

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 21 December 1993

relating to a proceeding pursuant to Article 86 of the EC Treaty
(IV/34.689 — Sea Containers v. Stena Sealink — Interim measures)

(Only the English text is authentic)

(94/19/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 16 thereof,

Having regard to the application of Sea Containers Ltd dated 15 April 1993, alleging an infringement of Article 86 of the Treaty by Stena Sealink Ports and Stena Sealink Line, and requesting the Commission to adopt interim measures,

Having regard to the Commission Decision of 16 July 1993 to open a proceeding in this case,

Having given Stena Sealink Ports and Stena Sealink Line the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

I. THE FACTS

A. The nature of the present Decision

- (1) This Decision provides for the rejection of an application for interim measures pending a final decision on the application made pursuant to Article 3 of Regulation No 17 by Sea Containers Ltd against Stena Sealink Ports and Stena Sealink Line, alleging an infringement of Article 86 of the EC Treaty.

B. The undertakings

- (2) Sea Containers Ltd ('SC') is a company incorporated in Bermuda. Its principal place of business in the United Kingdom is at Sea Containers House, 20, Upper Ground, London SE1 9PF. The main business activities of the company are the sale and leasing of specialized forms of marine cargo containers and the ownership and operation of ports and harbours. Through its subsidiary, Sea Containers Ferries Limited, the company operates passenger, car and freight ferry services.
- (3) Stena Sealink Line ('SSL') is a company incorporated in the United Kingdom. Its registered office is at Charter House, Park Street, Ashford, Kent TN 24 8EX. The company's principal

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

business is the operation of ferry services between the United Kingdom, Ireland and France.

- (4) Stena Sealink Ports (SSP) is a company incorporated in the United Kingdom. Its registered office is at Charter House, Park Street, Ashford, Kent TN24 8EX, although its main operating address is at Sealink House, Holyhead, Gwynedd LL85 IDQ. SSP is the owner and operator of the port of Holyhead in Anglesey, Wales. Prior to 16 November 1992, SSP was known as Sealink Harbours Limited.
- (5) SSL has a 55 % interest in SSP and the remaining 45 % of the company's shares are owned by Stena Sealink (Holdings) Limited, ('SSLH').
- (6) SSL and SSP are members of the Stena Line AB group of companies ('Stena group'), and have been since 1990.
- (7) SSL and SSP are effectively one economic unit as they have the same secretary and directors and SSL exerts considerable control over the commercial activities of SSP. Their employees do not always distinguish between the two companies, and often confuse them.
- (8) Consequently, they will be referred to throughout as Sealink, unless the need to distinguish between them arises.

C. The complaint

- (9) On 15 April 1993, the Commission received a complaint from SC pursuant to Article 3 of Council Regulation No 17 against SSL and SSP. The grounds of the complaint were that SSP had abused its dominant position as the owner and operator of the port of Holyhead, contrary to Article 86 of the EC Treaty, by failing to allow SC access on a reasonable basis to an essential facility or infrastructure, and had relied on its exclusive rights to protect its commercial interests as a ferry operator, without objective justification. SSL, a member of Sealink (see recital 8 above), was said to have a dominant position in the market for the provisions of passenger and car-ferry services on the 'central corridor' route between Great Britain and Ireland (see recitals 11 to 14 below), and would benefit from any protection it afforded with regard to new operators seeking to enter the market. SC argues that Sealink has not adequately separated its role as port operator from its role as ferry operator.

- (10) The complainant requested the Commission to take, as a matter of urgency, interim measures, *inter alia*, to :

- (a) prohibit Sealink from developing the port of Holyhead in a way which would have the effect of reducing the current capacity of the port ;
- (b) require Sealink to enter into an agreement with SC which would allow SC to operate a fast ferry service, through the central corridor, between Holyhead and Dun Laoghaire commencing in May 1994.

D. The market

- (11) The sea routes for passenger and car ferries currently operated between Great Britain and Ireland are as follows :
 - (a) the 'northern corridor' between the port of Stranraer in Scotland, and Belfast and Larne in Northern Ireland ;
 - (b) the 'central corridor' between the port of Holyhead in Wales, and Dublin and Dun Laoghaire in Ireland ;
 - (c) the 'southern corridor' between the ports of Swansea, Pembroke and Fishguard in Wales, and Cork and Rosslare in Ireland.
- (12) The relevant market in this case is the market for the provision of port services for passenger and vehicle ferries, over the central corridor route.
- (13) The substitutability of the three corridors across the Irish Sea for any traveller depends on the traveller's point of origin and his or her intended destination for the journey in question. The northern and southern corridors, which service routes between Scotland and Northern Ireland and South Wales and Ireland respectively, cannot be considered viable alternatives for the central corridor for the majority of leisure users, with or without cars. Almost one third of Ireland's population resides in the Greater Dublin area and Holyhead is easily reached by inhabitants of Birmingham, Manchester and Liverpool. The Irish ports on the northern and southern corridors are far from Dublin which is the single most important destination on the Irish side. The roads from Dublin to all the rest of Ireland are faster, and the public transport more satisfactory, than the roads or public transport from Larne, Belfast or Rosslare.

- (14) The central corridor accounts for between 50 and 60 % of the traffic passing between the United Kingdom and Ireland and therefore, is clearly a significant route.

E. Port of Holyhead

- (15) Holyhead is the only port in the United Kingdom currently serving Ireland in the market for the transport of passengers and cars on the central corridor route. The services now operated are by B&I (to Dublin) and Sealink (to Dun Laoghaire). B&I Line plc is a shipping line incorporated in Ireland which operates a ferry service between Holyhead and Dublin. Holyhead handles in the region of two million passengers and 330 000 cars each year.
- (16) The port is characterized by a narrow approach and a shallow channel. All land at the port, save for some unused British Rail tracks, is owned by Sealink. The port has five berths. Sealink operates conventional ferries from Station Berth and B&I from the Outer Harbour Berth. A third berth, the Admiralty Pier Berth, has been used by Sealink for its own fast ferry service from 16 July 1993, and was previously used by B&I at the time of Sea Containers' original application for access to the port. The remaining berths are at the East Quay (a disused container berth), and the repair or lay-by berth.

F. Background to the dispute

- (17) Both Sealink and SC agree that the existing facilities at Holyhead are unsatisfactory. For example, the west side of the port has an unsatisfactory road network, which is prone to congestion, and Station Berth and Admiralty Pier each have only single ramps.
- (18) Sealink has been working with the Welsh Development Agency, various regional councils and British Rail to prepare for the redevelopment of both sides of the port. Essentially, the development would encompass the movement of the ferry activities to the east side and the use of the west side purely as a commercial development for the benefit of the town of Holyhead. It is anticipated that the west side will be used for retail shopping, hotel and residential accommodation. The work to the east side

of the port would involve removing old British Rail tracks and developing a new railway station, constructing a new passenger terminal and freight facilities and deepening the harbour.

- (19) Two new multi-purpose berths are planned by Sealink for the east side of the inner harbour, which would be suitable for use by roll-on roll-off ferries, and fast ferries of the type used elsewhere by SC (the SeaCat). In its reply to the complaint, Sealink says that it intends to go ahead with the proposed redevelopment but states that the level of financial aid it receives will have an impact upon the timing of the redevelopment. Sealink's latest proposal is that redevelopment shall commence in 1994. Sealink states that the redevelopment of the port will allow more operators to offer a service from the port of Holyhead due to faster turnaround times resulting from more efficient port operations. SC argues that the redevelopment will reduce the capacity of the port.

G. The dispute

- (20) In 1992, SC considered introducing a fast ferry service on the central corridor, from May 1993 using the SeaCat vessel. SeaCat is a lightweight high-speed catamaran, capable of carrying both cars and passengers. Holyhead was and is considered by SC to be the only suitable port from which to operate such a service on the central corridor.
- (21) SC and Sealink entered into preliminary discussions about the proposed service in June 1992. After an initial delay, a meeting was held on 17 August 1992.

The main points arising from the meeting were :

- (a) SC said it would have a SeaCat vessel available to commence a service from Holyhead to either Dublin or Dun Laoghaire on 1 May 1993, and outlined its proposed timetable to Sealink ;
- (b) SC outlined its technical requirements and indicated that it was prepared to be flexible with regard to where it might operate from within the port. It would be prepared to pay for some temporary facilities which might be necessary. SC described its requirements for services as being a linkspan, passenger gangway, standage for at least 150 cars, a passenger terminal, suitable access and egress for passengers, and limited administrative offices ;

(c) Sealink said it had experienced difficulties with vessels manoeuvring in the port and it was felt that B&I might make a complaint about the effects of the SeaCat passing its vessel while it was in its berth. (The Commission ordered interim measures against Sealink on 11 June 1992 following a complaint pursuant to Article 86 of the EC Treaty, by which Sealink was obliged to alter its sailing times to avoid passing a B&I vessel more than once while it was in its berth);

(d) Sealink's planned redevelopment of the port was scheduled to begin in late 1992 and finish in early 1994. This would mean that the area around the former Container berth would effectively be a construction site, and nothing must be allowed to hinder progress towards the planned completion date. Sealink would, however, put any SC proposals to its engineering consultants.

- the effect of a SeaCat manoeuvring in close proximity to vessels moored along the East Dock,
- the requirement for a lay-by berth in the harbour,
- reduced sea room available to vessels entering and leaving the harbour from Station Berth,
- the time taken by a SeaCat to manoeuvre in bad weather.

Sealink stated that these concerns required careful consideration and appropriate advice from experts. Sealink asked if SC wished Sealink to put in hand a mathematical study of the effect of SeaCat manoeuvring, the cost to be paid by SC. Sealink was not yet in a position to provide details of when land on the west side would need to be released for development.

(22) SC and Sealink met again on 1 September 1992 and discussed options put forward by SC for the launch of its service. In essence, the options concerned the possible use by SC of any of four locations within the port. One option concerned the use of the Refit berth on the west side of the port, and the others concerned variations on the use of the Container berth on the east side.

Sealink indicated that from a port operational point of view the Refit berth option would be preferable but caution would be required due to marine implications, effects upon other users, and the timing of redevelopment of the west side. The same constraints applied to the east side. SC's application had come at a time of unprecedented change at Holyhead and the many proposed changes involved several other parties. Sealink was therefore not in full control of the progress and timing of the planned redevelopments.

(23) Sealink wrote to SC on 29 September 1992 listing the marine implications of a SeaCat operation from the port of Holyhead which it said needed to be examined. These included:

- the effect of a SeaCat passing a vessel at Admiralty Pier,
- the effect of conventional vessels passing a SeaCat while it was in berth,

(24) SC replied on 5 October 1992 stating that Sealink was simply producing a catalogue of uncertainties without suggesting any positive solutions. SC saw no insurmountable technical difficulties concerning SeaCat manoeuvring. SC also wrote to Sealink on 13 October stressing that its proposed options concerning the east side should not be forgotten.

(25) Sealink replied on 15 October 1992 asking SC to confirm the schedule it proposed to operate, and expressed doubts concerning the reliability of the SeaCat vessel, especially in bad weather. Sealink again suggested that a mathematical model would be a means of examining the implications of SC's proposed schedule.

(26) SC again wrote to Sealink on 28 October 1992 expressing concern at the lack of progress and accusing Sealink of employing delaying tactics in order to protect its own ferry business. SC stated that it intended to announce publicly at the World Travel Market on 17 November 1992, that it would commence a service from Holyhead in 1993.

(27) On 3 November 1992, Sealink replied that there were a number of issues to be resolved at Holyhead, such as navigational issues, effects on other customers, compatibility with the redevelopment plans, negotiations on investments and charges, and the obtaining of bank and third-party consents. Sealink confirmed, however, that it was willing, in principle, to allow SC to operate the SeaCat from existing facilities at the port at available 'slot times' (i.e. the scheduled time of arrival or departure available

or allocated to a ship movement) in 1993. Sealink also said that it was willing to accommodate SC on the east side after the redevelopment had been completed but that what SC was seeking was the creation of temporary facilities for 1993. This raised problems, according to Sealink, under all the above headings, which it was addressing but which SC discounted.

- (28) A meeting took place on 11 November 1992 between the parties at which the use of existing facilities was discussed. The following day SC provided Sealink with a list of the basic facilities it would require if it were to operate from existing facilities. These were an adapted linkspan, standage for at least 90 cars, a passenger terminal with suitable access and egress, and a passenger gangway. SC also presented a proposal to Sealink concerning the terms on which it would like access to the east side of the port. It proposed, *inter alia*, that Sea Containers should construct temporary facilities (which could be dismantled within 14 days) provided Sealink would guarantee them a place elsewhere in the port when the time came for the redevelopment of the east side to take place. SC would be guaranteed access to the port for 10 years, with an option to terminate at one month's notice, and would have priority use of the facility to be constructed, or the alternative facility during redevelopment works.

- (29) On 13 November 1992, Sealink provided a schedule of the available slots at the existing Holyhead facilities for 1993. Slots were offered as follows:

— Station Berth:

04.30 to 12.00

17.30 to 24.00

— Admiralty Pier Berth:

03.30 to 09.30

17.00 to 21.30

— Outer Harbour Berth:

04.30 to 13.00

16.00 to 00.30

On the same day, by telefax, SC applied for slots at Station Berth. The slots applied for were:

— 06.35 to 07.15

— 11.35 to 12.15

— 16.35 to 17.15

— 21.35 to 22.15

SC qualified its application by stating that it was based on the understanding that the gap between the departure of one vessel and the arrival of another would be 15 minutes rather than 30. SC also stressed that the application for slots at Station Berth was without prejudice to SC's view that Sealink had no reasonable basis for refusing to accommodate SC's proposed temporary facilities at East Quay.

- (30) On 16 November 1992, SC wrote to Sealink stating that the slots applied for were not considered to be optimum and SC would expect to receive more suitable slots in 1994, after the redevelopment of the port.
- (31) On 17 November 1992, SC announced publicly that it would commence a service from Holyhead in spring 1993 with departure times from Holyhead of 9.00, 14.00, 19.00 and 24.00. SC informed Sealink of this the following day, accusing it of not having responded to SC's application for slots at Station Berth.
- (32) Sealink replied on 20 November stating it needed to consider the requirements SC had specified in relation to Station Berth (see recital 29 above).
- (33) SC wrote to Sealink on 26 November stating that the slots offered to them at Station Berth were commercially unacceptable to SC because:
- (a) they were not suitable for appropriate rail connections;
 - (b) the starting time from the Irish side would be too early;
 - (c) the starting time from Holyhead would rule out attracting traffic from major British cities;
 - (d) the berthing arrangements did not leave any leeway for difficulties with the weather;
 - (e) the use of Station Berth would allow Sealink to exercise too much control over SC's operations.

SC also stated that SC's consulting engineer had ruled out the Admiralty Pier Berth for use by the SeaCat on technical grounds, and that the Outer Harbour Berth was unsatisfactory because of its exposure to north and north east winds. SC said it had no option but to press its case for access to the East Quay.

- (34) SC wrote to Sealink on 3 December 1992 stating that it had been clear for some time that the East Quay was the only facility which could sensibly be used for a SeaCat service in 1993. Sealink replied on 4 December saying that in the light of this they would regard SC's application for slots at Station Berth as having been withdrawn. It rejected SC's proposals of 11 November concerning temporary facilities at the East Quay, stating that they were 'presumptuous, one-sided and fraught with potential problems which would jeopardize the development programme'.
- (35) On 4 January 1993, SC wrote to Sealink stating that due to the lack of agreement between them it was now too late to commence a SeaCat service in 1993, but they would like to conclude an agreement which would enable them to commence a service in 1994.
- (36) A meeting took place between the parties on 20 January 1993 at which Sealink outlined its development plans for the east side of the port. The following day SC provided Sealink with a detailed written description of its technical and other requirements for a SeaCat service in 1994.
- (37) On 22 February 1993 Sealink advised SC that a number of its technical requirements could be met but that a port agreement could not be concluded before Easter 1993 as requested by SC and that its planning process for 1994 would not commence until September 1993.
- (38) After further inconclusive exchanges of correspondence SC lodged its complaint with the Commission on 15 April 1993.
- (40) On 21 June 1993 Sealink wrote to the Commission setting out terms it was prepared to offer to SC in relation to the use of existing facilities at Holyhead in 1994. A schedule was provided showing the available slots at the Station, Admiralty Pier and Outer Harbour berths. Sealink said it believed it could accommodate all of SC's 'reasonable' requirements as indicated in its previous requests for slots, but that the 13.20 to 14.00 slot would aggravate congestion problems at the port. Sealink could not guarantee that the measures it proposed would solve all the problems of congestion. Sealink indicated the port charges applicable to its own fast ferry service in 1993 and stated that 1994 charges would be finalized in the autumn of 1993 but should not increase significantly.

In relation to SC's proposal to operate from new or additional facilities, Sealink said that in the light of the substantial available capacity at the port's existing facilities which would enable Sea Containers to operate most, and perhaps all, of the slots they had identified as being desirable, there was no need to create new facilities. In any event, according to Sealink, extensive redevelopment works had to begin on the east side in 1994 if the new facilities were to be available for 1995. With regard to the west side, new facilities would not avoid the problem of congestion around the midday slot.

- (41) SC wrote to the Commission on 25 June 1993 in response to the Sealink letter. SC said that Sealink had not offered any terms which could be described as precise and that it had not been demonstrated that there was substantial available capacity at existing facilities (on the west side of the port). There was no flexibility for SC to change its timetable, and Sealink admitted that disruption might occur due to congestion, adverse weather conditions etc. The port charges were very high in comparison with, for example, Dun Laoghaire, and this was to Sealink's own benefit, as charges paid by it as a ferry company were received by it as port operator.

H. Developments since the complaint

- (39) On 24 May 1993, SSL made what it called an application to SSP for slots with which to commence a fast ferry service from Admiralty Pier Berth at Holyhead from 1 July 1993. This was approved on 28 May, and the timetable was approved for 1993 and 1994. A press release announcing a new service from Holyhead to an unspecified location in Dublin Bay as from July was issued by Sealink on 27 May 1993. Advertisements appeared in the British press on 5 June 1993 announcing the commencement of the service from Holyhead to Dun Laoghaire from 16 July 1993.

SC said that there was more than adequate capacity on the east side of the harbour, and therefore there was no need to concentrate all ferry operators at existing western berths with the resultant problems of slot allocation and congestion. Sealink had indicated that the redevelopment, which was originally scheduled to be completed by the spring of 1994 and was now apparently scheduled for completion in 1995, was far from certain, being dependent on grant aid. Sea Containers had indicated its willing-

ness to pay for the temporary facilities necessary and to move at 14 days' notice when Sealink required. SC maintains that Sealink's behaviour is not that which would have been expected of an independent port operator and is attributable to its wish to protect its ferry services from competition. An independent port operator would have actively sought new business for the port and would have sought constructively to find solutions to any technical obstacles which might have arisen.

- (42) In its response to the Commission's statement of objections, Sealink indicated that a slot between 12.30 and 13.15 was available to SC on the west side. Sealink also stated that it was prepared to permit SC to construct temporary facilities and use the east side for a fast ferry service as soon as it wished, provided that those facilities were moved at 14 days' notice when the east side redevelopment began. (It later appeared that Sealink wanted redevelopment to begin before May 1994, which is when SC wished to commence its operations). SC would bear the expense of such temporary facilities and would pay normal port dues. Sealink could not guarantee SC identical slots on the west side when it moved there once redevelopment work began on the east side.

- (43) At the oral hearing, SC indicated that the 12.30 to 13.15 slot on the west side would undermine its daily schedule to an unacceptable degree because its first sailing from Dun Laoghaire would have to depart at 05.45 — too early to be commercially viable — with the result that the whole service would not be commercially viable.

- (44) The Commission invited B&I Line plc to attend the oral hearing as a third party likely to be affected by a decision on interim measures in this case. B&I supported Sealink's contention that a 13.20 to 14.00 slot for SC on the west side would give rise to unacceptable levels of congestion at the port and wished to reserve its position in relation to the alternative slot proposed in the light of actual experience during 1994. With regard to the redevelopment of the port, B&I said that it had not been consulted by Sealink regarding its plans and could not, without further information, form a view as to whether it would be adversely affected by the installation of a temporary facility for SC. B&I expressed the view that it should be fully consulted regarding any possible interim measures ordered by

the Commission which might have an adverse effect on its business.

- (45) On 1 October 1993 Sealink made an offer to SC of a slot on the west side between 13.20 and 14.00 which it said could be achieved by carrying out various improvements to the port facilities. It had become possible to carry out these improvements because vacant possession of some cottages on the west side had been achieved on 18 June 1993 and their demolition created space for a series of improvements which would ease traffic-congestion problems. The slot now available for SC would mean that SC could have all of the slots it had said were essential to operate a commercially viable service, i.e. with departure times from Holyhead of 9.00, 14.00, 19.00 and 24.00.

- (46) SC replied to this offer on 13 October 1993, saying that there was considerable doubt as to whether the congestion problem could be solved by making the improvements suggested by Sealink and that it would be extremely unlikely that SC's traffic could be handled satisfactorily at the times proposed. However, on 8 November 1993, SC wrote to Sealink stating that after giving further thought to the offer it had decided to accept it in spite of its reservations. SC now proposes to commence a service from Holyhead to Dun Laoghaire from May 1994.

- (47) Since SC has now accepted the slots offered to it by Sealink, the question arises whether a decision on its application for interim measures should be adopted. SC has maintained its application, and the national authorities have also asked the Commission to make a decision. The Commission must therefore consider whether there remains sufficient public interest in a decision. Although the parties have reached agreement on access for Sea Containers to the port of Holyhead for the 1994 season, they hold opposing views of their respective rights. In particular, Sealink continues to claim that it has no special obligations in its capacity as port owner. If a decision is given at this stage on the application for interim measures it will clarify the legal position of the parties now and for their future dealings. It may obviate the need for further intervention by the Commission at a later stage, particularly in relation to access to the new facilities to be built on the east side of the port. It will also provide guidance as to the treatment of this and similar situation in the future. In those circumstances the Commission therefore considers it appropriate to make a decision in this case.

- (48) The Commission understands from the United Kingdom authorities that it is likely that Sealink will obtain the funding it requires and that the redevelopment of the east side of the port of Holyhead will proceed as planned in 1994.

I. The essential arguments of the parties

- (49) SC argues that, at least until 1 October 1993, Sealink abused its dominant position as the port authority at Holyhead in order to protect its position in the market for the provision of ferry services across the central corridor, in contravention of Article 86.

- (50) SC suggests that Sealink intentionally prevented it from commencing a fast ferry service in an attempt to protect its own share of the market for traffic passing through the central corridor.

- (51) Sealink believes that SC should have been able to use the existing facilities at the port to launch its service, pending the redevelopment. Sealink maintains that SC was seeking exclusive use of its own berth and terminal and believes that it was not entitled to this. In any event, Sealink argues, SC was offered slots to commence its service and therefore was at no time denied access to essential infrastructure. SC could have commenced a service from Holyhead in 1993 had it wished to do so and is now free to commence a service in 1994. Sealink regards the request for interim measures as unfounded.

- (52) The companies therefore disagree on:

- whether there was sufficient available capacity without congestion at existing (West Dock) facilities for Sea Containers to operate a commercially viable service in 1994,
- whether Sealink had legitimate reasons for refusing SC's proposals to operate on a temporary basis from the East Quay in 1993,
- whether it was feasible in the light of the redevelopment project for Sea Containers to construct temporary facilities on the east side of the port for use in 1994.

- (53) SC maintains that, until 1 October 1993, the slots offered to it at existing facilities did not allow it to operate a commercially viable service. SC also argues that it was entitled to access to the east quay as there was spare capacity there and that Sealink's

reasons for refusing access concerned the protection from competition of its own ferry services.

- (54) Sealink maintains that its reasons for refusing to permit SC to use the East Quay were that it wished to avoid interference with the planned redevelopment of the port, which it now intends should begin in 1994. Sealink argues that Sea Containers was only interested in having exclusive use of its own facilities at Holyhead and was not genuinely interested in operating from existing facilities.

II. LEGAL ASSESSMENT

A. Conditions for ordering interim measures

- (55) The Commission's power pursuant to Article 3 of Regulation No 17 to require the termination of an infringement of the competition rules includes the power 'to take protective measures to the extent to which they might appear indispensable in order to avoid the exercise of the power to make decisions given by Article 3 from becoming ineffectual or even illusory because of the action of certain undertakings' (Case No 792/79 R, *Camera Care v. Commission* (')).

- (56) The conditions to be met for the granting of interim measures are:

- prima-facie evidence of an infringement, and
- urgency, based upon the need to avoid a situation which is likely to cause serious and irreparable damage to the party seeking interim measures or is intolerable for the public interest.

Any measures that the Commission takes must be of a temporary and conservatory nature and restricted to what is required in the given situation. The Commission must also have regard to the legitimate interests of the undertaking which is the subject of the interim measures. The interim measures must not go beyond the scope of the Commission's powers to order the termination of an infringement in the final decision.

- (57) Even where the operator of an essential facility is required to provide access of non-discriminatory terms, interim measures to enable a new compe-

(') (1980) ECR 119, p. 131 (paragraph 18).

titor to enter a market require stronger justification than measures maintaining the situation of an already established competitor.

- (58) Where an undertaking is denied the opportunity to provide a new product or service to a market and that opportunity is likely to diminish considerably in value in the absence of interim measures, there is sufficient urgency to justify interim measures if the other conditions for granting them are met.
- (59) Otherwise, a final Commission decision prohibiting an abuse of a dominant position which hindered the 'growth of competition' ⁽¹⁾ would be rendered 'ineffectual or even illusory' ⁽²⁾.

B. Application of these principles to the present case

(1) *Prima-facie case of infringement*

(a) Article 86

- (60) In this case, the first two points at issue are (i) whether Sealink holds a dominant position, and (ii) whether Sealink's behaviour amounts to an abuse. In an interim measures case, the Commission does not need to make a final determination on these points but must nevertheless decide whether a reasonably strong prima-facie case on both issues has been shown.

(b) Dominant position

- (61) To determine whether an undertaking is dominant, it is necessary first to identify the 'relevant market', i. e. the relevant geographical and service markets in which to assess the market power of the allegedly dominant undertaking.
- (62) The essence of the complaint is that what amounts to refusal of access to the port of Holyhead on reasonable and non-discriminatory terms will protect and lead to the strengthening of Sealink's position on the market for the provision of maritime transport services for cars and passengers on the 'central corridor' route between the United Kingdom and Ireland (see recital 11 above).

⁽¹⁾ Case 85/76, *Hoffmann La Roche v. Commission* (1979) ECR 461, p. 541 (paragraph 91). See also the orders of the President of the Court of First Instance in Cases T-24/92 R and T-28/92 R, *Langnese-Iglo and Schöller v. Commission* (1992) ECR, pp. II-1839 and T-7/93 R and T-9/93 R (same parties), (1993) ECR, pp. II-131.

⁽²⁾ See recital 55 above.

- (63) The port of Holyhead is the only British port now serving this market. The nearest alternative port to Holyhead is Liverpool; the journey from Dublin to Liverpool is approximately twice the length of that from Dublin to Holyhead. This makes the Dublin to Liverpool journey so much longer that the Liverpool port is not substitutable for Holyhead for the purpose of passenger and car ferry services.

- (64) In the present circumstances Sea Containers could not, if they wished to introduce a ferry service on the central corridor route, do so without substantially increasing the length of the crossing or building a new port themselves. The latter course of action would not be economically or physically realistic.

- (65) Therefore Sealink, in its capacity as port authority, has a dominant position in the market for the provision of port facilities for car and passenger ferry operations on the central corridor route between the United Kingdom and Ireland.

(c) Abuse of dominant position

- (66) An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i. e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met ⁽³⁾. An undertaking in a dominant position may not discriminate in favour of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 86.

⁽³⁾ See among others the judgments of the Court in : Cases 6 and 7/73, *Commercial Solvents v. Commission*, (1974) ECR, p. 223; Case 311/84, *Télémarketing*, (1985) ECR, p. 3261; Case C-18/88 *RTT v. GB-Inno*, (1991) ECR, pp. I-5941; Case C-260/89, *Elliniki Radiophonia Teleorassi*, (1991) ECR, pp. I-2925; Cases T-69, T-70 and T-76/89, *RTE, BBC and ITP v. Commission*, (1991) ECR, pp. II-485, 535, 575, and Commission Decisions : 76/185/EEC — *National Carbonizing Company*, OJ No L 35, 10. 2. 1976, p. 6; 88/589/EEC — *London European — Sabena*, OJ No L 317, 24. 11. 1988, p. 47; 92/213/EEC — *British Midland v. Aer Lingus*, OJ No L 96, 10. 4. 1992, p. 34; *B&I v. Sealink*, 11. 6. (1992) 5 CMLR 255; EC Bulletin, No 6 — 1992, point 1.3.30.

- (67) This principle applies when the competitor seeking access to the essential facilities is a new entrant into the relevant market. In the Hoffmann-La Roche case⁽¹⁾, the Court said:

'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of an undertaking in question, the degree of competition is weakened and which, through recourse to methods different to those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'

A decision on interim measures may be just as necessary, to ensure that any final decision of the Commission is effective, in the case of a complainant who is a new entrant as it is in the case of an already established competitor.

- (68) SC wishes to introduce a new fast ferry service to the Holyhead-Dun Laoghaire route, using a wave-piercing catamaran. Until Sealink introduced its own fast ferry service in spring 1993, no such service had been available on the route concerned.
- (69) Sealink has now commenced its own version of the very service which SC sought to provide. The goodwill and commercial reputation which SC wished to build up by offering the first fast ferry service on the route concerned now accrue to Sealink.
- (70) Sealink consistently delayed and raised difficulties concerning SC's possible use of existing facilities on the west side of the port. It was not until 21 June 1993 that Sealink stated its willingness to permit SC to operate from temporary facilities, at its own expense, on the eastern side on the port, until such time as the redevelopment works required them to be moved. At the hearing, it became clear that redevelopment work was intended to start before SC's fast ferry service, thus rendering the offer meaningless. The Commission considers that Sealink did not conduct its negotia-

tions with Sea Containers by proposing or seeking solutions to the problems it was raising and that its rejection of all of SC's proposals without making any counter offer or attempting to negotiate was not consistent with the obligations on an undertaking which enjoys a dominant position in relation to an essential facility. Neither was it the conduct which would have been expected from an independent port authority. This is borne out by the fact that Sealink gave itself rapid approval for its own fast ferry service. To sum up, SSP treated the request by SC in a discriminatory manner in comparison with that of SSL.

- (71) At no stage during the negotiations which took place between June 1992 and March 1993 did Sealink set out any proposals of its own concerning SC's proposal to solve the problems raised by Sealink by constructing, at SC's own expense, temporary facilities in the port. Its actions in this respect were entirely negative and consisted of raising difficulties associated with each of the four options put forward by SC.
- (72) Until 1 October 1993, Sealink was unwilling to provide Sea Containers with the slots it had requested to commence a service from existing facilities.
- (73) Sealink did not consult the two ferry operators at the port of Holyhead on its redevelopment plans.
- (74) Sealink never set up any procedures for dealing with its responsibilities as harbour operator to ensure that it carried out its duties to other ferry operators. Sealink never consulted SC about ways of solving the difficulties Sealink identified. Sealink approved promptly its own timetable for its ferry operations in 1993 and 1994 but refused to discuss SC's 1994 timetable until the autumn of 1993. During 1993 Sealink altered its development plan for the east side of the harbour several times without consultation with SC, often in order to suit its own needs, although later versions of the plan made it more difficult to allow SC to install temporary facilities in 1994 on the east side. Sealink itself admitted that its other proposals to SC for 1994 might lead to congestion, but it refused to allow SC to have its own facilities. Although SC said that the timetable suggested to it by Sealink for 1994 was unsatisfactory, until October 1993 Sealink never

⁽¹⁾ See footnote 1, on page 16.

claimed to have considered any modification in its own 1994 timetable. At the hearing Sealink argued that it had no duty to let in a new entrant if the overall service at the port would deteriorate as a result, but Sealink never had consultations with SC to see if this alleged result was unavoidable. It appears that Sealink also omitted to consult B&I about its plans to redevelop the port of Holyhead.

- (75) It is the Commission's view that in the circumstances of the present case an independent harbour authority, which would of course have had an interest in increasing revenue at the port, would at least have considered whether the interests of existing and proposed users of the port could best be reconciled by a solution involving modest changes in the allocated slot times or in any plans for the development of the harbour. In situations such as the present one, unless a solution is considered fully and discussed with all the interests involved, it is likely that a port authority which is not independent will prefer an arrangement which minimizes inconvenience to itself (especially in relation to its own operations as a user) but which does not necessarily provide non-discriminatory access to the new entrant. If Sealink, in drawing up the various versions of its redevelopment plan for the east side, had always duly consulted SC (and B&I), it might have been possible to avoid the difficulty of reconciling the plan with SC's wish for temporary facilities there.

- (76) While SC has no right to insist on obtaining a preferential position in any respect, the Commission concludes that until 1 October 1993, Sealink did not offer access to Holyhead on non-discriminatory terms to SC. In the context of this decision it does not seem necessary to examine in detail the relevance of the considerations put forward by Sealink and described in recitals 23, 27 and 40 above. This question would be further examined in the context of any final decision in this case.

(d) Effect on trade between Member States

- (77) The complaint relates to access to a port whose geographic market constitutes a substantial part of the common market because that port provides one of the main links between two Member States, the United Kingdom and Ireland, and is the only port providing a direct link between Great Britain and the capital city of Ireland. The refusal to offer SC access on a reasonable and non-discriminatory basis to port facilities at Holyhead so as to enable it

to commence a ferry service, and any consequential effect that this has upon the competition situation on the maritime transport market on the Irish Sea, would have a direct effect on trade between Member States.

(e) Conclusion

- (78) On the evidence available at present, there is a sufficient prima-facie case of a pattern of behaviour constituting abuse under Article 86 to order interim measures, if the other conditions for ordering such measures are fulfilled.

(2) *Likelihood of serious and irreparable harm; urgency*

- (79) Notwithstanding the above, Sealink has now (on 1 October 1993) made an offer to Sea Containers which would enable it to commence a service in 1994 at the slot times which it had said it regarded as essential for the operation of a commercially viable service. SC has now accepted this offer and the Commission considers that the offer made by Sealink is reasonable in the context of a port with limited capacity. In particular, Sea Containers has been offered the exact slot times which it itself identified as essential for its service, and it would use the same shore facilities as the other operators at the port. Any delays or disruption which might occur due to congestion or bad weather would be likely to affect the other operators as well.

Before the condition of urgency arising from the danger of serious and irreparable harm being caused to SC can be fulfilled, the Commission considers that it would need to have been shown that SC could not operate a commercially viable service from the port in 1994 as a result of Sealink's conduct, and would therefore have been unable to enter the market. As SC has now been offered, and has accepted, the opportunity to commence a service, the question of whether SC would suffer serious and irreparable harm such as would justify the ordering of interim measures no longer arises,

HAS ADOPTED THIS DECISION :

Article 1

The application made by Sea Containers Ltd requesting the Commission to order interim measures against Stena Sealink Line and Stena Sealink Ports is rejected.

Article 2

This Decision is addressed to :

Sea Containers Limited,
Sea Containers House,
20 Upper Ground,
London SE1 9PF,
United Kingdom.

Done at Brussels, 21 December 1993.

For the Commission

Karel VAN MIERT

Member of the Commission
