison, there is no evidence that the prices charged by HHAB to the ferry-operators at Helsingborg would stand out, in particular as

compared to tariffs applied in other Swedish ports, but also in comparison with other ports, such as Calais and Dover, which are of similar size in terms of numbers of passengers and cars transported as Helsingborg.

Conclusion

183. There is therefore insufficient evidence to conclude that the port fees charged by HHAB to the ferry-operators would be unfair when compared to the port fees charged in other ports.

II.B.2.3. Assessment of whether the port charges are unfair in themselves

184. In the Article 6 letter, the Commission drew the preliminary conclusion, that:

- The economic value of the services and facilities provided by HHAB to the ferry-operators would be much higher than the production costs incurred by the port.
- The port charges are not unfair in themselves because there is no sufficient evidence that they would exceed the economic value of the services and facilities provided by the port to the ferry-operators (even if they may exceed the costs actually incurred by HHAB to provide these services and facilities).

185. In assessing the "economic value of the product supplied" the Commission considered in the Article 6 letter that account must be taken not only of the costs actually incurred by the port in providing these services, but also additional costs and other factors which are not reflected in the audited profits and losses of HHAB. The Commission listed three elements which could be taken into consideration, in this case, when assessing the economic value of the services provided by HHAB to the ferry-operators:

- The port of Helsingborg has very high sunk costs, which are not accounted for in the audited financial reports of HHAB or the city of Helsingborg. The Commission argued in the Article 6 letter that if the port would have to rebuild the existing installations used by the ferry-operators from scratch, or if it were envisaged to build a new ferry-port at the same location, the costs incurred by such a port to provide exactly the same level of services and facilities to the ferry operators would be far higher than the costs presently accounted for by HHAB.
- The ferry-operators benefit from the fact that the location of the port of Helsingborg meets their needs perfectly. The Commission argued in the Article 6 letter that this represents an intangible value in itself, which could be taken into account as part of the economic value of the services provided by HHAB, and which is not reflected in the accounts of HHAB.
- The Commission argued that the land used by the port for the ferry-operations is very valuable in itself. Keeping the ferry-operations there instead of using the land for other purposes is likely to represent an opportunity cost for the City of Helsingborg (the unique shareholder of the port).

186. In view of the above, the Commission has drawn the preliminary conclusion that the economic value of the services should be considered to be much higher than the costs accounted for by HHAB to provide port services to the ferry-operators. It is,

however, difficult to determine the precise economic value of the services provided by HHAB, because most of its components are intangible. This is even rendered more difficult due to the following additional factors:

- A large part of the total services and facilities provided by HHAB to the ferry-operators in the port is charged for under specific agreements, separate from the port charges. It appears that the amounts charged by HHAB pursuant to these specific agreements are low when compared to the port charges and to the list of the services covered by the agreements. Thus, high port charges may be off-set by charging below cost under the specific agreements, thus rendering the charging system as a whole fully in line with the economic value of the services provided by the port.
- Most of the costs of HHAB are fixed costs. The variable costs, which vary with the intensity of the services provided to the ferry-operators (for instance with the number of calls made by the ferries, with the number of passengers, vehicles and with the weight of cargo transported onboard the ferries) are very minor. This renders the task of assessing the relationship between the port charges (which are based to a very large extent on the volume of traffic onboard the ferries) and the economic value of the services provided by the port to the ferry-operators more difficult.

187. Sundbusserne made a number of comments in its reply to the Article 6 letter on the above Commission's arguments. The Commission notes that the opportunity cost for the City of Helsingborg and most of the sunk costs (related to assets owned by the City of Helsingborg) should indeed not be considered as costs for HHAB.

188. The Commission has substantially amended its assessment concerning whether the prices are unfair and will focus in this section on whether the port charges are unfair in relation to the economic value of the services provided by HHAB. Sundbusserne's comments made in reply to the Article 6 letter, in so far as relevant to these questions will be addressed in the following.

a) Assessment of the economic value of a product/service

Sundbusserne's comments

189. The complainant recalls that the expression "unfair in itself" is to be found in paragraph 252 of the United Brands Judgement, which Sundbusserne considers as an alternative to the test in paragraph 250-251 of the same judgement.⁸⁷

190. Sundbusserne refers to paragraph 250 in United Brands and argues that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied", is an abuse. According to the complainant, "the excess can be determined by making a comparison between the selling price of the product in question and its costs of production" (paragraph 251 of the United Brands judgement). "Thus, the economic value of the services must be equal to the cost of production including a reasonable profit margin. The reasonableness of the profit

⁸⁷ Reply to the Article 6 letter, 4th paragraph of page 4.

margin can only be determined by a comparison between that profit margin in a monopolistic environment and a calculated possible profit margin in a competitive environment.”⁸⁸

191. According to Sundbusserne⁸⁹, “In assessing the “economic value” it is, with few irrelevant exceptions, not correct to take into account “additional costs and other factors”. Based on the calculation made by the Commission it is evident that charges are excessive in relation to the costs actually incurred by [HHAB] to provide the services. As the excess determined has no reasonable relation to the economic value of the product supplied (cost of production including reasonable profit), the price charged is unfair and as such abusive.”

Assessment by the Commission of Sundbusserne’s comments

192. As explained in section II.B.2.1.d), an analysis of excessive or unfair pricing abuse an analysis of excessive or unfair pricing abuse must focus on the price charged, and its relation to the *economic value* of the product. While a comparison of prices and costs, which reveals the profit margin, of a particular company may serve as a first step in such an analysis, this in itself cannot be conclusive as regards the existence of an abuse.
193. In line with what the Court has stated in paragraph 252 of the United Brands judgement, a distinction must be made between the assessment of the difference between the price and the production costs – the profit margin - and the assessment of whether the price is unfair.
194. At the end of section II.B.2.1.d), the Commission concluded that in any event, even if it were to be assumed that the profit margin of HHAB is high or even "excessive", this would not be sufficient to conclude that the price charged bears no reasonable relation to the economic value of the services provided.
195. The case law of the Court of First Instance and the European Court of Justice as well as the decisional practice of the Commission provide little guidance on how to determine whether a price must be considered unfair in itself.
196. While the ECJ in United Brands stated that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse"⁹⁰, it provided no further details on how to determine this “economic value” of the product/service provided.
197. In its comments on the Article 6 letter, the complainant implicitly acknowledges that the fairness/unfairness of the price should be assessed in relation to the economic value of the product/service provided. However, it considers that the economic value of the product/service should be determined by following a “cost-plus approach”. According to such an approach, the economic value of a product/service should be

⁸⁸ Reply to the Article 6 letter, p 4-5.

⁸⁹ Reply to the Article 6 letter, 4th paragraph of page 9.

⁹⁰ Case 27/76, United Brands v Commission [1978] ECR 207, at paragraph 250.

calculated by adding to the costs incurred in the provision of this product/service a reasonable profit which would be a percentage of the production costs. Any price exceeding the so-determined economic value of the product/service should then be found unfair.

198. According to Sundbusserne, finding that the difference between the price and the production costs exceeds what it considers as a reasonable margin (which would be a determined percentage of the production costs) would necessarily lead to the conclusion that the price is unfair (see section II.B.2.1.d) above).
199. The Commission does not exclude that the question whether a price is unfair may be assessed within a cost-plus framework which encompasses the respective relations between the production costs, the price (or the profit margin) and the economic value of the product/service. However, in such an assessment, the economic value of the product/service cannot simply be determined by adding to the costs incurred in the provision of this product/service a profit margin which would be a pre-determined percentage of the production costs.
200. First, it should be recalled that there are uncertainties, in this case, as regards the precise determination of the incurred costs (the production costs) that the Commission has taken into account. For the reasons explained above in Section II.B.2.1.b), the assessment of the incurred costs by the Commission is based on an *approximate* cost allocation. The Commission has proceeded based on assumptions (notably the key of repartition of the distributed costs), which naturally affect the level of the incurred costs by HHAB in providing services to the ferry-operators.
201. Moreover, due to the fact that HHAB did not provide a realistic cost model for its pricing, the Commission had to refer to the data available in the audited financial reports. This approach adopted by the Commission is rather strict as regards the determination of the production costs. In particular, in the Commission's approximate cost allocation, the depreciation costs are based on the historical values of the assets (for the reasons developed in Section II.B.3.b) of the Article 6 letter, the replacement values provided by HHAB in its cost allocation could not be retained). However, a company that sets its prices on the basis of depreciated historical costs may – depending on how the production costs of the relevant assets have developed over the years – well find itself in a position that its return does not (i.e. no longer) allow it to finance future capital expenditures for the replacement of existing assets.
202. In addition, when setting a price *a priori*, a company does not necessarily only refer to the incurred costs (production costs). For instance, it is legitimate that a company may want to cover the cost of capital. As explained in section 5 of [Appendix 3.1](#), the cost of capital (which corresponds to the profit which would allow the company to remunerate its shareholders at the appropriate level) is not a cost accounted for as such in the audited financial reports and is therefore not counted in the approximate costs allocation made by the Commission for the purposes of this decision (in absence of any reliable information on what the capital market would expect as a remuneration for investments in HHAB). Such a cost can, however, be viewed *a priori* as a charge for a company when setting the price for a product/service.
203. In any event, in the present case, there is no information on what a reasonable profit margin should be. The Commission explained in section II.B.2.1.d) that there would

be insuperable difficulties in establishing valid benchmarks as concerns the profitability of ferry-operations in ports. A comparison with the profitability of other ports, as suggested by Sundbusserne, could in principle only be considered as an indication and not as sufficient evidence in itself in determining whether the port charges are unfair in themselves.

204. Moreover, the “cost-plus approach” suggested by Sundbusserne only takes into account the conditions of supply of the product/service. The determination of the economic value of the product/service must take account of other non-cost related factors, especially as regards the demand-side aspects of the product/service concerned.
205. The demand-side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service.
206. As a consequence, even if it were to be assumed that there is a positive difference between the price and the production costs exceeding what Sundbusserne claims as being a reasonable margin (whatever that may be), the conclusion should not necessarily be drawn that the price is unfair, provided that this price has a reasonable relation to the economic value of the product/service supplied. The assessment of the reasonable relation between the price and the economic value of the product/service must also take into account the relative weight of non-cost related factors.

Conclusion

207. In the present case, the economic value of the product/service cannot simply be determined by adding to the approximate costs incurred in the provision of this product/service as assessed by the Commission, a profit margin which would be a pre-determined percentage of the production costs. The economic value must be determined with regards to the particular circumstances of the case and take into account also non-cost related factors such as the demand for the product/service.
208. As a consequence, finding a positive difference between the price and the production costs exceeding what Sundbusserne claims as being a reasonable margin, would not necessarily lead to the conclusion that the price is unfair, provided that this price has a reasonable relation to the economic value of the product/service supplied.

b) Non-cost related factors that should be taken into account in assessing the economic value of the service provided by HHAB

209. The Commission argued in the Article 6 letter that the ferry-operators benefit from the fact that the location of the port of Helsingborg meets their needs perfectly. The sailing distance between Helsingborg and Elsinore, which is the shortest between Sweden and Denmark, allows them to operate a frequent short distance service, which is more cost-efficient and attractive for passenger and vehicle traffic. In the port itself, their passenger and/or vehicles terminals are directly accessible from downtown Helsingborg. The port has excellent connections with road and rail transport (bus and rail Knutpunkten terminal).

210. The Commission argued in the Article 6 letter that this represents an intangible value in itself, which must be taken into account as part of the assessment of the economic value of the services provided by HHAB, and which is not reflected in the costs actually incurred by HHAB, based on the approximate calculation made by the Commission.

Sundbusserne's comments

211. Sundbusserne explains that it has been operating from the port of Helsingborg since 1958 and that its operations (a sort of bus line across the Sound with small passenger ferries) are “of course based on the location of the port”.⁹¹

212. The complainant acknowledges that the port of Helsingborg has excellent connections with road and rail transport, but claims that it does not benefit from them because people travelling to Knutpunkten (the bus and rail terminal) will however most likely continue their travel with Scandlines (which is able to transport vehicles).⁹²

213. Finally, Sundbusserne argues that “an intangible value represented by the location is not a cost for [HHAB] and cannot be taken as part of the economic value of the services provided.”⁹³

Assessment by the Commission of Sundbusserne's comments

214. The Commission has explained above in section II.B.2.3.a) that the economic value of the product/service should also reflect the demand side features of this product/service (i.e. the valuation by the customers and consumers of the product/service). Sundbusserne seems to acknowledge that the port of Helsingborg represents a value to Sundbusserne and its customers because of its unique location close to Elsinore. The Commission takes the view that this should be taken into account in the assessment of the economic value of the service provided by HHAB and in its price.

215. Even if Sundbusserne may not directly benefit from all the possibilities of road and rail connections offered by the Knutpunkten terminal, the fact that the terminal of Sundbusserne is located at the very centre of the city (and very close to Knutpunkten), is particularly favourable in respect of foot passengers. The location of the port allows both passengers and ferry-operators to cross the Øresund in an expeditious way, which is in itself valuable, creates and sustains demand both on the downstream and the upstream markets. In this case, the demand by customers for the provision of transport services on the downstream market to cross the Øresund between Helsingborg and Elsinore sustains the demand by the ferry-operators for the provision of port services at Helsingborg, which benefits Sundbusserne.

⁹¹ Reply to the Article 6 letter, 3rd paragraph of page 8.

⁹² Reply to the Article 6 letter, 3rd paragraph of page 8.

⁹³ Reply to the Article 6 letter, 2nd paragraph of page 8.

216. The location of the port does not necessarily imply higher production costs for HHAB. However, it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service.
217. The port of Helsingborg holds a dominant position on the relevant market for the provision of port services in the port of Helsingborg to ferry operators operating on the HH-route. The holding of a dominant position does not, however, mean that the company in question necessarily abuses of its dominant position⁹⁴.
218. An abuse must be established, i.e. that a dominant undertaking is engaged in exclusionary and/or exploitative practices. To this end, the burden of proof is on the Commission to demonstrate, based on cogent evidence, the existence of such an abuse. In this respect, the Court stated in *United Brands* that "however unreliable the particulars supplied by [the dominant company]..., the fact remains that it is for the Commission to prove that [the dominant company] charged unfair prices".⁹⁵ In that particular case, the Court found that the basis for the calculation adopted by the Commission was open to criticism, and that any doubt must benefit the alleged infringer.⁹⁶
219. In the case at hand, despite an extensive analysis including an approximate calculation and allocation of HHAB's costs based on the available information, the Commission considers that there is not sufficient evidence to establish that HHAB charges unfair/excessive prices that would constitute an abuse of dominant position within the meaning of Article 82 of the Treaty.

Conclusion

220. In the light of the above, the Commission considers that there is insufficient evidence to conclude that the port charges would have "no reasonable relation to the economic value" of the services and facilities provided to the ferry-operators by HHAB, when all the relevant (economic) factors for the determination of this economic value are taken into account.
221. Hence the prices charged by HHAB under the port charges should not therefore be found unfair in themselves.
222. The Commission therefore concludes that there is no sufficient evidence that the port charges would be unfair/excessive and that there would be an abuse of dominant position by HHAB within the meaning of Article 82 of the EC Treaty. Sundbusserne's complaint in this regard must therefore be rejected.

⁹⁴ Case 322/81 *Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461, paragraph 57.

⁹⁵ Case 27/76, *United Brands v Commission* [1978] ECR 207, at paragraph 264

⁹⁶ *Ibid*, at para 265

II.B.3. Cross-subsidisation

223. In its complaint, Sundbusserne alleges that HHAB, by charging low prices to (cargo) vessels calling at the South Harbour, the West Harbour and the Bulk Harbour at Helsingborg and high prices to ferry-operators calling at the North Harbour, is cross-subsiding the first-mentioned related markets.
224. In section II.C.1.1.c) of the Article 6 letter, the Commission has drawn the preliminary conclusion that the fact that the ferry-operations would seem to generate profits whereas, in general, the other operations of the port generate losses cannot be regarded as being an abuse in itself.
225. This preliminary conclusion was based on the judgement by the Court of First Instance (hereafter “CFI”) in *United Parcel Services Europe*⁹⁷, which upheld a Commission decision rejecting a complaint by UPS. UPS had alleged that Deutsche Post AG abused its dominant position on the reserved postal market where it has been granted exclusive rights, by using profits derived from this market in order to acquire control of undertakings active in neighbouring markets or to subsidise activities in a liberalised market.
226. In paragraph 55 of this judgement, the CFI clarified that the acquisition at issue “could raise problems in the light of the Community competition rules where the funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market”. It stated that “in such a situation, where there are grounds for suspecting an infringement of Article 82 EC, it is necessary to examine the source of the funds used for the acquisition in question in order to determine whether that acquisition stems from an abuse of a dominant position.”
227. In view of the above, the Commission considered in the Article 6 letter, that “even if HHAB would use profits derived from the market for the provision of facilities and services to the ferry-operators active on the HH-route (where it holds a dominant position) to cover the losses generated by its other activities, this would not in itself constitute an abusive conduct on this market. In such a situation, it is necessary to examine the source of the profits in order to examine whether they come from an abuse of dominant position on the relevant market.”
228. As concerns cross-subsidisation *per se*, the Commission recalled in the Article 6 letter⁹⁸ that to date, “cross-subsidisation” has only been considered an abuse in the context of state-supported monopoly rights. In the postal sector, for instance, the Commission considers that the operators to which exclusive rights have been granted should not use the income from the reserved area to cross-subsidise activities in areas

⁹⁷ Case T-175/99, *United Parcel Europe SA (UPS) v Commission*, Judgement of the CFI of 20 March 2002

⁹⁸ Article 6 letter, section II.C.1.1.c), paragraph 158.

open to competition, because such a practice could prevent, restrict or distort competition in the non-reserved area⁹⁹.

229. Outside the context of such monopolies, the extension of a dominant position to another market would normally constitute an infringement only when it weakens or reduces the degree of competition in the subsidised market.

230. In some cases, it may be necessary for the establishment of an abuse to demonstrate that the abuse has the actual or potential effect of eliminating all competition in the adjacent market. In this context one should keep in mind the following reference in the Court of First Instance judgement in *Tetra Pak II*¹⁰⁰: "The Court of Justice has held in particular in [Commercial Solvents] and [Telemarketing] that Article [82] of the Treaty applies where an undertaking holding a dominant position on a particular market reserves to itself, without any objective necessity, an ancillary or dependent activity on a neighbouring but separate market where it is not in a dominant position, with the possibility of eliminating all competition on that market."

231. In this respect, the Commission argued in the Article 6 letter that Sundbusserne had not provided any evidence that the use of profits derived from the ferry-operations to cover the losses generated by the other operations would weaken or reduce competition in the neighbouring market for the provision of port facilities and services to cargo vessels where HHAB is in competition with many other ports in Scandinavia and Europe¹⁰¹.

232. In addition, Sundbusserne had not brought any evidence that the use of profits derived from the ferry-operations to cover the losses generated by the other operations would in itself indicate an abusive pricing strategy on behalf of HHAB to drive competitors (i.e. other cargo ports) out of the market, for instance by setting prices below its variable costs.

Sundbusserne's comments

233. Sundbusserne did not comment on the Commission's assessment set out above, nor bring any new element in support of an alleged cross-subsidisation by HHAB in breach of Article 82 of the EC Treaty.

Conclusion

⁹⁹ See paragraph 3.4. of the Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C 39).

¹⁰⁰ CFI judgement of 6.10.1994 in Case T-83/91 Tetra Pak v Commission [1994] ECR II-755, para. 115 (Tetra Pak II).

¹⁰¹ As regards the market for the provision of port facilities and services to cargo vessels, there are genuine alternatives to the port of Helsingborg (all major cargo ports in and around the Øresund region: Copenhagen, Frederikshavn, Gothenburg, Trelleborg, Halmstad and Malmö), which supports the assumption that HHAB does not hold a dominant position on this market (see market definition, section II.A. above).

234. The Commission confirms therefore its assessment developed in section II.C.1.1.c) of the Article 6 letter, and referred to above in paragraphs 223-232.
235. Even if HHAB would use profits derived from the market for the provision of facilities and services to the ferry-operators active on the HH-route (where it holds a dominant position) to cover the losses generated by its other activities – which seems to be the case according to the amended approximate cost/price analysis attached as Appendix 4.2 -, this would not in itself constitute an abusive conduct on this market.
236. Sundbusserne has not provided any evidence that the use of profits derived from the ferry-operations to cover the losses generated by the other operations would weaken or reduce competition in the neighbouring market for the provision of port facilities and services to cargo vessels. In addition, Sundbusserne had not brought any evidence that this would in itself indicate an abusive pricing strategy on behalf of HHAB to drive competitors (i.e. other cargo ports) out of the market.
237. There is therefore insufficient evidence that HHAB has abused its dominant position under Article 82 of the EC Treaty in cross-subsidising the market for the provision of port facilities and services to cargo vessels with profits derived on the market for the provision of port facilities and services to the ferry-operations. Sundbusserne's complaint in this regard must therefore also be rejected.

II.B.4. Refusal of access to documents and negotiation by HHAB

238. In its complaint, Sundbusserne questions whether HHAB's refusal to grant access to certain documents required by Sundbusserne and its manner of negotiating may in themselves constitute abuses of Article 82 of the EC Treaty.
239. As regards the first point, Sundbusserne refers to the fact that access to the IMR documents were denied by HHAB in the context of the negotiation about the port charges which took place in 1997 (see section I.B.2. above).
240. As regards the second point, Sundbusserne refers to the same context and in particular to the decision by HHAB to refuse to negotiate with Sundbusserne about the port charges as long as Sundbusserne continued to withhold 50% of the passenger fees. Sundbusserne argues that HHAB therefore did not negotiate in good faith.
241. In section II.C.2. of the Article 6 letter, the Commission explained that different types of behaviour on behalf of undertakings in a dominant position may constitute abuses. Sundbusserne has not specified which type of abuse would be involved, but it would seem that the allegations above could in theory be characterised as an exclusionary abuse, e.g. a refusal to deal. A unilateral refusal to grant access to information may, under certain circumstances, be considered an abuse under Article 82, for instance in situations where certain information is kept by an undertaking in a dominant position in order to avoid another undertaking (a competitor) to be able to compete or to enter the relevant market (e.g. *ITT Promedia NV v Commission*¹⁰²).

¹⁰² T-111/96 *ITT Promedia NV v Commission* [1998] ECR II-2937.

242. The Commission has taken the view in the Article 6 letter that this is not the situation in the case at hand, and that the obligation to provide information in this type of cases cannot be extended to comprise business secrets, whose disclosure would harm the essential interests, the operation or the development of the business of the party concerned.
243. The Commission argued that HHAB, like any undertaking, has the right to refuse to grant access to confidential business secrets in order to protect its commercial interests. As concerns Sundbusserne's request for access to the Internal Monthly Reports (IMR), the Administrative Court of Appeal in Göteborg concluded in its ruling in 1998 that HHAB had the right under Swedish law to refuse access to the IMR documents as they were held to contain confidential business secrets (see section I.B.2 above). The information contained in the requested documents concerns pricing, investments and profitability of different areas of activity of HHAB, which need to be protected vis-à-vis the competitors of HHAB. In addition, the Court stated that knowledge of this information would probably improve the negotiation position of HHAB's customers to the detriment of the port and the intended use of this information may harm HHAB in the context of the pending court proceedings¹⁰³.
244. In view of the above, the Commission has drawn the preliminary conclusion that the refusal by HHAB to give to Sundbusserne access to the confidential IMR documents, a refusal which has been subject to scrutiny and confirmed by a competent national Court, cannot be considered an infringement of Article 82 of the EC Treaty.
245. The Commission also recalled in the Article 6 letter that the concept of abuse under Article 82 is objective. Consequently, the question whether HHAB negotiated in good faith in the context of the discussion about the port charges in 1997, which would be the alleged intent of HHAB according to Sundbusserne, should not be relevant in this context.
246. As regards the alleged refusal by HHAB to negotiate with Sundbusserne, the Commission recalled that it was only following Sundbusserne's unilateral decision to withhold 50% of the passenger fees, that HHAB made the negotiations conditional upon Sundbusserne's payment of port charges according to the port's tariff. In this respect, HHAB explained that Sundbusserne should continue to pay according to the tariff as long as the negotiations were ongoing and until an agreement could be reached on the port charges.
247. In the Article 6 letter, the Commission has taken the view that the behaviour of HHAB could not be considered as a unilateral refusal to deal since it did not refuse to provide the necessary port services and facilities that Sundbusserne needed in order to continue its ferry operations. According to HHAB, its threat to take Sundbusserne to court for its unilateral decision to withhold 50% of the passenger fees, which could involve security measures, was not intended to jeopardize Sundbusserne's ferry operations (see section I.C.3.2. above).

¹⁰³ See judgement of 26 June 1998.

248. Nor could it be stated that HHAB refused to negotiate as it merely made the negotiations conditional upon the full payment of the port fees (past and present) under its public tariffs until an agreement (covering rebates) would be reached.
249. The Commission has drawn the preliminary conclusion in the Article 6 letter that the behaviour of HHAB in this context does not amount to an abuse in the meaning of Article 82 of the EC Treaty and that the argument of the complainant as regards refusal of access to documents and manner of negotiation of HHAB should therefore be rejected.

Sundbusserne's comments

250. Sundbusserne did not comment on the Commission's assessment set out above, nor bring any new element supporting that HHAB's refusal to grant access to certain documents required by Sundbusserne or its manner of negotiating would constitute abuses of Article 82 of the EC Treaty.

Conclusion

251. The Commission therefore confirms its assessment developed in section II.C.2 of the Article 6 letter, and referred to above in paragraphs 238-249.
252. The refusal by HHAB to give to Sundbusserne access to the confidential IMR documents, a refusal which has been subject to scrutiny and confirmed by a competent national Court, cannot be considered an infringement of Article 82 of the EC Treaty.
253. The decision by HHAB to refuse to negotiate with Sundbusserne about the port charges as long as Sundbusserne continued to withhold 50% of the passenger fees could not be considered as a unilateral refusal to deal. The behaviour of HHAB in this context does not amount to an abuse in the meaning of Article 82 of the EC Treaty and that the argument of the complainant as regards refusal of access to documents and manner of negotiation of HHAB should therefore be rejected.

III. CONCLUSION

Despite an extensive analysis of the facts available, which involves in particular an approximate cost calculation and efforts to find benchmarks with other ports, the Commission considers that there is insufficient evidence to conclude that the prices charged by HHAB are unfair and thus constitute an abuse within the meaning of Article 82 of the Treaty.

In addition, there is no evidence that HHAB has abused its dominant position under Article 82 of the EC Treaty in cross-subsidising the market for the provision of port facilities and services to cargo vessels with profits derived on the market for the provision of port facilities and services to the ferry-operations.

Finally, Sundbusserne's arguments that HHAB's refusal of access to documents and manner of negotiation constitute an abuse of dominant position by HHAB should be rejected.

Consequently, the Commission considers that there are insufficient grounds for acting on your complaint.

For these reasons, I inform you that the final decision of the Commission is to reject your complaint of 3 July 1997 pursuant to Article 7(2) of Council Regulation No 1/2003 of 16 December 2002¹⁰⁴ and Article 7(2) of Commission Regulation No 773/2004 of 7 April 2004¹⁰⁵.

An action challenging this Decision may be brought before the Court of First Instance of the European Communities in accordance with Article 230 of the EC Treaty. Such actions shall not, pursuant to Article 242 of the EC Treaty, have suspensory effect unless the Court otherwise orders.

The Commission reserves the right to send a non-confidential version of this decision to HHAB and to make available a public version to third-parties. If you consider that parts of this Decision contain business secrets or other confidential information, please, within two weeks after its reception, contact Lenita LINDSTRÖM-ROSSI (tel: +322 295.50.24), Michel LAMALLE (tel: +322 299.69.08) or Antonio Carlos TEIXEIRA (tel: +322 298.65.19) in order to specify which information, in your view, should not be disclosed to HHAB and/or to third-parties and give reasons for your request.

Done at Brussels, 23.07.2004

For the Commission

(signed)

Mario Monti
Member of the Commission

¹⁰⁴ OJ L 1, 4.1.2003, p. 1.

¹⁰⁵ OJ L 123, 27.4.2004, p. 18.

APPENDIX 3.1

Detailed explanations on the amendments brought by the Commission's to its allocation of HHAB's costs

1. In Appendix 3 of the Article 6 letter, the Commission has set out an approximate calculation and allocation of HHAB's costs according to whether they are related to services provided to the ferry-operators active on the HH-route (Scandlines, Sundbusserne and HH-Ferries) or to the other activities of the port, from consistent data made available by the port, mainly from the audited financial reports.
2. This cost-allocation shows the revenues and the approximate costs of HHAB related to the three ferry-operators active on the HH-route (Scandlines, Sundbusserne and HH-Ferries) on one side and the other revenues and approximate costs of HHAB on the other side, for the years 1993 to 2000.
3. The Commission has reviewed its approximate calculation in view of the present decision. The present Appendix provides detailed explanations about the amendments brought by the Commission in its calculations. The revised approximate cost/price analysis is set out in Appendix 4.2.
4. For the purposes of the present decision, as compared to the approximate cost allocation set out in the Article 6 letter, the Commission will now base itself on the following assumptions:
 - the allocation of costs to ferry-operations should not include the train ferry operations of Danlink nor the services provided to DFDS;
 - the port charges should be taken before the reduction applied on the port fees charged to HH-Ferries;
 - the use of a key of repartition of the distributed costs (the overhead costs, the maintenance costs of the leased assets and the leasehold paid to the City of Helsingborg) which varies with the level of the disputed port charges will not be used;
 - the leasehold paid by HHAB to the City of Helsingborg for the land assets should be allocated to the ferry-operations in proportion to the surface they occupy on the land-side in the port.

1. The reduction of port charges invoiced to HH-Ferries

5. HHAB offered in April 1998 to Scandlines, Sundbusserne and HH-Ferries to reduce the port charges over the period 1997-2000¹. Scandlines and Sundbusserne did not accept this offer, whereas HH-Ferries did.

¹ Document 636, File A16, letter from HHAB to the Commission dated 22 April 1998

6. The offer only concerned vehicle and passenger fees. Proposed reductions, based on *[CONFIDENTIAL]* published tariffs, were *[CONFIDENTIAL]*. The agreement between HHAB and HH-Ferries terminated at the end of the year 2000.
7. The Commission has amended the approximate cost calculation and, for the purposes of this decision, the port charges are now taken before the reduction applied on the port fees charged to HH-Ferries, for the following reason. The three ferry-operators are subject to the same charging system, apart from the reduction on vehicle and passenger fees granted to HH-Ferries. This reduction should not affect the conclusion whether the port charges charged to the ferry-operators active on the HH-route are excessive or not. The assessment should then be made as if HH-ferries were charged the full price. The Commission considers that, for the purpose of its approximate cost allocation, the reduction applied to HH-Ferries should then be added to the revenues of the port (to the revenues of the ferries and to the total revenues) since 1997 and onwards.

2. Relation between the port charges and the costs

8. In paragraph 153 of the Article 6 letter, the Commission explained that as regards the ferry-operations, the revenues considered in the approximate cost allocation correspond to the aggregated port charges invoiced by HHAB to Scandlines, Sundbusserne and HH-Ferries. The costs correspond to all approximate costs incurred by HHAB which can be reasonably attributed to services provided to the ferry-operators active on the Helsingborg-Elsinore route.
9. The Commission recalled that the provision by HHAB of a number of services and facilities to the ferry-operators in the port are in principle covered by specific agreements and stated that the amounts of these agreements (about *[CONFIDENTIAL]* MSEK per year in total for the three ferry-operators) should be deducted from the costs to be covered by the port charges on the ferry-operations' side and from the revenues on the side of the other operations; they would therefore increase the imbalance between the ferry-operations and the other operations.

[CONFIDENTIAL]

10. The complaint relates only to the port charges, not to the amounts charged by HHAB pursuant to specific agreements for the provision of specific services and facilities on the land-side or to the charging system as a whole (including the specific agreements). The Commission therefore considers that the right approach would ideally consist in relating the contested port charges to HHAB's costs incurred in providing the services covered by these port charges.
11. However, due to a lack of precise data and to the intricacy (the importance of which varies from one operator to the other) existing between the services provided within the port charges and within specific agreements, it would be insuperably difficult and hazardous to try to segregate out of the approximate total costs (all costs incurred by HHAB which have been attributed to all services provided to the ferry-operators active on the Helsingborg-Elsinore route), the costs incurred attributable to services covered by the port charges.

12. If it were assumed that the amounts charged pursuant to specific agreements (about [CONFIDENTIAL] MSEK² per year in total for the three ferry-operators) cover the costs of the corresponding services, these amounts could be deducted from the costs to be covered by the port charges on the ferry-operations' side and from the revenues on the side of the other operations, as the Commission suggested in paragraph 153 the Article 6 letter. But there is no sufficient evidence that such an assumption can be made, notably because these amounts appear to be low when compared to the port charges and to the list of the services covered by the agreements. The Commission did not therefore deduct the amounts charged under specific agreements from the costs to be covered by the port charges.
13. While maintaining that a first step in the assessment would consist in a comparison between the contested port charges and the costs incurred by HHAB in providing the services covered by these port charges, it can be accepted, for consistency reasons, that the amounts charged by HHAB to the ferry-operators pursuant to specific agreements are taken into account in the approximate cost/price analysis (these amounts are deducted from the revenues on the side of the other operations).
14. The amended approximate cost/price analysis would therefore take into account, as regards the ferry-operations:
- on the one hand, HHAB's total revenues derived from the ferry-operations (the aggregated port charges invoiced by HHAB to Scandlines, Sundbusserne and HH-Ferries, plus the amounts charged to them pursuant to the specific agreements),
 - and on the other hand, all costs incurred by HHAB which can be reasonably attributed to services provided to the ferry-operators active on the Helsingborg-Elsinore route.
15. The costs to be covered by the port charges are necessarily lower than the total costs. If the port charges were to be found excessive in relation to the total costs, they would a fortiori be excessive in relation to the costs of the services charged within the port charges.

3. Allocation of the overhead costs, the maintenance costs of the leased assets and the leasehold paid to the City of Helsingborg to the ferry-operations

16. For the purpose of its approximate cost allocation (see Appendix 3 to the Article 6 letter), the Commission has considered that the overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg could be reasonably allocated to the ferry operations proportionally to the revenues (port charges) they generate out of HHAB's total income (between 30 and 40% each year).
17. The Commission considered in paragraph 152 of the Article 6 letter that such an allocation based on revenue may underestimate the costs allocated to the ferry-operations, as compared to the proportion of all activities they represent in the port.

² [CONFIDENTIAL]

If another key were to be used, for instance the number of the calls of the different vessels at the port of Helsingborg, in order to better reflect the importance of the ferry-operations in the port (90%), the distributed costs allocated to the ferry-operations would be much higher than to the other operations, which would affect the resulting relative profits and losses of the ferry-operations and the other operations, without changing the final result at the overall company level. Nevertheless, the Commission has opted for the purposes of the present decision in the Article 6 letter to base the allocation on revenue, as this in any event is more favourable to the complainants.

18. The Commission has tried to obtain from HHAB a precise allocation of its costs to the ferry-operations.
19. It appears that only a small part of the costs incurred by HHAB are directly attributable to the ferry-operations. The ferry-operators share the use of the port with other vessels. Some quays are devoted to the ferry-operations. But others (for instance, quays n° 308-312 and 401-407) have over the years been used partly by the ferries and partly by other vessels. This means that all the costs incurred by HHAB on the sea-side (including the costs of maintenance of the assets, dredging, traffic control...) cannot be directly allocated to the ferry-operations and must be distributed between the different users of the port.
20. In the Article 6 letter³, the Commission has explained that, due to historical reasons, the IMR⁴ (“Internal Monthly reports”) does not allocate the costs borne by HHAB to the different areas of activities in a way that would allow the identification of the costs related to providing services for ferry-operators from those related to the other users of the port. It is not possible, for instance, to identify the costs related to Scandlines and Sundbusserne, on the one hand, and the costs related to Danlink and the other activities in the same area on the other hand. Neither is it possible to identify and allocate the costs related to HH-Ferries in the Sundterminal area.
21. The overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg, which are not allocated by HHAB between the different categories of users of the port before being registered in the financial accounts of HHAB, had therefore to be treated by the Commission as distributed costs.
22. As concerns the leasehold paid by HHAB to the City of Helsingborg for the land assets, the Commission will assume for the purposes of the present decision, as argued by Scandlines, that it could reasonably be allocated to the ferry-operations in proportion of the surface they occupy on the land-side in the port.

³ Article 6 letter, section II.B.4.

⁴ The IMR is structured in several parts, corresponding to different areas/activities of the port. For each area/activity, the IMR specifies the revenues (in particular the port charges), the direct costs, some indirect costs (the rent paid to the City of Helsingborg, the overhead costs, the depreciation costs) and the results. The financing costs are included at the aggregate company level and are not allocated to each area/activity.

23. In its comments on the Article 6 letter⁵, HHAB explains that, out of 174.000 m2 in the North and Ocean harbours, 3000 m2 are used by DFDS and 65.000 m2 correspond to the Ocean Harbour. Then, 106.000 m2 are used by the ferry operations which correspond to 60,9% of the surface of the North and Ocean Harbour.
24. The shares of the leasehold paid by HHAB to the City of Helsingborg which should be allocated to the ferry-operators for the years 1994-2000 are therefore the following:

	Leasehold paid to the City			% Ferry-operations
	North & Ocean Harbour	Ferry-operations (60,9%)	Total Port	
1994	10,0	6,1	27,0	22,6%
1995	20,0	12,2	37,0	32,9%
1996	20,4	12,4	37,4	33,2%
1997	20,4	12,4	37,4	33,2%
1998	21,1	12,9	37,6	34,2%
1999	21,1	12,9	37,6	34,2%
2000	21,1	12,9	37,6	34,2%

MSEK

25. As concerns the other distributed costs, the Commission has used in the Article 6 letter a key of repartition of those costs between the different users, based on the revenues they generate out of HHAB's total income (between 28,9% and 38,6% between 1993 and 2000 - 33,7% on average - for the ferry-operations).
26. The Commission maintains that, for the purposes of the present decision, the order of magnitude of such a key (about 1/3 for ferry-operations) can be used for an approximate cost allocation, based on the following reasons:
- Such a figure reflects to a certain degree the relative importance of the ferry-operations, as compared to the other activities in the port. HHAB's revenues consist of port charges (about **50%** of the total revenues; Scandlines alone accounts for about [CONFIDENTIAL] % of HHAB's total revenues, HH-Ferries about [CONFIDENTIAL] % and Sundbusserne a little more than [CONFIDENTIAL] %), revenues derived from stevedoring (32%), storage services (8%), tug services (2,5%) and rents paid by third parties for leaseholds in the port area (6%). Without any other available precise indication on how the distributed costs could be allocated for present purposes between these different activities, referring to the relative importance of these activities in terms of revenues for HHAB provides an objective and reasonable key for an approximate distribution of those costs. However, this only provides an order of magnitude and does not mean that these costs should vary with the level of the port charges in question.
 - Other keys of repartition could have been envisaged which would be more accurate for one specific category of costs, as mentioned above the surface

⁵ Doc 582b, File B15, section 2.3.

occupied by the different users is accurate for the allocation of the leasehold paid by HHAB to the City of Helsingborg for the land.

A key based on the number of calls (i.e. the number of access) of the different vessels in the port of Helsingborg would reflect the relative importance of the ferry-operations in the port on the sea-side. Such a key would be accurate for instance, for the costs related to traffic control in the port or for the maintenance of assets on the sea-side. If this key were to be used, 90%⁶ of the distributed costs should be allocated to the ferry-operations. The Commission decided not to use this key for the allocation of the distributed costs, because it would not be accurate for costs incurred by HHAB on the land-side. It would be disproportionate, due to the importance of the cargo operations in the port on the land-side (stevedoring, storage services for instance).

27. Without any available detailed composition of the distributed costs nor any precise indication on how the distributed costs should be allocated between the different activities in the port, the Commission considers that, for the purpose of the present decision and as a basis for its approximate cost-allocation, about 1/3 of the distributed costs (as a fixed key, not varying with the level of the revenues of the port) can be allocated to the ferry-operations.

4. Assets used by the ferry-operations. Depreciation costs

28. In Appendix 3 to the Article 6 letter, the Commission attached the list of the assets owned by HHAB considered to be used by the ferry-operations. This list specifies, for each asset, its description, its original acquisition value, its acquisition date, its depreciation period, the coefficient of its use by the ferry-operations, and its depreciation value for each year from 1994 to 2001.
29. Some items have been included in this table which do not appear to relate to ferry operators: building no 900780 Coast Guard (MSEK 7,1) and building no 900790 Towage building (MSEK 3,05 + 0,7), which are located in the City harbour outside the ferry port); items related to asset n°900100 (berth 403B) which is located in the Ocean Harbour (the ferry-operations do not seem to use any part of the Ocean Harbour). These assets have therefore been removed and do not appear in the amended list attached as Appendix 3.2.
30. The coefficients of use of some assets by the ferry-operations are amended:
- The Sound terminal is considered to be 9% used for the ferry-operations. Out of the gross area of premises at the Sound terminal (about 1.326 m²), the traffic control occupies 130m². In 2001, some 50.000 vessels called at the port of Helsingborg, out of which the ferries accounted for 45.000 calls, i.e. 90%. Then 90% of (130/1326) of the Sound Terminal should be allocated to the ferry-operations.
 - Building 203 (Old custom house) is considered to be 30% used by Sundbusserne;

⁶ Most of the traffic in the port of Helsingborg is ferry-traffic on the Helsingborg-Elsinore route (HH route). In 2001, some 50.000 vessels called at the port of Helsingborg, out of which the ferries accounted for 45.000 calls, i.e. 90%.

- The other assets which are not exclusively used for the ferry-operators (for instance, the Port's Office) are considered to be 33% used by the ferry-operations (the same key of repartition as the one used for the allocation of the distributed costs between the ferry-operators and the other users of the port in section 3 above).

5. Cost of Capital

31. HHAB explained⁷ that its pricing policy as regards the port charges should take into account, amongst other costs, the cost of capital. HHAB did not give a precise definition of the cost of capital but referred to the "cost of capital invested (interest)".
32. In the Article 6 letter⁸, the Commission explained that the cost of capital should include, on one hand, the financial costs that remunerate the creditors (i.e. the banks in general) and, on the other hand, the dividends served to the shareholders (i.e. the "equity" holders) whenever the company is profitable. The latter component can vary each year depending on the operational performances of the company and consequently reflects the risk associated with equity investments as opposed to providing financing through debts.
33. It should be recalled that the term and the concept of "cost of capital" were introduced by HHAB in a context where it wanted to justify the level of its price. In such a context, the price should allow the company to cover the cost of capital that is intended, on one hand, to remunerate the bond holders (i.e. the banks in general) and, on the other hand, to serve dividends to the shareholders (i.e. the "equity" holders). Hence the two components of the cost of capital:
 - The former corresponds to the financial costs which notably include the interest charges paid on the net outstanding debts. These costs are costs accounted for, which appear as such in the audited annual financial reports. In the case at hand, they consist essentially in the interest charged for the long term loan granted by the City of Helsingborg⁹. As a consequence, this component of the cost of capital should be represented by the net financial costs of this loan which equals the financial result (the other financial income and costs being insignificant).
 - The latter corresponds to the profit which would allow the company to remunerate its shareholders at an appropriate level. It is closely related to the term "cost of capital" referred to in the language of finance and economics (expected remuneration of the equity capital). It is not a cost accounted for as such in the audited annual financial reports. It can however be viewed *a priori* as a charge for the company, when it wants to fix its price, because if the equity holders are not served the expected remuneration, they may decide to invest elsewhere. In reality

⁷ Document 332, File B2, section 6.2., p 9

⁸ Article 6 letter, section II.B.3.c) paragraph 134-137

⁹ It must be recalled that in 1993, the City of Helsingborg transferred part of its assets to HHAB at a market value of 427,57 MSEK. 130 MSEK were registered as a contribution in kind for an issue of new shares of HHAB and the rest (297,57 MSEK) was registered as a loan from the City [Document 398, File B4, section 3, p. 8.]

and *a posteriori*, the remuneration of the equity capital will vary according to the net income after tax generated by the company and available for distribution to the shareholders under the form of dividends (once the legal and free reserves and the undistributed profits are deducted).

In the case at hand, in absence of any reliable indication on what the capital market would expect as a remuneration for investments in HHAB, the Commission has considered in the Article 6 letter that the Income After Taxes generated by the company¹⁰ would represent an approximate value of this component of the capital cost. It was assessed as if the whole Income After Taxes were distributed to the equity holders. As a consequence if this component of the cost of capital were to be treated as one of the costs actually incurred by HHAB, the company would never show a profit (or loss).

34. In the Article 6 letter, the Commission has made an estimation of the cost of the capital provided to the company through loans and equity, mainly in order to compare it to the value provided by HHAB in its cost allocation¹¹. As this cost allocation is not used further in the determination whether the port charges are unfair and as it is not a cost accounted for per se in the audited annual financial reports, the “cost of capital” will not appear any longer in the amended approximate cost allocation made by the Commission. Only the financial result, the net income and the ROE (Return on Equity) will be specified.
35. For the purposes of the present decision, in the amended approximate cost allocation, the Return On Equity ratio is calculated as the ratio:

$$\text{ROE} = \text{Net Income (After Taxes)} / \text{Equity}.$$

	1994	1995	1996	1997	1998	1999
Equity	193,370	229,778	261,267	296,813	299,068	325,841

MSEK

¹⁰ The Income After Taxes has been calculated by applying to the Income Before Taxes a corporate tax ratio of 28% which is the nominal value for the corporation tax in Sweden.

¹¹ In this respect, it appears that, when calculated on the basis of the financial result and the profits after tax achieved by the company (instead of half the replacement value of the assets of the port), the cost/remuneration of the capital would amount on average to 48,3 MSEK per year between 1994 and 2000, for the whole company, instead of 177 MSEK as argued by HHAB (i.e. 10% of half of the replacement value of the port’s assets).

APPENDIX 4.1

Approximate allocation of HHAB's costs [CONFIDENTIAL]

APPENDIX 6.1

COMPARISON OF OFFICIAL TARIFFS IN FERRY PORTS

1. A comparison is made between the price that Sundbusserne pays in the port of Helsingborg and the price it would pay according to the official tariffs in 1997 and 2000 in the following major ferry ports in the Øresund area, the Baltic Sea and the North Sea (English Channel): Helsingborg (S), Stockholm (S), Göteborg (S), Malmö (S), Copenhagen (DK), Frederikshavn (DK), Turku (FI), Rostock (D), Dover (UK) and Calais (F).
2. The table below gives an indication of the size of the ports in terms of the volume of ferry traffic they handle, and the share of ferry activities of the total turnover in 2003:

[CONFIDENTIAL]

3. The comparison consists in comparing the ship fees and the goods fees invoiced by HHAB to Sundbusserne in the port of Helsingborg to what it would pay according to the official tariff in other ports.
4. The comparison only concerns the official tariffs in these ports, i.e. the tariffs which are normally published on a yearly basis, applicable to passenger vessels (ro-ro and other passenger ferries – hereinafter “ferries”) providing regular international services (i.e. excluding passenger vessels on domestic routes, cruise vessels and high-speed passenger crafts in as far as separate tariffs apply to these).
5. Most of the ship-owners that call a certain port regularly, such as ferry operators, have individual agreements with the port in question (like Scandlines and Sundbusserne with HHAB) whereby they pay less than the price indicated in the official tariff on which the comparison is based (rebates based on the number of passengers, vehicles and cargo transported by the ferries and/or number of calls) or on a different basis (for instance, on a lump sum). The official tariff does not therefore represent what Sundbusserne would actually be charged in these ports for the same number of calls and traffic as in Helsingborg. It should, however, be noted that the official tariffs in the ports of *[CONFIDENTIAL]* specify the applicable reductions, and therefore these reductions have been taken into account in the comparative table, where possible¹.
6. In the absence of specific rules at international or Community level on the charging in ports, the level and method of charging is generally decided by the ports themselves (unless regulated at national or local level – this is, however, unusual). As a result, there are considerable differences between the charging systems in ports.
7. Despite these discrepancies, the official tariffs commonly comprise a ship fee per port, which depends on the characteristics of the vessel and fees which depend on what and

¹ *[CONFIDENTIAL]*

how much is transported onboard, i.e. a passenger fee, vehicle fee and a cargo fee for the cargo transported onboard the lorries.

8. The ship fees/port dues are commonly based on the capacity of the ship and calculated on the Gross Tonnage (“GT”) of the vessel. The ports can, however, charge these fees on another basis, e.g. the net tonnage of the vessel (the port of [CONFIDENTIAL]), or the geometric volume of the vessel, per cubic metre (the port of [CONFIDENTIAL]). The ship fee is normally charged per call, in other words each time the vessel calls the port (including entry and departure)². However, the [CONFIDENTIAL] ports covered in this comparison charge the ferries per month and per vessel rather than per call.
9. The ferries also commonly pay a passenger fee per arriving/disembarking and departing/embarking passenger and a vehicle fee per vehicle unit (in this comparison we have only considered cars, busses and lorries), the amount of which varies depending on the type of vehicle³.
10. As regards the cargo transported onboard the lorries, the practice differs between the ports. Most ports in the comparison charge both a vehicle fee and a cargo fee for the cargo carried by the lorry (depending on the load). Some other ports only charge either a vehicle fee per lorry, irrespective of the load actually carried (e.g. [CONFIDENTIAL]) or a cargo fee based on the weight (e.g. [CONFIDENTIAL]⁴).
11. Tables attached as Appendices 6.2. and 6.3. below [WHICH ARE CONFIDENTIAL] provide a comparison of port tariffs between Helsingborg and the other ports for 1997 and 2000 respectively.
12. Each table contains two main parts: (i) the specifications of the charging systems of the ports in local currency and (ii) the specifications of the charging systems of the ports in Euros (to allow a comparison). The change rate is specified between the two parts of the table, for each year and each port (country)⁵.
13. An additional sub-table at the bottom specifies the parameters used in the calculations (yearly number of calls, gross tonnage, net tonnage and specifications for calculation of the volume of a typical Scandlines/Sundbusserne’s vessel).
14. As concerns Helsingborg, the ship fees and the goods fees correspond to the disputed port charges invoiced to Scandlines and Sundbusserne since [CONFIDENTIAL] (which differ from the official tariffs for [CONFIDENTIAL]). For the other ports, they reflect the official tariff without application of rebates.

² [CONFIDENTIAL]

³ [CONFIDENTIAL]

⁴ [CONFIDENTIAL]

⁵ Source : Eurostat’s official local currency/€conversion rates.

15. As regards the ship fee, the first line specifies the specification for calculation of the fee and the second line the minimum fee, when applicable. The ship fee is then calculated for a typical Sundbusserne' vessel, per call and per year:
- For [CONFIDENTIAL], the ship fee is only calculated per year, since the ship fee is specified per month and per vessel (the fact that Scandlines/Sundbusserne uses 4 vessels (3 in 2000) on the Helsingborg-Elsinore route was taken into account).
 - For Helsingborg, the fact that the ferry-operators pay a ship fee only once per day and per vessel is taken into account, which means that the amount specified per year for the ship fees corresponds to what Scandlines and Sundbusserne actually paid for these fees in [CONFIDENTIAL].
 - For the other ports, the ship fee per year is calculated by multiplying the ship fee per call by the annual number of calls. This calculation does not take into account any rebate on the number of calls which could be granted by the port under specific agreements.
16. The goods fees are specified per unit of passenger, car, bus, lorry and tonne of cargo (even if Sundbusserne transporting only passengers would only be charged a passenger fee).
17. These tables show that there are considerable differences, notably as regards the levels of the ship fees charged per call and per year. There is however no evidence that the ship fee per call charged in Helsingborg would stand out as compared to the other ports.
18. The comparison between the ship fees charged per year should be taken with caution since rebates could likely be negotiated with the ports and applied (due to the high number of calls made by the ferry-operators), as is the case in the port of Helsingborg where the ship fee is only charged once per day and per vessel (which is equivalent to charging Sundbusserne about 1 call out of 20).
19. Despite these reservations, there is no evidence that the prices charged by the port of Helsingborg to Sundbusserne (i.e. ship fee or goods fee) would be substantially higher as compared with the official tariffs in other ports.

I. THE FACTS.....	2
I.A. THE PARTIES	2
I.A.1. The port of Helsingborg.....	2
I.A.2 The parties.....	4
I.A.2.1. Helsingborgs Hamn AB	4
I.A.2.2. Sundbusserne	5
I.B. THE COMPLAINT	5
I.B.1. Complaint lodged by Sundbusserne to the Commission	5
I.B.2. National proceedings at the Administrative Court of Appeal in Göteborg and the Swedish competition authority.....	6
I.C. SERVICES AND CHARGES BY HHAB	7
I.C.1. Services and facilities provided by HHAB	7
I.C.2. Services and facilities provided and charged by HHAB within the port fees	9
I.C.2.1. Facilities and services provided and charged by HHAB to ferry operators on the HH-route through the port fees.....	9
I.C.2.2. Facilities and services provided and charged by HHAB to cargo vessels within the port fees	10
I.C.3. Port fees charged by HHAB	10
I.C.3.1. Basic structure of tariffs.....	10
I.C.3.2. Port fees actually charged by HHAB to the ferry operators active on the HH-route	12
I.C.3.3. Port fees actually charged by HHAB to cargo vessels	13
II. LEGAL ASSESSMENT.....	14
II.A. MARKET DEFINITION AND DOMINANCE.....	14
II.A.1. The relevant market.....	14
II.A.2. HHAB holds a dominant position on the relevant market	16
II.A.3. Substantial part of the common market	16
II.A.4. Conclusion	16
II.B. ABUSE OF DOMINANT POSITION UNDER ARTICLE 82 OF THE EC TREATY	16
II.B.1. HHAB's pricing policy as regards the port charges	17
II.B.2. Unfair/excessive pricing	19
II.B.2.1. Comparison between the costs actually incurred and the price charged.....	20

a) Allocation by HHAB of its costs to ferry-operations.....	20
b) The Commission's allocation of HHAB's costs to ferry-operations	22
c) The ferry-operations would seem to generate profits which cover losses generated by other operations in the port.	23
d) Assessment of the difference between the costs actually incurred and the price actually charged	25
II.B.2.2. Assessment of whether the port charges are unfair when compared to prices charged to other users and prices charged by other ports with ferry traffic	30
a) Condition for a valid comparison between prices charged by other ports	30
b) Comparison between the port fees charged by HHAB to the ferry-operators and to the cargo vessels.....	32
c) Comparison with the port of Elsinore.....	33
d) Comparison with port fees charged in other ports	37
II.B.2.3. Assessment of whether the port charges are unfair in themselves	39
a) Assessment of the economic value of a product/service	40
b) Non-cost related factors that should be taken into account in assessing the economic value of the service provided by HHAB	43
II.B.3. Cross-subsidisation	46
II.B.4. Refusal of access to documents and negotiation by HHAB	48
III. CONCLUSION	50