II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 January 1999

relating to a proceeding pursuant to Article 85 of the EC Treaty

(Case IV/36.253 — P&O Stena Line)

(notified under document number C(1998) 4539)

(Only the English text is authentic)

(1999/421/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular the second subparagraph of Article 12(4) thereof,

Having regard to the summary of the application published [2] pursuant to Article 12(2) of Regulation (EEC) No 4056/86,

Having regard to the Commission's notification to the parties of 10 June 1997 that there exist serious doubts within the meaning of Article 12(3) of Regulation (EEC) No 4056/86 as to the applicability of Article 85(3) to the agreement in question,

Having regard to the summary of the relevant agreement published [3] pursuant to Article 23(3) of Regulation (EEC) No 4056/86,

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

Whereas:

I. THE FACTS

1. The application

(1) On 31 October 1996 The Peninsular and Oriental Steam Navigation Company ('P&O') and Stena Line Limited (Stena) submitted an application to the Commission pursuant to Article 12(1) of Regulation (EEC) No 4056/86 for negative clearance under Article 85(1) of the Treaty or, in the alternative, exemption under Article 85(3) in respect of a proposed joint venture merging their respective ferry operations on the Short French Sea and Belgian Straits.

(2) On 10 December 1996, SeaFrance SA ('SeaFrance') submitted a complaint to the Commission against the proposal to create a joint venture.

[1] OJ L 378, 31.12.1986, p. 4.
[2] OJ C 80, 13.3.1997, p. 3.
[3] OJ C 39, 6.2.1998, p. 21.

(3) On 13 March 1997, pursuant to Article 12(2) of Regulation (EEC) No 4056/86, the Commission published a summary of the application in the *Official Journal of the European Communities* and invited interested parties to submit their comments within 30 days ([4]). Comments were received from a variety of sources including competitors, customers, trade associations, local government, public representatives, private individuals and one Member State.

(4) On 10 June 1997, before the expiry of the 90-day deadline provided for in Article 12(3) of Regulation (EEC) 4056/86, the Commission informed the parties that there existed serious doubts within the meaning of that Article as to the applicability of Article 85(3) of the Treaty to the agreement in question.

(5) On 6 February 1998, pursuant to Article 23(3) of Regulation (EEC) No 4056/86, the Commission published a notice indicating its intention to exempt the agreement ([5]).

2. **The parties and the complainant**

(6) P&O is listed on the London Stock Exchange and is the parent company of a diversified group with interests including roll-on/roll-off (ro-ro) ferries, deep sea container and bulk shipping, cruise vessels, European haulage, international port management, exhibition organisation, commercial construction, property development and the sale of domestic property. The roll-on/roll-off ferry business operates tourist and freight ferry services between Great Britain and mainland Europe and Ireland.

(7) Stena operates ferry services between Great Britain and mainland Europe and Ireland. It forms part of the Stena Line AB group which operates ferry services in north-western Europe, including routes in Scandinavia and from the Hook of Holland to Harwich. Stena Line AB is listed on the Stockholm Stock Exchange and forms part of the Stena Sphere group of companies, whose interests include ferries, offshore contracting for the oil and gas industry, shipping, drilling, property, finance and metals.

(8) P&O and Stena are hereinafter referred to as 'the parties'.

(9) The complainant SeaFrance operates ferry services on the Dover/Calais route. SeaFrance is owned by the French railway company SNCF.

3. **The agreement**

(10) The parties have agreed to combine P&O's and Stena's respective ferry operations on the Short French Sea and Belgian Straits in a joint venture company called P&O Stena Line. P&O previously operated a mixed tourist and freight service between Dover and Calais on the Short French Sea and a freight-only service between Dover and Zeebrugge on the Belgian Straits. Stena previously operated mixed tourist and freight services between Dover and Calais and Newhaven and Dieppe on the Short French Sea.

(11) The P&O company which previously operated its Short French Sea and Belgian Straits services, P&O European Ferries (Dover) Limited, has become the vehicle for the joint venture. Stena has transferred all assets and liabilities currently employed on its Dover/Calais and Newhaven/Dieppe routes to the joint venture company. The share capital of the company is owned 60 % by P&O and 40 % by Stena, although voting rights are split equally between the two parties. Similarly, representation and voting rights on the Board of Directors of the joint venture company are divided equally between P&O and Stena.

(12) The parties originally envisaged that P&O Stena Line would have assets of approximately GBP 410 million, funded by approximately GBP 100 million of equity and the remainder by debt, part of which would be secured by mortgages over the vessels, the remainder being guaranteed by P&O. The parties subsequently informed the Commission that P&O Stena Line would have assets of about GBP [...] million ([6]), funded by a combination of equity, loan stock, borrowings and securities. Upon starting operations, its assets included a total of 14 ships: five multi-purpose ferries (operating mixed tourist and freight services) and three freight-only vessels previously owned by P&O; and five multi-purpose ferries and one fast craft previously owned by Stena.

([4]) See footnote 2.
([5]) See footnote 3.
([6]) Certain information is not included in the published text for reasons of confidentiality.

(13) It was envisaged that the joint venture would operate a regular service between Dover and Calais departing every 45 minutes and employing six multi-purpose vessels. Three multi-purpose vessels would be withdrawn from service. The joint venture would continue to operate P&O's three vessel, freight-only, service on the Dover/Zeebrugge route as well as Stena's one fast craft and one mufti-purpose vessel service on the Newhaven/Dieppe route.

(14) The joint venture started operating services on 10 March 1998. P&O Stena Line subsequently informed the Commission that it intended to operate a seventh multi-purpose vessel (the *Pride of Bruges*) on the Dover/Calais route for the 1998 summer season (May to September) and possibly thereafter. P&O Stena Line has also informed the Commission that on 16 October 1998 it removed the fast craft from the Newhaven/Dieppe route for a refit, after which the craft was not put back on the route but delivered back to its owners on 30 October 1998, and that it is consulting with its employees about the future of its service on that route.

(15) The parties projected that the joint venture would give rise to cost savings of GBP 75 million as a result in savings in the costs of ships and the costs of overheads (port costs, administration and marketing). That figure included projected savings from the removal of Stena's *Pegasus* fast craft from the Newhaven/Dieppe route, and the removal of Stena's vessel *Antrim* from the Newhaven/Dieppe route to be replaced by P&O's vessel *Pride of Bruges*. In fact, Stena removed the *Pegasus* from the Newhaven/Dieppe route in October 1996, well before the implementation of the joint venture. Further, the joint venture did not dispose of the *Cambria* as originally intended but transferred it from the Dover/Calais route to the Newhaven/Dieppe route because the *Pride of Bruges* has been kept on the Dover/Calais route. Using the parties' figures for the costs of those ships, the costs savings brought about by the joint venture can be estimated to be GBP [...] million.

(16) Under the agreement, P&O and Stena undertake not to be involved directly or indirectly (other than through the joint venture) with the provision of ferry services calling at any port on the English coastline between (and including) Newhaven and (but excluding) Harwich or on the European mainland coastline between (and including) Dieppe and (but excluding) Zeebrugge. The joint venture's activities are limited to the provision of ferry services on the Dover/Calais, Dover/Zeebrugge and Newhaven/Dieppe routes.

(17) The parties operate other ferry services that have not been brought into the joint venture.

(18) P&O operates the following services:

(a) on the North Sea, P&O's subsidiary P&O North Sea Ferries operates mixed passenger/freight services on the Hull/Zeebrugge and Hull/Rotterdam routes, as well as freight-only services on the Teesport/Zeebrugge and Teesport/Rotterdam routes. P&O European Ferries operated freight-only services on the Felixstowe/Zeebrugge and Felixstowe/Rotterdam routes; these services are now operated by P&O North Sea Ferries;

(b) on the Western Channel, P&O European Ferries operates mixed passenger/freight services between Portsmouth and Le Havre, Cherbourg and Bilbao;

(c) on the Irish Sea, P&O European Ferries operates mixed passenger/freight on the northern corridor. P&O's subsidiary Pandoro operates freight-only services in the northern and central corridors.

(19) Stena operates the following services:

(a) on the North Sea, Stena Line BV (part of the Stena Line AB group) operates passenger and freight services on the Harwich/Hook of Holland route;

(b) on the Irish Sea, Stena operates mixed passenger/freight services on all three corridors, as well as the largely freight-only Holyhead/Dublin route on the central corridor.

Stena does not operate services on the Western Channel. Until 1996, it operated on the Southampton/Cherbourg route.

4. **Relevant markets.**

(20) This section considers the following two relevant markets on which the joint venture operates:

(a) the market for tourist passenger services (passengers and passenger vehicles) on the Short Sea routes, consisting of routes across the Short French Sea (routes between Dover, Folkestone, Ramsgate, Newhaven and Calais, Dieppe, Boulogne, Dunkirk; and the Channel Tunnel) and the Belgian Straits (Ramsgate/Ostend);

(b) the market for unitised freight services (maritime services and door-to-door intermodal services) between England and mainland Europe (Western Channel, Short Sea and North Sea routes).

(21) Section 6 considers the Western Channel, North Sea and Irish Sea tourist passenger routes on which the proposed joint venture will not operate, but on which (together with the Anglo/Continental freight market) the parties operate their own independent services.

4.1. *Business passengers*

(22) In the Night Services ([7]) and Eurotunnel ([8]) decisions, the Commission found there to be distinct markets for leisure travellers and for business travellers, since the two groups of travellers have different demands. The business traveller values rapidity, comfort and frequency, whereas leisure travellers put a higher value on price. Business passengers and tourist passengers can therefore be considered separate markets.

(23) Most business passengers wishing to travel between England and mainland Europe would be likely to use scheduled air services or high speed train services (Eurostar and connecting rail services) in view of their greater rapidity and comfort than ferry or Le Shuttle services (shuttle services for cars and lorries through the Channel Tunnel). For business passengers, Eurostar and air services will be substitutable for ferry and Le Shuttle services. To the extent that business passengers do use ferry or Le Shuttle services, the existence of competing rail and air services means that the joint venture and Le Shuttle (even if they were not to compete with each other) would be faced with effective competition for business travellers. As far as passengers are concerned therefore, the assessment of the proposed joint venture may be confined to the effects on tourist passengers.

4.2. *Tourist passengers*

4.2.1. Le Shuttle services and ferry services are substitutes

(24) The complainant SeaFrance questions the extent of substitutability between maritime services and the Eurotunnel service. It argues that because the characteristics of the two modes of transport are appreciably different, one can deduce that there will be a rapid segmentation of demand between those who, for reasons linked to its characteristics, systematically prefer the tunnel and those who prefer the maritime services. This segmentation will occur, according to SeaFrance, when all customers who so wish have tried out the tunnel.

(25) There is evidence, however, that market shares of both ferries and Eurotunnel will vary in response to relative prices. Between February and May 1996, Eurotunnel's market share of Short French Sea car traffic fell in successive months from 41 % in February to 35 % in May. Eurotunnel reduced its brochure prices with effect from June 1996, and its market share rose in successive months until the Tunnel fire in November 1996 from 36 % in June to 46 % in October.

(26) To the extent that there are categories of passengers who would either only ever use the ferries or only ever use the Tunnel, they will not constitute a separate market because the operators have no means of identifying their preferences and charging them higher prices.

4.2.2. Eurostar services are not a substitute for ferry services

(27) The parties consider that the direct city to city rail services offered by Eurostar has an impact on 'both the foot passenger and tourist vehicle sector of the ferry market'. The parties doubt however that distinguishing foot passengers and passengers travelling with a vehicle is helpful or relevant to assessing the joint venture.

(28) Foot passengers (that is passengers who do not enter a vessel in a coach or car) represented 13 and 17 % respectively of P&O's and Stena's passengers in 1996 (January to October). The numbers were 990 000 and 720 000 respectively. By way of

([7]) Commission Decision 94/663/EC (OJ L 259, 7.10.1994, p. 20), paragraphs 20 to 27.
([8]) Commission Decision 94/894/EC (OJ L 354, 31.12.1994, p. 66), paragraphs 64 to 66.

comparison, P&O and Stena respectively carried 3,1 and 1,4 million coach passengers, and Short French Sea ferry operators and Le Shuttle together carried 25,3 million passengers in that period. Eurostar carried 4,9 million passengers in the full year 1996.

(29) Eurostar services will clearly not be a substitute for some categories of ferry and Le Shuttle passengers, such as those who travel (whether by foot (on the ferries), car or coach) to take advantage of duty-free goods and cheaper duty-paid goods in France. Duty-free sales are unavailable on the Eurostar system, and the Eurostar services are not as convenient for day trips to retailers located in France.

(30) Eurostar's main competitors are the airlines: in 1996 more passenger travelled by Eurostar on the combined London/Paris and London/Brussels routes than travelled by air (18 % fewer passenger travelled by air between London and Paris in 1996 to October compared to 1995 to October). The London/Paris or London/Brussels city centre to city centre tourist who would consider Eurostar substitutable for ferry and Le Shuttle would, in the absence of Eurostar, be likely to have travelled by air rather than ferry or Le Shuttle. The position may be different for a low-budget tourist, who may consider scheduled coach services (that use a ferry or Le Shuttle) to be an alternative to Eurostar. Scheduled coach operations are one of the categories of traffic carried by the ferries and Le Shuttle where there is likely to be more keen price competition due to the purchasing power of the coach operators and the lack of market transparency.

(31) It is thus only a limited category of tourist passenger for which Eurostar services may in practice be substitutable for those of the ferries and Le Shuttle. For the larger proportion of customers the services will not be sufficiently substitutable for Eurostar to be considered as being within the same relevant market as the ferries and Le Shuttle.

4.2.3. Geographic aspect

(32) The volume of the Short French Sea services, their frequency, speed of crossing and price mean that the Western Channel and North Sea routes cannot be considered substitutable. The reduced crossing time offered by the fast ferry services on the Newhaven/Dieppe and Ramsgate/Ostend routes mean that those services offer a significant degree of competition to services on the Dover/Calais and Folkestone/Calais routes, and should be included in the relevant Short Sea market.

(33) The duration of crossing of the Short Sea services is 35 minutes by Le Shuttle or Hoverspeed hovercraft, 50 to 55 minutes by Hoverspeed fast ferry to France, 75 to 90 minutes by Dover/Calais conventional ferry, 100 minutes by Ramsgate/Ostend fast ferry, 125 minutes by Dover/Ostend fast ferry and 135 minutes by Newhaven/Dieppe fast ferry. The short crossing time means that these routes are in particular preferable for those passengers who travel primarily in order to buy duty-free goods and products charged lower rates of duty in France.

(34) By comparison, crossing times on other services are:

Harwich/Hook of Holland Stena HSS (high speed sea service):	3 hours 40 minutes
Poole/Cherbourg:	$4^1/_2$ hours
Portsmouth/Cherbourg:	5 hours (7 to 8 hours overnight) (2 hours 25 minutes by fast ferry)
Portsmouth/Le Havre:	$5^1/_2$ hours ($7^1/_2$ to 8 hours overnight)
Portsmouth/Caen:	6 hours
Hull/Zeebrugge:	13 to 15 hours (overnight)

(35) The Short French Sea ports, particularly Dover, Folkestone and Calais, have good motorway access. The Short French Sea offers the widest choice of type of service (conventional ferry, fast ferry and tunnel), and significantly higher frequencies than on North Sea and Western Channel routes. The high frequencies mean that passengers increasingly travel without having pre-booked ('turn up and go')

(36) These characteristics of the Short Sea routes means that customers have been attracted to using these routes. Prices on Short Sea services would have to rise very significantly before customers would switch to other routes on the Western Channel or North Sea, and certain categories of customers (such as day-trippers) would respond to price rises by deciding not travel at all rather than by switching to the other routes.

4.3. *Freight market*

(37) The parties carry freight on ro-ro ferries. Ro-ro services compete with other means of transporting unitised freight ([9]). Unitised freight (as opposed to bulk freight) is stored, for the purpose of transportation, in one of a variety of standardised modes including driver-accompanied vehicles, unaccompanied trailers and containers. Unitised freight can be carried on ro-ro vessels and lo-to (lift-on, lift-off) vessels, and via the Channel Tunnel on Le Shuttle Freight services and freight trains.

(38) Short Sea freight services compete with other Anglo/continental freight services, that is, services between England and mainland Europe (Western Channel, Short Sea and North Sea routes) ([10]).

II. LEGAL ASSESSMENT

5. Article 85(1) of the Treaty

(39) The formation of the joint venture constitutes a restriction of competition within the meaning of Article 85(1) because the parties were actual competitors on the relevant markets on which the joint venture operates.

(40) That restriction of competition is appreciable. The parties have a high combined market share (even if their combined market share on the Short Sea declined following the market entry of Eurotunnel). The joint venture is a full function joint venture which operates in the same freight transport market as its parents, and in a neighbouring passenger transport market to those in which its parents operate.

(41) The formation of the joint venture has an effect on trade between Member States given the importance of the parties in the Short Sea tourist market and in the Anglo/Continental freight market ([11]).

6. Absence of spillover

(42) The Commission has concluded that no restriction of competition within the meaning of Article 85(1) arises out of the risk that the parties' cooperation within the joint venture might spill over into the parties' independent tourist passenger services on the North Sea, Western Channel and Irish Sea and their independent freight services on the Anglo/Continental freight market.

6.1. *North Sea tourist services*

6.1.1. Market

(43) In 1997, North Sea services carried 470 000 tourist vehicles and 2,32 million passengers. The North Sea services comprise those on routes between ports on the east coast of England and ports in Belgium and the Netherlands. Services to Hamburg and Esbjerg (operated by Scandinavian Seaways) are not considered to be part of the same market. It is likely to be only a small proportion of tourist travelling on P&O's and Stena's services to Belgium and the Netherlands who would find services to Hamburg and Esbjerg to be substitutable.

(44) The prices which operators on the North Sea routes may charge is constrained by the prices prevailing on the Short Sea. It is clear from data provided by the parties that rates achieved by the operators on the North Sea between 1994 and 1996 have followed very closely the rates achieved on the Short Sea. Market studies also support the argument that passengers travelling to and from the catchment areas traditionally associated with the North Sea routes have been switching to the Short. Sea in recent years. However, the reverse is not evident, which suggests one-way substitutability i.e. the North Sea is constrained by the Short Sea, but not vice versa. Tourist services on the North Sea routes should therefore be considered to operate within a relevant market consisting of North Sea and Short Sea routes.

([9]) See Commission Decision 97/84/EC (OJ L 26, 29.1.1997, p. 23) *'Ferry Operators — Currency Surcharges'*, paragraph 5.

([10]) See footnote 9. For the purposes of that Decision, the Commission considered the relevant geographic aspect of the freight market to be limited to services between England and France, Belgium and the Netherlands.

([11]) See the sixth recital in the preamble to Regulation (EEC) No 4056/86 describing the effect which restrictive practices concerning international maritime transport may have on Community ports.

(45) On the North Sea, P&O North Sea Ferries operates services on the Hull/Zeebrugge and Hull/Rotterdam routes. Stena Line operates on Harwich/Hook of Holland route, on which in 1997 it introduced HSS fast ferries. Scandinavian Seaways operates on Newcastle/Ijmuiden (Amsterdam). Olau and then Eurolink until 1996 operated on the Sheerness/Vlissingen route, and the P&O European Ferries Felixstowe/Zeebrugge route carried tourist vehicles until 1996. Market shares of North Sea tourist vehicles are as follows:

Table 1. North Sea and Short Sea tourist vehicle shares

	1997 (thousand PCU [1])	1997 (%)
P&O (North Sea)	226	3,15
Stena (North Sea)	205	2,86
Scandinavian Seaways (North Sea)	35	0,49
Eurotunnel	2 384	33,27
P&O (Short Sea)	1 738	24,25
Stena (Short Sea)	1 173	16,37
SeaFrance	580	8,09
Hoverspeed	528	7,37
Holyman Sally (Ramsgate/Dunkirk)	49	0,68
Holyman Sally (Ramsgate/Ostend)	248	3,46
Total	7 166	99,99

Source: The parties.
[1] Passenger car unit.

6.1.2. Assessment

(46) Any attempt by the parties to coordinate behaviour on the North Sea will be destabilised by competition from the Short Sea. Therefore it cannot be concluded that the creation of the joint venture will make it reasonably foreseeable that the parties will act in a way which they did not before the creation of the joint venture and in a way which brings about an appreciable restriction of competition between those parents. The parties' cooperation on the Short Sea is therefore unlikely to spill over onto their activities on the North Sea.

6.2. *Western Channel tourist services*

6.2.1. Market

(47) In 1997 Western Channel services carried 1,1 million tourist vehicles and 4,22 million passengers. The Western Channel services comprise routes to the west of the Short Sea between ports on the south coast of England and ports on the north coast of France.

(48) As with the North Sea, the evidence suggests that prices which operators on the Western Channel routes may charge is constrained by the prices prevailing on the Short Sea, but not vice versa. Tourist services on the Western Channel routes should therefore be considered to operate within a relevant market consisting of Western Channel and Short Sea routes.

(49) Only P&O European Ferries and Brittany Ferries operate services on the Western Channel routes. Until 1996 Stena Line operated on the Southampton/Cherbourg route. Since then it has considered operating a fast ferry on the route. Market shares of Western Channel tourist vehicles are as follows:

Table 2. Western Channel and Short Sea tourist vehicle shares

	1997 (thousand PCU)	1997 (%)
Brittany Ferries (Western Channel)	702	8,95
P&O (Western Channel)	440	5,61
Eurotunnel	2 384	30,4
P&O (Short Sea)	1 738	22,16
Stena (Short Sea)	1 173	14,96
SeaFrance	580	7,4
Hoverspeed	528	6,73
Holyman Sally (Ramsgate/Dunkirk)	49	0,62
Holyman Sally (Ramsgate/Ostend)	248	3,16
Total	7 842	99,99

Source: The parties.

6.2.2. Assessment

(50) In relation to the Western Channel, the parties argue that there cannot be any coordination of P&O's and Stena's operations since Stena is no longer active on those routes. Stena should, however, be considered a potential competitor given that it has considered (and can presumably reconsider) whether to re-enter the Southampton/Cherbourg route with a fast ferry service.

(51) However, the same considerations apply to the Western Channel, as to the North Sea. Any attempt by the parties to coordinate behaviour on the Western Channel will be destabilised by competition from the Short Sea. The parties' cooperation on the Short Sea is therefore unlikely to spill over onto their actual or potential activities on the Western Channel.

6.3. *Irish Sea tourist services*

6.3.1. Market

(52) The Irish Sea can be divided into three relevant tourist markets: the Northern, Central and Southern Corridors ([12]). In 1997 services on the three corridors carried respectively 590 000, 460 000 and 380 000 tourist vehicles and 2,7, 2,8 and 1,5 million passengers. Market shares in the three corridors are as follows:

Table 3. Northern Corridor Irish Sea tourist vehicle market shares (%)

	Routes currently operated	1995	1996	1997
Stena	Belfast/Stranraer	52	47	46
P&O	Larne/Cairnryan	28	33	30
Sea Containers (SeaCat Scotland)	Belfast/Stranraer	18	18	21
Norse Irish Ferries	Belfast/Liverpool	2	2	3

Source: P&O; for 1997, Passenger Shipping Association.

([12]) See Commission Decision 94/19/EC, *'Sea Containers v. Stena Sealink'*, (OJ L 15, 18.1.1994, p. 8) paragraphs 11 and 13.

Table 4. Central Corridor Irish Sea tourist vehicle market shares (%)

	Routes currently operated	1995	1996	1997
Stena	Dublin/Holyhead Dun Laoghaire/Holyhead	68	68	64
Irish Ferries	Dublin/Holyhead	32	32	31
Sea Containers (Isle of Man Steam Packet Company)	Dublin/Liverpool	—	—	5

Source: P&O; for 1997, Passenger Shipping Association.

Table 5. Southern Corridor Irish Sea tourist vehicle market shares (%)

	Routes currently operated	1995	1996	1997
Stena	Rosslare/Fishguard	60	52	45
Irish Ferries	Rosslare/Pembroke	25	27	42
Swansea Cork Ferries	Cork/Swansea	15	17	13

Source: P&O; for 1997, Passenger Shipping Association.

(53) Stena is present with mixed freight/passenger services on all three corridors (as well as the largely freight-only Holyhead/Dublin route on the Central Corridor). P&O operates tourist services only on the Northern Corridor (in addition, P&O's Pandoro subsidiary operates freight-only services in the Northern and Central Corridors).

(54) Ferry operators on the Irish Sea offer landbridge services from Ireland to mainland Europe combining a crossing on their Irish Sea services with a crossing on a Britain/Continent service. The proportions of landbridge traffic carried by the principal operators on the Irish Sea, together with their partners for the leg between Britain and the mainland, are as follows:

Table 6. Landbridge services on the Irish Sea

	Landbridge traffic 1997 (%)		Tourist operator on Britain/Continent legs
	Tourist	Freight	
Stena	[...]	[...]	Stena, Brittany Ferries
P&O	[...]	[...]	P&O, Scandinavian Seaways
Sea Containers	0,4	n/a	Hoverspeed, Scandinavian Seaways
Irish Ferries	[...]	[...]	Eurotunnel, P&O, Scandinavian Seaways
Swansea Cork	7,4	13,6	P&O, Hoverspeed, Sally, Brittany Ferries

Source: The operators and their brochures. Swansea Cork figures are for 1997 January to June. Stena figures are for Southern and Central Corridors.

(55) Landbridge tickets, at least on the Central and Southern Corridors, account for an appreciable, albeit low, proportion of Irish Sea tourist traffic, and a higher proportion of freight. Landbridge tickets account only for a small proportion (less than 1 %) of Short Sea tourist traffic.

6.3.2. Assessment

(56) The only corridor on which both parties offer tourist services is the Northern Corridor. Almost all tourist traffic carried on the Northern Corridor is intra-United Kingdom traffic:

Table 7. Northern Corridor Irish Sea passengers originating in Ireland

	(%)	Number
Stena	[< 5]	[< 60 000]
Sea Containers	2	

Source: Stena, Sea Containers.

(57) In view of the low proportion and low amount of inter-State traffic using the Northern Corridor tourist routes, it can be concluded that there is no appreciable effect on inter-State trade.

6.4. *Anglo/Continental freight market*

6.4.1. Market

(58) The Anglo/Continental freight market is characterised by strong price competition, low barriers to entry, and purchasing power on the part of larger customers.

(59) The market shares of operators of freight services on Anglo/Continental routes are as follows:

Table 8. Anglo/Continental freight market 1996 (January to October) and 1997

Operator	1996			1997		
	Volume (thousand freight units)	Market shares (%)		Volume (thousand freight units)	Market shares (%)	
		A	B		A	B
Eurotunnel	426	15		268	7	
North Sea Ferries	248	9		685	17	
P&OEF (Felixstowe) [1]	204	7				
P&OEF (Portsmouth)	122	4	20	157	4	21
P&OEF (Dover)	476	17		873	21	
Stena Short Sea	207	8	25	357	9	30

Operator	1996			1997		
	Volume (thousand freight units)	Market shares (%)		Volume (thousand freight units)	Market shares (%)	
		A	B		A	B
Stena Western Channel	12	—		—	—	
Stena BV	77	3	3	112	3	3
SNAT/SeaFrance	107	4		393	10	
Brittany Ferries	125	4		181	4	
Sally	101	4		117	3	
Ostend Line	64	2		—	—	
Cobelfret (2)	146	5		210	5	
Olau/Eurolink (2)	29	1		—	—	
Maersk	63	2		90	2	
Bell Line (2)	45	2		70	2	
Geestline (2)	45	2		70	2	
UTL/IFF (2)	57	2		85	2	
DFDS/Torline	58	2		90	2	
Other operators (2)	259	9		350	9	
Total		100	48		100	54

(1) P&O European Ferries (Felixstowe) is now part of P&O North Sea Ferries.
(2) Estimates.
Source: P&O and Stena. Column A shows the market share of each service, column B shows the aggregated market shares of each parents' retained services, and of the services which now make up the joint venture.

6.4.2. Assessment

(60) On the basis of the 1997 market shares, the joint venture would have had a 30 % share, P&O 21 %, and Stena 3 %. In that period Eurotunnel had a 7 % share (as compared to 15 % in the 10 months before the Tunnel fire), SeaFrance had a 10 % share and eight other operators had shares of between 2 and 5 %. Even if the joint venture and the parties were to coordinate their behaviour, they would be unlikely to be able to raise prices without losing their customers to competitors.

7. **Article 85(3) of the Treaty: Short Sea tourist market**

7.1. *Improvement in the production or distribution of goods, or promotion of technical or economic progress*

(61) The first and second conditions of Article 85(3) require an assessment of the efficiencies and other benefits that can be expected from merging the parties' separate ferry operations on the Short Sea, and the extent to which those efficiencies will benefit consumers.

(62) The creation of the joint venture will bring about benefits, notably the improved frequency to be offered by the joint venture, continuous loading, and estimated cost savings of GBP [...] million. The overall positive benefits will arise even were the joint venture to decide to stop operating on the Newhaven/Dieppe route.

7.2. *Allowing consumers a fair share of the resulting benefit*

(63) Customers can be expected to benefit from the improved frequency and continuous loading. Customers can be expected to benefit from the cost savings to the extent that the joint venture will be faced by effective competition.

7.3. *No restrictions which are not indispensable*

(64) The third condition of Article 85(3) requires consideration of whether less restrictive alternatives are available to achieve the benefits of the proposed joint venture.

(65) The Commission considers that lesser forms of cooperation between P&O and Stena, such as joint scheduling, interlining or pooling, would be unlikely to lead to the benefits to be achieved by the joint venture. In particular, any form of cooperation less than a joint venture would not achieve the savings in administration and marketing, which represent a significant part (GBP [...] million) of the estimated GBP [...] million costs savings.

(66) Under the agreement, P&O and Stena undertake not to be involved directly or indirectly (other than through the joint venture) with the provision of ferry services calling at any port on the English coastline between (and including) Newhaven and (but excluding) Harwich or on the European mainland coastline between (and including) Dieppe and (but excluding) Zeebrugge. The joint venture's activities are limited to the provision of ferry services on the Dover/Calais, Dover/Zeebrugge and Newhaven/Dieppe routes. These restrictions can be regarded as necessary for the creation of the joint venture.

7.4. *No elimination of competition in respect of a substantial part of the products in question*

(67) The fourth condition of Article 85(3) requires an assessment of whether the proposed joint venture can be expected to be faced with effective competition in the Short Sea tourist passenger market.

(68) In its 'letter of serious doubts' the Commission stated its concern that the creation of the joint venture could lead to a duopolistic market structure conducive to parallel behaviour of the joint venture and Eurotunnel. This issue is addressed in the following section.

8. **Risk of creation of duopoly on the Short Sea tourist market**

8.1. *Market concentration before and after the creation of the joint venture*

8.1.1. Operators' positions on the market before the creation of the joint venture

(69) The most important recent change to the market for cross-channel ferry services has been the opening of the Channel Tunnel in 1994. Other major changes have been the ending, on 31 December 1995, of the pooling arrangement between Stena and Société Nouvelle d'Armement Transmanche (SNAT; now SeaFrance), and the ending, on 1 March 1997, of the pooling arrangement between Sally Line and Regie Voor Maritiem Transport (RMT).

(70) Since 1993 there have been large increases in capacity and market volume, and consumers have benefited from price reductions. From 1993 to 1996, passenger vehicle numbers increased from 3,6 to 5,8 million, and passenger numbers from 20,3 to 30,2 million (of which 8,7 million were accounted for by Eurotunnel). In the first half of 1997, passenger vehicle numbers increased by 11,6 % as compared to the same period in 1996.

(71) Table 9 shows the market shares of operators of tourist services on the Short French Sea for different periods since 1994.

Table 9. Short French Sea: market share of tourist vehicles

	1993	1994	1995	1996 to October	October 1996	1997
Eurotunnel	0,0	0,0	25,9	39,3	45,5	36,9
P&O	45,5	49,3	35,7	26,5	23,7	26,9
Stena	20,4	19,7	15,0	19,5	16,6	18,2
SNAT/SeaFrance	14,4	15,2	11,6	5,5	6,8	9,0
Hoverspeed	11,8	9,5	6,5	6,0	4,6	8,2
Sally/Holyman Sally	7,9	6,3	5,3	3,2	2,8	0,8
Total	100	100	100	100	100	100

Source: P&O and Stena.

(72) The market share figures considered in Table 9 relate to the Short French Sea and thus do not include Holyman Sally's service on the Ramsgate/Ostend route. It started a new fast ferry service on 1 March 1997. The service ended in March 1998 and was replaced from 6 March 1998 by a fast ferry service between Dover and Ostend jointly owned by Holyman and Hoverspeed. Sally then continued to operate a freight service on the Ramsgate/Ostend route (which also carried passengers from late June 1998) until the service was closed on 20 November 1998.

(73) Since the opening of the Channel Tunnel in 1994, Eurotunnel gained market share until the Tunnel fire in November 1996. The year-by-year growth in Eurotunnel's market share masks uneven monthly fluctuations. For example, Eurotunnel lost market share from February to May 1996. Eurotunnel's market share in 1997 (37 %) was lower than its market share immediately before the fire (46 %). Eurotunnel's market share can be expected to return to its level before the fire and to resume growth.

(74) P&O's market share fell from 46 % in 1993 to 27 % in 1996 (first 10 months). In the 1997 its market share was 27 % notwithstanding the effects of the Tunnel fire. Stena sustained its market share at around 20 % over the period 1993 to 1996 (first 10 months), but with a drop to 15 % in 1995. Its rise to 20 % in 1996 (notwithstanding Eurotunnel's increased market share) can be attributed to its success in attracting customers of the Stena/SNAT pool after it broke up at the end of 1995. Stena was less successful than the other Dover/Calais ferry operators in increasing its market share as a result of the Tunnel fire.

8.1.2. Degree of concentration on the market: size and distribution of market shares

(75) The creation of the joint venture reduced the number of operators on the market from six to five. More significantly, on the basis of 1997 market shares, the creation of the joint venture increased the combined market share of the two largest operators from 64 % (Eurotunnel and P&O) to 82 % (Eurotunnel and joint venture). Furthermore, the creation of the joint venture changes the variation of market share sizes. Before the joint venture there is one clear leader (37 %), and a spread of sizes of smaller operators (27 %, 18 %, 9 %, 8 %, 1 %). After the joint venture, the difference in size between the top two operators is reduced (from over 10 % difference, to 8 %). The distribution of operators becomes one of two leaders (45 %, 37 %), followed a long way behind by three operators (9 %, 8 %, 1 %).

8.1.3. Instability of market shares

(76) The parties point to the instability of market shares in recent years and the unlikelihood that they will be stable in the future. They point out that Eurotunnel's prospectus has referred to an intent to reach a market share of 70 %, and state that other operators have made investments predicated on them increasing their market shares. They thus consider that the ferry operators and Eurotunnel do not have a community of interest in maintaining market shares or prices.

(77) Market shares have not been stable due in particular to the entry of Eurotunnel onto the market. The growth in Eurotunnel's market share has not been linear; in particular the Tunnel fire caused a reduction in its market share. The ending of the StenalSNAT pool also caused instability in market shares.

8.2. *Factors affecting competition between the joint venture and Eurotunnel*

8.2.1. Pricing practices and market transparency

(78) There are three main fare categories:

(a) Published brochure fares. Prices typically vary according to time of year, time of day, length of stay and type of vehicles and number of passengers. Brochures include discounted fares applicable to early bookings. Brochure fares are used as the basis for fare reductions for groups of 10 or more travelling together in a minibus or coach.

(b) Promotional fares. These include day trip and longer stay promotions offered in conjunction with newspapers, offers advertised in the national and local press, duty-free discounts, discounts offered in brochures (including early booking fares), and discounts offered for example through certain organisations such as motoring organisations. In 1996 the parties developed policies of matching competitors' fares, and direct sales staff have been given discretion to negotiate rates within defined limits.

(c) Negotiated rates for ITX operators (that is, travel companies offering self-drive holidays with an inclusive price for a sea crossing and accommodation), coach package holiday operators and scheduled coach operators. Rates for ITX operators are typically agreed in the summer of the preceding year.

(79) The situation in the tourist market differs from that in the freight market where almost all prices are negotiated individually between operator and freight haulier.

(80) Parallel behaviour is more difficult when transactions are large, infrequent and not published. The ferry operators' contracts with ITX operators and larger coach operators meet those conditions. However, the published brochure and promotional prices are still significant and the ITX and coach categories form only a limited part of operators' traffic and ticket revenue.

(81) Cars constitute the large majority of tourist vehicles carried on the Short Sea routes: 94 % for P&O (1996 to October), 96 % for Stena (1996 to October) and 97 % for Eurotunnel (1996). Apart from those vehicles travelling on bookings made through ITX operators, [. . .] % for P&O in 1995, and [. . .] % for Stena in the 1995 peak season), and the limited number of 'closed' promotions (that is, promotions limited to a category of persons and thus not generally publicised), the carriage of tourist cars is a market in which transactions are small and frequent, and at prices that are transparent to other operators. These features indicate market transparency.

(82) It is not only the brochure prices that are transparent to other operators. Promotions will be advertised and thus capable of being monitored by competitors. Operators also have access to monthly figures for the volumes carried by their competitors, allowing them to monitor effects of shifts in relative prices.

8.2.2. Capacity constraints

(83) The parties argue that Eurotunnel has 'vast unutilised capacity' which, together with its high frequency of crossings, is one of the factors that gives it exceptional market power in the Short French Sea tourist market. Further, the parties argue that the different available capacities and different rates of capacity utilisation held by Eurotunnel and the ferry operators will result in Eurotunnel and the ferry operators having significant incentives to adjust their pricing strategies so as to grow volumes, fill unutilised capacity and maximise contributions to fixed costs.

8.2.2.1. Nature and distribution of capacity

(84) The entry on stream of the capacity of Eurotunnel was accompanied by increased capacity offered by the ferries. Table 10 gives the figures for 1996 provided by the various operators. When considering the figures in Table 10, the following should be borne in mind. The Tunnel fire in November 1996 meant that Eurotunnel's capacity was reduced as compared to a full year of operation. SeaFrance low capacity utilisation rate is at least in part due to its having started operations only in 1996; in the first half of 1997 its capacity utilisation rate was 59 %.

Table 10. Short Sea — 1996 capacity and carryings

	Capacity (million PCU)	Carryings (million PCU)	Capacity utilisation (%)
Eurotunnel	9,12	4,94	54
P&O	11,8	5,1	43
Stena	7,09	2,79	39
SeaFrance	4,05	1,26	31
Hoverspeed	0,67	0,36	53
Sally and Sally/RMT	3,16	1,22	38
Total	35,9	15,7	44

Source: The operators

(85) The capacity offered varies in nature. Eurotunnel uses passenger-only or freight-only shuttles. Eurotunnel is able to decrease its capacity (in off peak periods) in relatively small amounts by removing trains, with only small changes to the frequency of departures. The parties and SeaFrance use multi-purpose vessels which can carry both passengers and freight. The size of these vessels means that capacity comes in larger lumps, making it more difficult to reduce capacity in off peak periods whilst keeping an acceptable frequency.

(86) The capacity utilisation rates indicated in the table are nominal figures calculated by dividing the total carryings by the total nominal capacity of each operator's service(s). In practice, operators are unable to use 100 % of their nominal capacity, and so the effective utilisation rates are higher than those indicated.

(87) The parties argue that Eurotunnel and the joint venture can be expected to have considerable spare capacity over a full year. They estimate that in 1997, had the joint venture gone ahead, each of Eurotunnel and the joint venture would have had a 46 % capacity utilisation rate (for comparison, the parties' actual 1996 capacity utilisation rates were 43 % (P&O) and 39 % (Stem)). However, it is relevant to consider the capacity utilisation at peak periods in order to assess whether the operators will at those times have scope to attract additional passengers by decreasing prices; this is considered in points 91 to 99.

(88) Eurotunnel's capacity is determined by the Tunnel system. The necessity to offer a competitive frequency means that a ferry operator has to operate at least three conventional ferries or two fast ferries. A ferry operator has an incentive to maximise the capacity of each individual vessel, in order to lower unit costs. An operator then has to set prices in order to maximise its revenue from its chosen level of capacity (indeed the expected revenues will also been taken into account in the initial decision as to capacity). Prices can be changed more rapidly and flexibly than capacity.

(89) Firms faced with excess capacity will normally have an incentive to cut prices to fill that excess capacity. Where possible they will seek to price discriminate between customers (for example by promotional fares) in order to maximize revenue. Where prices are transparent, any price cuts will provoke rapid retaliation. All these effects appear to have occurred since the end of 1995 when the increased capacity of the ferry operators coincided with the entry of the capacity of Eurotunnel. This has brought benefits for consumers as prices have fallen.

(90) The ferry operators have had the further incentive to compete amongst themselves in order to signal their commitment to the market and to position themselves for a possible ferry rationalisation.

8.2.2.2. Capacity at peak periods

(91) Eurotunnel and the joint venture have sufficient capacity to cater for twice the 1996 level of demand during the year. It must be considered whether

there is sufficient capacity at critical times of the year, such as peak periods, which would make it more likely that those operators would raise prices in parallel than compete for volume.

(92) Eurotunnel defines a capacity restriction as arising when it cannot accept all traffic that turns up on the next or immediately following shuttle. 'Peak times' are defined as weekends in July and August. This does not correspond with a situation where demand exceeds supply in a structural way. Eurotunnel introduced a reservation system in order to avoid some of the congestion problems experienced at peak times in 1996, and states that it has been successful, with about 50 % of traffic now pre-booked.

(93) Peak periods for the ferries occur only on a limited number of days during the year — mostly weekends between May and August — and then only for a few hours each day. Even at peak periods the consumer has a choice of fares and the ferry operators' fares are differentiated even on individual days. During the high season it remains possible to obtain at least three different brochure fares depending on the day and time of travel, in addition to promotional offers. A flexible traveller and the overwhelming majority of the traffic on Dover-Calais is leisure traffic can shop around to get the best deal and will not be faced by capacity constraints.

(94) Furthermore, the joint venture indicated that it had decided to operate a seventh multi-purpose vessel on the Dover/Calais route for the 1998 summer season because market growth rates in 1997 and 1998 had exceeded the parties original projections based on 1996 data. Thus it appears that the joint venture has in practice decided to increase capacity rather than be faced with capacity constraints.

(95) Eurotunnel and the ferry operators therefore have incentives to adjust their pricing strategies so as to grow volumes rather than increasing prices. The existence of spare capacity could restrain any attempt by either operator individually to raise prices because its competitor would have the necessary spare capacity at its disposal to carry customers who switch.

(96) That conclusion holds provided that Eurotunnel does not reach its capacity limits for operating Le Shuttle tourist services. On the basis of Eurotunnel's own projections, that would not seem likely. Eurotunnel's financial restructuring proposals included projections that it would continue to increase its market share of tourist vehicles on the Dover/Folkestone to Calais route. It projected that traffic growth would be significantly lower in the 1996 to 1999 period as compared to the preceding three years, would fall in 2000 due to the effects of duty-free abolition, and then would resume annual growth of less than 5 %. On that basis it projected its market share on the Dover/Folkestone to Calais route to continue to grow, reaching 63 % in 2000, 67 % in 2002 and 70 % in 2006. Eurotunnel has not announced any short-term plans for investments to increase Le Shuttle tourist capacity; as stated above, it is aiming to spread tourist demand away from peak periods. In the longer term, it could increase capacity by investing in new signalling (to increase the frequencies of train paths in the Tunnel) and in new tourist shuttles.

(97) However, if market growth were to be considerably higher than that for which Eurotunnel has planned, then Eurotunnel could find that Le Shuttle tourist services became capacity constrained before it was willing or able to increase capacity. The most important factor influencing demand is likely to be the ending of duty-frees; other factors will include changes in disposable incomes, holiday patterns and the erosion of cultural barriers between the two sides of the Channel.

(98) At off peak times, both the joint venture and Eurotunnel have clear incentives to increase loads due to their low load factors. A sizeable part of the ferry operators' income (60 %) is made in periods which are off peak. This is largely due to the importance of on-board spending by passengers. Given that load factors in these periods are only 50 %, raising prices would be a risky strategy in that it might (a) deter passengers who would have travelled only for the purpose of buying duty-free goods, and (b) shift demand to rival operators. Revenues during the peak June-August period amount only to 40 % of the ferries' annual revenue.

(99) After 1999, if demand falls following the termination of duty-free sales, then (assuming no withdrawal of capacity) there will be increased overcapacity in the market. To the extent that it is possible to forecast, on-board spending will still be important to the ferries, and Eurotunnel may also have developed its retailing activities in its terminals in the meantime. In such a scenario, both parties would therefore still have an incentive to maximise load factors in order to increase revenues. However, the outcome may be different if demand for cross-Channel travel were to increase strongly notwithstanding the loss of duty-free revenues. In such a scenario, Eurotunnel may find its Le Shuttle tourist service capacity constrained.

8.2.3. Cost structures

(100) Firms with differing cost structures are less likely to act in parallel ([13]). This section considers the costs structures of Le Shuttle and of the parties' Short Sea ferry operations.

(101) Le Shuttle's operating costs in 1996 were as follows.

Table 11. Le Shuttle operating costs, 1996

(4,9 million PCU carried)	million GBP	GBP per PCU
Directly attributable costs:		
— Travel agents' commission	[...]	[...]
— Terminal costs, Le Shuttle crew wages, retail commercial costs and sales staff, maintenance on rolling stock	[...]	[...]
— Depreciation on rolling stock	[...]	[...]
— Le Shuttle's share of Tunnel operating costs		
— Power, fuel, retail staff, Tunnel maintenance, insurance, operations	[...]	[...]
— Depreciation on Tunnel, equipment, etc.	[...]	[...]
— Administration and marketing	[...]	[...]
— Start up/exceptional costs	[...]	[...]
Total	[...]	

Source: Eurotunnel.

(102) The parties' operating costs in 1996 were as follows:

Table 12. Parties' operating costs 1996

(P&O: 3,9 million PCU carried) (Stena: 2,8 million PCU carried)	P&O		Stena	
	million GBP	GPB per PCU	million GBP	GPB per PCU
Travel agents' commission	[...]	[...]	[...]	[...]
Port taxes/port transit costs	[...]	[...]	[...]	[...]
Other product cost			[...]	[...]
Vessel operating costs (excluding depreciation)	[...]	[...]	[...]	[...]
Depreciation	[...]	[...]	[...]	[...]
Administration and marketing	[...]	[...]	[...]	[...]
Total	[...]		[...]	

Source: P&O, Stena. P&O figures cover Dover/Calais only; Stena figures cover Dover/Calais and Newhaven/Dieppe.

([13]) This is in particular because, if two firms have the same marginal cost function, they will both, by setting a profit-maximising cost where marginal cost equals marginal revenue, independently arrive at a price that maximises joint profits. If marginal costs differ and price differentials between the two firms are not sustainable, then firms will have difficulty agreeing on a price. See Scherer and Ross, *Industrial Market Structure and Economic Performance*, Third Edition, pp. 238 to 244.

(103) The parties consider variable costs to be those costs which vary according to the amount of traffic carried on the basis of a given level of investment. Both Le Shuttle and the ferries will have travel agents' commissions as such a cost. In addition, the parties will pay port taxes; on the basis of P&O's actual costs in 1996 on the Dover/Calais route, the parties calculate these to be approximately GBP [. . .] per PCU carried. The parties suggest that Le Shuttle may also have some very minor additional variable costs. The parties rightly conclude that on this basis Le Shuttle's variable costs are significantly less than those of the parties (and thus those that can be expected of the joint venture).

(104) The variable costs identified by the parties are the costs that are variable over the shortest of periods; they are in fact the same as marginal costs. The parties consider that it is these relative short-term variable costs of carrying incrementally more traffic that are important, because it is these costs that will determine pricing strategy.

(105) Table 13 shows the operators' per unit operating costs (as calculated above) divided into short-term variable costs (as defined above), semi-variable costs (for the ferries: vessel operating costs and other product cost; for Le Shuttle: terminal costs, Le Shuttle crew wages, retail commercial costs and sales staff, maintenance on rolling stock), overheads (administration and marketing; for Le Shuttle: Le Shuttle share of power, fuel, retail staff, Tunnel maintenance, insurance, and operations). Le Shuttle's share of Tunnel depreciation costs and its start up/exceptional costs are ignored as they can be considered respectively sunk costs and non-recurring costs.

Table 13. Operators' per unit operating costs, 1996 (GBP)

	P&O	Stena	Le Shuttle
Variable costs	[. . .]	[. . .]	[. . .]
Semi-variable costs	[. . .]	[. . .]	[. . .]
Overheads	[. . .]	[. . .]	[. . .]
Depreciation	[. . .]	[. . .]	[. . .]
Total	[. . .]	[. . .]	[. . .]

Source: Table 11 and 12.

(106) When the combined variable and semi-variable costs are considered, Le Shuttle's 1996 per unit operating costs at GBP [. . .] remain lower than those of P&O at GBP [. . .] and significantly lower than those of Stena at GBP [. . .]. Given the differences in variable and semi-variable costs, Eurotunnel may have more room to manoeuvre than the ferries when it comes to sustaining periods of low pricing. In addition, the composition of costs is quite different between Eurotunnel and the ferries, in particular with regard to the port dues which are paid by the ferries. There is also scope for further divergence in cost structures in the future, as the market evolves. Eurotunnel may therefore be tempted to try to increase market share by underpricing the ferries as it did from May 1996.

8.2.4. Conclusion as to competition between the joint venture and Eurotunnel

(107) In the light of the above, it can be concluded that the characteristics of the joint venture and Eurotunnel are such that they can be expected to compete with each other rather than to act in parallel to raise prices.

8.3. *Other actual and potential competitors*

(108) The degree of competition in the market will also be affected by the presence of other actual or potential competitors to the joint venture and Eurotunnel. This section first considers whether other operators already on the market can be expected to provide effective competition. Secondly, entry barriers are considered in order to assess whether new operators could be expected to enter the market.

8.3.1. Impact of competition from operators other than Le Shuttle

(109) At its start of operations, the joint venture was faced with four competitors: Le Shuttle, SeaFrance, Hoverspeed, and Holyman Hoverspeed.

(110) SeaFrance considers that the creation of the joint venture will progressively eliminate competing ferry operators, in particular SeaFrance, the only direct competitor on the Dover/Calais route, because of the frequency of the joint venture's sailings and the benefits the joint venture would derive from the renown of its parents' names.

(111) Sea Containers (the owner of Hoverspeed) has said that the creation of the joint venture can be supported if the position of other operators in the market were clearly protected. It is concerned that the joint venture could at any time start fast ferry services in direct competition to small niche operators, like Hoverspeed or Holyman Sally, with no incremental overhead expense. Therefore, through predatory pricing Hoverspeed and/or Holyman Sally could be driven out of business.

(112) The parties state that the joint venture will achieve cost savings necessary to meet the strong competition from Eurotunnel. They state that although competition to the joint venture will primarily come from Eurotunnel, the joint venture will also have to respond competitively to the actions of the three other ferry operators. The parties argue that those operators' recent investments indicate a clear commitment to stay in the market.

(113) If the parties' projections show that their own operations would not be sustainable if they continued on a stand-alone basis, that raises the question of how sustainable SeaFrance's position will be in particular after the ending of duty-free concessions in 1999.

(114) SeaFrance complains that it will be disadvantaged by the joint venture's proposed timetable of a departure every 45 minutes during 18 hours a day and hourly for the remaining time. P&O currently operates a 45 minute frequency at peak times only. The 45 minute schedule allows for continuous loading. SeaFrance argues that to compete with the joint venture it would have to consider increasing its fleet to four or five vessels in order to be able to offer a competitive frequency.

(115) As a fast ferry operator, Hoverspeed may be better able to succeed in the more difficult market conditions after 1999. After the end of duty-free, customers may place more value on the higher speed offered by fast craft than on the more extensive leisure and retailing amenities on board the large multi-purpose vessels. Hoverspeed Holyman can exploit its geographic niche to Belgium.

(116) The extent to which the other ferry operators will provide effective competition after 1999 is uncertain. SeaFrance, which would compete the most directly against the joint venture, may be most at risk of being unable to remain in the market, notwithstanding that it was successful in increasing its market share in 1997. Hoverspeed, including Hoverspeed Holyman, may have scope to develop its market niches, but it can be doubted whether it can provide effective competition given its limited capacity.

(117) In conclusion, there is not a sufficient probability of effective competition from the other operators after 1999 to conclude that they alone would ensure that competition would not be eliminated.

8.3.2. Potential competition: entry barriers

(118) The creation of the joint venture releases ferry berths at each of Dover and Calais, and therefore access to berths would not, as it has been in the past, be an entry barrier.

(119) The minimum efficient scale for Short French Sea services is considered by the operators to be three conventional ferries or two fast ferries. The parties state that, other than relocating suitable ferries from other routes, the lowest cost entry would be by means of chartering three conventional ferries (at between GBP 5 to 10 million each per year

according to the parties) or two fast ferries (at between GBP 3,5 and 4 million according to the parties), or purchasing two fast ferries. Other alternatives include the purchase of second-hand ferries (the price of which would vary depending on the age and type of vessel), or, for existing ferry operators, relocating ferries currently used on other routes. Costs could be further increased by the need to comply with the new safety requirements arising out of the International Convention for the Safety of Life at Sea (SOLAS) and the Stockholm Agreement, and the possible need to convert cabin space in ferries built for longer routes to retail, amusement and sitting space more appropriate to the Short Sea.

(120) SeaFrance doubts the feasibility of using second-hand vessels, because they have to meet SOLAS standards if switched to a new route. It thus considers that the only feasible way to enter the market with multi-purpose vessels would be to purchase at least four vessels costing GBP 85 million each, a total of GBP 340 million.

(121) The SOLAS standards are applicable to all vessels (old and new) operating on international routes. The cost of meeting the standards would only be an additional cost if a ferry was switched from a domestic route on which it is not required to comply with SOLAS requirements.

(122) The parties acknowledge that the investments required in ferries are 'clearly material and have a degree of risk attached to them'. Although the parties state that the risk is limited by the fact that the ferries could be used on other routes and would have a resale value, switching ferries (back) to other routes may itself carry costs.

(123) The parties also consider that the fact that the other three existing ferry operators have all made investments in new ferries shows that the costs and risks of making investments in ferries do not constitute an insurmountable barrier to entry. The costs and risks faced by a potential new entrant cannot, however, be usefully compared to existing players investing in incremental capacity increases and improved services. Unlike an existing player adding say a fourth ferry, a new entrant, in order to operate the minimum scale of operation, would introduce a lump of new capacity relatively large in relation to the market thus making retaliation more likely and so increasing the risk of the entry.

(124) A new entrant would have to establish marketing and sales operations. The parties consider that advertising would be likely to cost GBP 1 to 2 million per year. At least during start-up, spending on advertising relative to sales would probably be higher relative to sales than the average for the industry. Marketing costs would be lower for a new entrant which was an existing ferry operator with an established marketing and sales operations and known name.

(125) The creation of the joint venture should not in itself alter the financial costs (both for ferries and for marketing and sales) of new entry.

(126) In conclusion, entry barriers for companies not already in the ferry industry can be considered high, making new entry from such a source unlikely. Entry barriers would be lower for an existing ferry operator which was able to switch from other routes vessels already meeting modern safety requirements. For such an operator, the entry costs would be limited to the costs of any necessary conversions for Short Sea operations, and marketing and sales costs. Any new entry would seem more likely to be by way of a take-over of, or a joint venture with, an existing operator (as was the case with Holyman Sally).

8.4. *Conclusion on the risk of duopoly*

(127) The Commission considers that characteristics of the market are such that the joint venture and Eurotunnel can be expected to compete with each other rather than to act in parallel to raise prices. First, although a more concentrated market structure is brought about by the creation of the joint venture, with Eurotunnel and the joint venture each having similar large market shares, market shares have not been stable in recent years. Secondly, Eurotunnel and the joint venture are

unlikely both to face significant capacity restraints and they have different cost structures. Thirdly, other ferry operators can, at least until 1999, be expected to provide competition. The proposed joint venture can therefore be expected to be faced with effective competition in the Short Sea tourist passenger market. The Commission therefore considers that the fourth condition of Article 85(3) of the Treaty is fulfilled.

(128) An important change in market conditions will occur when duty-free concessions are abolished in mid-1999. The effects of the loss of revenue from duty-free sales is uncertain. It seems likely that ticket prices will rise ([14]) and some operators have stated that prices will be likely to rise in the order of 30 to 40 % ([15]). Price increases would, however, decrease the number of tourist passengers and operators have strong incentives to limit any price increases by reducing costs and to developing alternative sources of revenue.

(129) The abolition of duty-free concessions may have knock-on effects on competition between the joint venture and Eurotunnel in one or more of the following ways. First, Eurotunnel might find its Le Shuttle tourist service capacity constrained if demand for cross-Channel travel were to increase more strongly than it has projected and notwithstanding possible prices increases due to the loss of duty-free revenues. Secondly, to the extent that operators are not successful in developing revenue sources to replace duty-free sales, they will have less incentive to maximise load factors in order to increase revenues. Thirdly, the extent to which the other ferry operators will after 1999 be able to provide effective competition to the joint venture and Eurotunnel is uncertain.

(130) The Commission therefore considers it appropriate in this case to limit the duration of the exemption to three years from the date of implementation of the agreement, that is from 10 March 1998. This will enable the Commission to assess the impact of the joint venture on the Short Sea tourist market after the 2000 summer season, by which time the full effects of the end of duty-free concessions on market conditions can be expected to be known.

([14]) See for example the comments of P&O Stena Line Managing Director Mr Russ Peters 'Prices are going to go up as and when duty-free is abolished, but they will still have to be at a market price that people will pay' (*Lloyd's List*, 24 April 1998).

([15]) Sally Chairman and Chief Executive Mr Bill Moses is quoted as saying 'The task is to replace the average on board spend of about GBP 18 per person and I believe passenger fares will have to go up as much as 45 %' (*Lloyd's List*, 23 May 1998); SeaFrance Managing Director Mr Robin Wilkins is reported as predicting that 'passengers will have to pay 30 % more to cross the Channel when duty-free sales are abolished' (*Lloyd's List*, 5 May 1998).

9. **Article 85(3) of the Treaty: Anglo/Continental freight market**

(131) In relation to this market the joint venture does not risk eliminating competition and the other conditions for exemption pursuant Article 85(3) are fulfilled.

9.1. *Improvement in the production or distribution of goods, or promotion of technical or economic progress*

(132) The creation of the joint venture will bring about benefits, notably the improved frequency to be offered by the joint venture, continuous loading, and the projected cost savings. These benefits will accrue to freight customers.

9.2. *Allowing consumers a fair share of the resulting benefit*

(133) Freight customers can be expected to benefit from the improved frequency and continuous loading, and can be expected to benefit from the cost savings to the extent that the joint venture will be faced by effective competition.

9.3. *No restrictions which are not indispensable*

(134) As concluded in point 65, lesser forms of cooperation, such as a joint scheduling, interlining or pooling, would be unlikely to lead to the benefits to be achieved by the joint venture. In particular, any form of cooperation less than a joint venture would not achieve the savings in administration and marketing.

9.4. *No elimination of competition in respect of a substantial part of the products in question*

(135) The Anglo/Continental freight market is characterised by strong price competition, low barriers to entry, and purchasing power on the part of larger customers. The joint venture will face competition from other operators including Eurotunnel, SeaFrance and the parties' retained services. Competition in the Anglo/Continental freight market will therefore not be eliminated.

10. **Conclusions**

(136) For the reasons set out above, the Commission finds that the parties' proposed joint venture infringes Article 85(1) of the Treaty but is capable of exemption pursuant to Article 85(3).

(137) Pursuant to Article 13 of Regulation (EEC) No 4056/86, a decision applying Article 85(3) of the Treaty is to indicate the period for which it is to be valid; normally such period should not be less than six years. The exemption in this case should take effect from the date of implementation of the agreement and, for the reasons given at points 128, 129 and 130, its duration should be limited to three years,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85(3) of the Treaty, the provisions of Article 85(1) of the Treaty are hereby declared inapplicable for the period 10 March 1998 to 9 March 2001 to the creation of the P&O Stena Line joint venture as notified to the Commission by The Peninsular and Oriental Steam Navigation Company and Stena Line Limited.

Article 2

This Decision is addressed to:

— The Peninsular and Oriental Steam Navigation Company
78 Pall Mall
London SW1Y 5EH
United Kingdom;

— Stena Line Limited
Charter House
Park Street
Ashford
Kent TN24 8EX
United Kingdom.

Done at Brussels, 26 January 1999.

For the Commission

Karel VAN MIERT

Member of the Commission