

COMMISSION DECISION
of 11 June 1992
relating to a proceeding under Article 86 of the EEC Treaty
(IV/34.174 - Sealink/B&I - Holyhead : Interim measures)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No. 4056 of 22 December, 1986, laying down detailed rules for the application of Articles 85 and 86 of the EEC Treaty to maritime transport⁽¹⁾,

Having regard to the application of B&I Line plc dated 6 January, 1992, alleging an infringement of Article 86 of the Treaty by Sealink Harbours Ltd. and Sealink Stena Ltd. and requesting the Commission to adopt interim measures,

Having regard to the Commission Decision of 9 April 1992 to open a proceeding in this case,

Having given Sealink Harbours Ltd. and Sealink Stena Ltd. the opportunity to make known their views on the objections raised by the Commission in accordance with Article 23(1) of Regulation No. 4056/86,

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

Whereas :

I. THE FACTS

A. The nature of the present Decision

(1) OJ No. L378, 31.12.86, p. 4/13.

1. This Decision provides for interim measures pending a final decision on the application made under Article 3 of Regulation No. 17/62 and Article 10 of Regulation No. 4056/86 by B&I Line plc against Sealink Harbours Ltd. and Sealink Stena Ltd., alleging an infringement of Article 86 of the EEC Treaty

B. The undertakings

2. B&I Line Plc ("B&I") of P.O. Box No 19, B&I Ferryport, Alexandra Road, Dublin 1, Ireland, is a shipping line incorporated in Ireland which was wholly owned by the Irish State until its acquisition by the Irish Continental Group ("ICG") on 31 January 1992.
3. Sealink Stena Line Limited ("SSL") of Charter House, Park Street, Ashford Kent TN24 8EX, United Kingdom is an operator of ferry services between Great Britain, Ireland and France. SSL's holding company is Sealink Stena Line (Holdings) Limited ("SSL Holdings").
4. Sealink Harbours Limited ("SHL") of Charter House, Park Street, Ashford Kent TN24 8EX, United Kingdom is the owner and operator of the port of Holyhead in the United Kingdom. SHL is owned 45 % by SSL Holdings and 55 % by SSL.
5. SSL and SHL have both been members of the group of companies controlled by Stena Line AB ("the Stena Group") of Sweden since their acquisition by the Stena Group from Sealink Ferries Limited in 1990.
Since SHL is owned 55 % by SSL and 45 % by the holding company of SSL, the two companies may be considered to be a single economic entity. In this context, SHL and SSL are referred to jointly as "Sealink".

C. The Background

6. B&I currently operates multi-purpose roll-on-roll-off (ro-ro) services between Dublin and Holyhead and between Rosslare (Ireland)

and Pembroke (United Kingdom) as well as a freight only ro-ro service between Dublin and Liverpool (in conjunction with Pandoro, a subsidiary of P&O). The Dublin-Holyhead route is operated by B&I using one ship, the "Leinster" which sails two round trips per day.

7. SSL currently operates a multi-purpose ferry service between Holyhead and Dun Laoghaire (Ireland) using two ships, the "Stena Hibernia" and the "Stena Cambria". The former operates two round trips daily all year round. The latter operates one round trip daily during the off-peak period and two round trips daily during the peak season. In addition SSL also operates a multi-purpose ferry service between Rosslare and Fishguard (United Kingdom) using the "Stena Felicity".
8. The published voyage times for both lines operating from Holyhead are 3 hours 30 minutes. The scheduled voyage time between Fishguard and Rosslare is also 3 hours 30 minutes, while the B&I service between Pembroke and Rosslare takes 4 hours 15 minutes, both operators usually offering two round trips per day.

The Port of Holyhead

9. There are navigational factors which restrict the efficiency of the port of Holyhead, in particular a shallow channel and a narrow approach channel.
B&I and SSL use two different berths in the port of Holyhead. SSL has always used the Station berth in the Inner Harbour adjoining the British Rail station; while B&I uses the Admiralty Pier berth in the Outer Harbour to which it gained access in 1989.
10. When B&I's vessel the "Leinster" is moored at Admiralty Pier berth, SSL's vessels the "Stena Hibernia" and the "Stena Cambria" sailing to and from the Station berth have to pass close by the "Leinster". Because of the narrow passage opposite the Admiralty Pier berth and channel depth limitations, the passing vessels' motion leads to the drawing away of water and appreciably increased turbulence, causing significant horizontal and vertical movements of the vessel at the Admiralty Pier berth.

11. Because of the degree of movement, B&I is required by SHL, as harbour owner and operator, to disconnect the linkspan to its ferry in Admiralty Pier berth while any other vessel passes the berth. During disconnection the loading or discharging of vehicles and passengers is prevented, and other necessary maintenance services are disrupted.

The Dispute - 1990, 1991

12. In the autumn of 1990 SSL announced its proposed schedule for 1991. B&I expressed concern that the new times for 1991 would result in the "Leinster" having to disconnect the linkspan twice each time it was berthed at Admiralty Pier in order to allow for two movements by SSL vessels.
13. SSL and SHL argued that B&I had applied to be berthed at Admiralty Pier at the times of SSL's existing vessel movements, so it was inevitable that B&I would face surge problems when other ships passed by. SHL said that the answer to B&I's problems lay in a technical solution which would involve altering the stern shape of the "Leinster" so that she would fit snugly into the fenders protecting the linkspan at Admiralty Pier, thus eliminating the need for the linkspan to be disconnected when other ships are passing by.
14. B&I argued that its decision to move to the Admiralty Pier berth did not oblige it to submit to any disruption over and above that inherent in the operation by SSL of its traditional schedule. B&I maintained that the decision to move to the Admiralty Pier berth in order to achieve sailing and arrival times closer to those of its choice was made against the background of SSL's refusal to make any change whatsoever in its traditional schedule. SHL's attitude in this context was significant in that it made clear in a letter dated 17th February 1989 to the Department of Tourism and Transport in Dublin that "no agreement will be given to vary sailing schedules if that alteration compromises the ability of [the] port to provide an acceptable level of service to all port users" (emphasis added by Sealink).

15. The Commission was approached by B&I about the situation and on 23 November 1990 wrote to SHL saying that under Article 86, of the EEC Treaty:

"a company or group which is in a dominant position and which owns or operates a facility or a part of an infrastructure which its competitors must use to carry on their business is obliged by Article 86 to grant access on a non-discriminatory basis to its competitors. Whether the dominance results from the ownership of a facility, or from other factors, is irrelevant. "Non-discrimination" means that the dominant company is obliged to treat its competitors as users of the facility on equal terms with its own operations".

16. Following the Commission's intervention, discussions between SSL, SHL, B&I and the Commission took place, ultimately resulting in a compromise solution being agreed.
17. The compromise solution was based on four criteria, namely:
- a) no more than one vessel to pass Admiralty Pier when the "Leinster" was berthed there;
 - b) the linkspan not to be disengaged for more than 15 minutes;
 - c) the linkspan not to be disconnected during discharge of the "Leinster" in the 45 minutes following its arrival on schedule, so as to enable discharge to be completed without interruption; and
 - d) in normal service, the linkspan not to be disconnected during the last 45 minutes prior to the scheduled departure time of the "Leinster", so as to provide an uninterrupted period for completion of loading and departure formalities.
18. This was agreed between SHL and B&I and recorded in a series of 12 plans annexed to a memorandum in relation to Holyhead port operations issued by SHL on 20 June 1991, prior to the implementation of SSL's modified timetable on 27 June 1991.

19. In addition SHL in a letter to B&I dated 13 February 1991 recorded agreement that:

"the B&I Line service will not suffer greater disruption in 1991 than 1990 as a result of Sealink Stena Line operations";

and that to this end the Operations Manager would be instructed to ensure that:

"the status quo is maintained in respect of disruption to the B&I Line operation to ensure that the standard of service you receive is not reduced".

20. The difficulties in negotiating SSL's new schedule for 1991 (which lasted from October 1990 to April 1991) had been such that SSL wrote to B&I on 4 April 1991 suggesting that:

"any changes proposed by either of the major users of the port should be fully aired in the middle of this year for the 1992 season so that we avoid the problems which have arisen this year".

B&I accepted this suggestion.

D. The Complaint

21. By a formal application dated 6 January, 1992, under Article 3 of Regulation No. 17/62 and Article 10 of Regulation No. 4056/86, B&I complained to the Commission that SHL and SSL were in breach of Article 86 EEC. The essence of the complaint was that SSL intended to introduce a timetable on 9 January 1992 which would seriously disrupt the B&I scheduled service by causing two SSL vessels to pass while the "Leinster" was berthed at Admiralty Pier, and that the introduction of this timetable by SSL and its acceptance by SHL, the port authority, constituted an abuse of a dominant position. B&I asked that the Commission adopt interim measures to prevent the implementation of the new SSL schedule. The harmful effects of this new schedule would not be felt immediately but would become significant at peak periods due to the much higher

numbers of passengers travelling at those times and the consequently longer loading times required. Sealink's summer schedule was due to come into operation on 22 May 1992.

22. Despite the agreement proposed by SHL that timetable changes should be discussed in the middle of 1991 to allow time for negotiation, it was on 31 October 1991 that B&I first had notice of SSL's intention to change its timetable in 1992. Other different timetable proposals were put to B&I on 11 November 1991, 26 November 1991, 17 December 1991 and 18 December 1991.

23. During the discussions which took place between Sealink and B&I, B&I stated that SSL's proposed schedule for 1992 was unacceptable for the following reasons:

- a) the extended periods during which it would be necessary to disconnect the linkspan of the "Leinster", up to 30 minutes instead of no more than 15 minutes under the 1991 schedule; and
- b) the congestion on shore at the port of Holyhead resulting from the reduction of the periods between the departure and arrival times of the various SHL vessels.

24. While accepting that the proposed 1992 schedule would have some effect on B&I's operations, SHL responded by suggesting the following possibilities to minimise disconnection time for the "Leinster":

- a) delaying disconnection of the linkspan of the "Leinster" until after the SSL vessel has left Station berth and commenced its passage past Admiralty Pier;
- b) revising harbour regulations to reduce the time an inward bound vessel would take to pass Admiralty Pier;
- c) strengthening shoreside operations at Admiralty Pier by appointing supervisors to oversee the working of the "Leinster" with a flexible workforce at their disposal, by providing additional tugmaster operators to reduce the time taken to

unload and load the "Leinster"'s unaccompanied freight, and by speeding up the ramp motors, and

- d) modifying the Leinster and the berth at Admiralty Pier to ensure that there was no need to disengage the linkspan. ("the technical solution").

25. The Commission was once again approached by B&I, and on 9 December 1991 the Commission wrote to SHL stating that :

"the principles of the agreement reached in the summer of 1989 between SHL, [SSL] and B&I should remain valid insofar as they rule out any discrimination among the shipping lines using facilities in the same port. The 1989 agreement you will no doubt recall, contained a provision that changes or additions to one shipping line's schedule or services should not affect the schedules of another shipping line in a way that would be detrimental to it. At first sight, the proposed 1992 schedule of port slots for B&I and [SSL] does not seem to achieve this objective".

26. On 6 January 1992 SHL replied to the Commission's letter by stating, inter alia, that :

"The discussions which took place in 1989 did not result in B&I being granted the right to have the inner harbour at Holyhead closed to all new business whenever the B&I vessel is berthed at Admiralty Pier (at present more than 5 hours per day). That would be an extraordinary restriction for a harbour authority to accept from a ferry operator. It has always been envisaged that a technical solution must be found so that both the Station berth and Admiralty Pier berth can be fully used."

SHL went on to explain that it is usual for harbour authorities to require ferry operators to carry out any modifications that are necessary in order to use a particular berth, such modifications to be made at the operator's expense.

27. On 9 January 1992 SSL implemented its new schedule.

28. The suggestions (a) to (c) referred to in point 24 above, which were put forward by SHL to minimise any operational difficulties caused to B&I, were also implemented by 28 January 1992. The impact of these modifications on B&I operations was monitored by both SHL and B&I.

29. Sealink has engaged independent experts to study the possibility of implementing a technical solution (see para 24) and a final report was produced on 10 April, 1992. On 15 April the parties met to discuss the feasibility of implementing the solution proposed by Sealink's consultants and agreement was reached on a number of points. However, some points remain unresolved and, in any case, the shortest estimated length of time before which any technical solution might be fully in place was four months, i.e., after the date on which Sealink's Summer schedule would come into operation. Hence, the need to consider the case for interim measures in respect of the summer of 1992.

E. The Essential Arguments of the Parties

30. Sealink argues that the disruption feared by B&I is exaggerated, maintaining that the detailed reports made in respect of the Leinster's operations clearly indicate:

"that during the early morning when two SSL vessels pass by the "Leinster" the period of required disconnection does vary from day to day but that, except in exceptional circumstances the period of disconnection, is always less than 30 minutes and often considerably less".

31. B&I produced evidence based upon experience of the night sailings in January and February 1992 showing that, despite the implementation of suggestions designed to minimise disruption to B&I's operations, the average period of disconnection actually experienced when two vessels passed the "Leinster" was 24 minutes, as against 12 minutes when only one vessel passed. Thus, quite

apart from delays caused by other factors, the extended period of disconnection required in 1992 is likely to involve, on average, some 100 % more disruption to the "Leinster" in the off-peak season, and significantly more during the peak summer season.

32. SSL/SHL maintain that in assessing the complaint the Commission should take account of the fact that the "Leinster" does not properly fit the Admiralty Pier berth. SHL regrets that it did not require the "Leinster" to have the appropriate adjustments made before it commenced regular operations from Admiralty Pier. SSL asserts that it abandoned its preferred 1991 schedule as part of a compromise conditional upon B&I making appropriate changes to its vessel to ensure close fit into Admiralty Pier and that B&I's reluctance to implement a technical solution during the course of 1991 cannot preclude SSL from implementing a schedule in 1992 which is of commercial benefit to it.

II. Legal Assessment

A. Conditions for Ordering Interim Measures

33. The Commission's power under Article 3 of Regulation No. 17 to require the termination of an infringement of the competition rules includes the power to order interim measures in cases where, *inter alia*, the conduct complained of has the effect of either creating a situation likely to cause serious and irreparable damage to other undertakings, or creating a situation that is intolerable to the public interest, and it is essential to ensure that, pending the final decision of the Commission no such situation occurs. (Case No. 792/79 R, *Camera Care v. Commission*⁽²⁾). A similar power exists under Article 10 of Regulation 4056/86.

34. The conditions to be met for the granting of interim measures are:

- *prima facie* evidence of an infringement, and

(2) (1980) ECR 119, p 130.

- urgency, based upon the need to avoid a situation likely to cause serious and irreparable damage, to the party seeking interim measures, or which 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.

B. Application of these Principles to the Present Case

(1) Prima Facie Case of Infringement

(a) Article 86

35. In this case, the main points at issue in this respect are (i) whether Sealink holds a dominant position, and (ii) whether Sealink's behaviour amounts to an abuse. At this stage, the Commission does not need to make a final determination on these points but needs to investigate whether a reasonably strong prima-facie case has been shown.

(b) Dominant Position

36. To determine whether an undertaking is dominant, it is necessary to identify the "relevant market", i.e., the relevant product, geographical and service markets in which to assess the market power of the allegedly dominant undertaking.

37. The essence of the complaint concerns the use of the port of Holyhead, and discrimination in the provision of port services at that port which will lead to the strengthening of Sealink's position on the market for the provision of maritime transport services on the short sea routes between Great Britain and Ireland.

38. The short sea routes for multi-purpose ferries between Great Britain and Ireland are as follows :
- a) the "northern corridor", between the ports of Ardrossan, Stranraer, Heysham, and Fleetwood in Great Britain and Larne, Belfast and Warrenpoint in Northern Ireland.
 - b) the "central corridor" route between Liverpool and Holyhead in England and Wales respectively, and Dublin and Dun laoghaire in Ireland; and
 - c) the "southern corridor" routes between Fishguard, Pembroke and Swansea in Wales and Rosslare and Cork in Ireland.
39. The relevant market in this case is the market for the provision of port facilities for passenger and vehicle ferry services on the central corridor routes between the United Kingdom and Ireland. The port of Holyhead is the only port now serving this market on the British side, giving Sealink, in its capacity as port authority, a dominant position. The abuse alleged is discriminatory provision of port services by Sealink as port authority in allowing schedule changes of its ferry services which will result in disruption to B&I's services, thus imposing a competitive disadvantage on that company. Although freight is part of the operations of multi-purpose ferry services, the disruption alleged by B&I does not relate so much to this part of the service as to the passenger and the vehicle ferry services. Therefore it is not relevant that Liverpool, the nearest alternative port to Holyhead, although it presently does not have any passenger ferry services operating from it, is a competitor on the roll-on/roll-off freight market. Potential competition from Liverpool does not constrain the market power of Sealink at Holyhead.
40. Further, even if there were passenger ferry services operating from Liverpool, the sea journey from Dublin to Liverpool is about four hours longer than the Dublin-Holyhead route, and thus the Liverpool port is not substitutable for vehicle and passenger ferry services. B&I itself operated a passenger ferry service on the Liverpool route in the past but was forced to abandon it due to the

small number of customers using the route. Hence, in the present circumstances, B&I could not, if they wished to run multi-purpose ferry services on the central corridor at a port other than Holyhead, do so without increasing the time of the crossing or building a new port themselves.

The port of Holyhead constitutes a substantial part of the common market because it is a port providing one of the main links between two Member States; more especially, it provides the direct link between Great Britain and the capital city of Ireland. It should also be noted that this is, at least for passengers and cars, the most popular ferry route between Ireland and Great Britain.

(c) Abuse of Dominant Position

41. A dominant undertaking which both owns or controls and itself uses an essential facility, i.e., a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 86, if the other conditions of that Article are met.⁽³⁾ A company in a dominant position may not discriminate in favour of its own activities in a related market (case C-260/89, *Elliniki Radiophonia*, para. 37-38). The owner of an essential facility

(3) See the following judgments:

Cases 6 and 7/73, *Commercial Solvents v. Commission*, 1974 ECR 223
Case 311/84, *Télémarketing*, 1985 ECR 3261
Case 53/87, *Renault*, 1988 ECR 6039
Case 238/87, *Volvo v. Veng*, 1988 ECR 6211
Case C-260/89, *Elliniki Radiophonia Teleorassia*, judgment dated 18 June 1991 at paras. 37-38, and conclusions of Advocate General Lenz as para. 40
Cases 69/89, 70/89, and 75/89, *RTE, BBC and ITP v. Commission*, judgment dated 10 July 1991

Case C- 18/88 *RTT v. GB-Inno*, judgment dated 13 December 1991

and the following Commission decisions:

National Carbonising OJ No. L 35/6 10 February 1976
London European - Sabena, OJ No L 317/47, 24 November 1988
British Midland v. Aer Lingus, OJ. No. L96/34, 10 April 1992

which uses its power in one market in order to strengthen its position in another related market, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article 86 where a competitive disadvantage is imposed upon its competitor without objective justification.

This was accepted by Sealink through its subsidiary, SHL when it stated that no agreement would be given to vary schedules if this compromised its ability to provide an acceptable level of service to all port users (see paragraph 14 above). This is particularly so where the physical configuration of the port has obliged operators to accept differences in the services they are offered by the operator of the essential facility, in order to maximise its efficient utilisation.

42. The owner of the essential facility, which also uses the essential facility, may not impose a competitive disadvantage on its competitor, also a user of the essential facility, by altering its own schedule to the detriment of the competitor's service, where, as in this case, the construction or the features of the facility are such that it is not possible to alter one competitor's service in the way chosen without harming the other's. Specifically, where, as in this case, the competitor is already subject to a certain level of disruption from the dominant undertaking's activities, there is a duty on the dominant undertaking not to take any action which will result in further disruption. That is so even if the latter's actions make, or are primarily intended to make its operations more efficient. Subject to any objective elements outside its control, such an undertaking is under a duty not to impose a competitive disadvantage upon its competitor in the use of the shared facility without objective justification, as seemed to be accepted by SHL in 1989 (see paragraph 14 above).
43. Sealink did not comply with this duty when one of its subsidiaries, SHL, decided to allow another, SSL, to change its schedules for 1992, in its own commercial interest, in a manner which will disrupt each of B&I's operations at Holyhead during the peak season twice, and which will thus impose a competitive disadvantage on

B&I. By implication, Sealink has accepted that the passing of a second vessel would cause more disruption to B&I's operations. This is shown by its agreement to the compromise solution in 1991 (see paragraph 17 above), its suggestion that any proposed changes to schedules for the 1992 season be aired well in advance to avoid the problems negotiating the 1991 schedules (see paragraph 20 above), and Sealink's suggestions put forward with a view to minimising the disconnection time of the Leinster (see paragraph 24).

Even if Sealink as ferry operator altered its schedule because it considered that it was in its commercial interests to do so, and Sealink as harbour authority allowed this, the result is still a *prima facie* abuse of dominant position by Sealink, since it is to improve that undertaking's position at the expense of its competitor, B&I. A dominant company may improve its service but if that improvement will necessarily harm its competitor then its own commercial interests are not enough for the purposes of Article 86 to justify the resulting harm to the competitive situation of its competitor. Article 86 exists to prohibit certain types of behaviour by dominant undertakings, even though the reason for that behaviour is the pursuit of the undertaking's own interests. It follows that those interests alone cannot make Article 86 inapplicable; if the conduct is not to be considered an abuse, it must relate instead to an objective concern which the conduct is necessary to protect (see Case T-30/89 Hilti)⁽⁴⁾. No such justification has been claimed in this case.

SHL has also argued that measures have been implemented by SHL to reduce the disruption to the minimum possible level. However, in following its own commercial interests, Sealink has imposed a competitive disadvantage on its competitor without a relevant justification. Thus the requirement to show a *prima facie* infringement of Article 86 EEC is met, whether or not anything has been done which might later be found to have mitigated its effects (an argument which in any event recognises that the disruption does exist).

(4) judgement of 12.12.91, not yet reported, grounds 102 - 119

The duty on a dominant owner of an essential facility not to place its competitor at a competitive disadvantage in the shared use of that facility is particularly important where, as in this case, there are only two companies using the facility, and the two companies are supplying sea transport services to a Member State on the periphery of the Community for which such transport is important.

44. It is not clear from the relevant correspondence whether the compromise reached between SSL and B&I in 1991 was conditional upon B&I modifying its vessel or implementing some other technical solution. Nor is it clear that either party is more to blame than the other for the delay in seeking a technical solution.

However, even if a technical or other solution can ultimately be found which will prevent disruption to B&I from SSL's new schedule, it has not yet been put into effect, nor can it be put into effect in time for the summer peak season. It therefore cannot be taken into account in determining whether to grant interim measures.

(d) Effect on Trade between Member States

45. The complaint relates to access to a port which constitutes the destination/departure point on the British side of one of the most important multi-purpose ferry services between two Member States, the United Kingdom and Ireland. The disruption of B&I's service and any consequential effect that this has upon the competition situation on the maritime passenger market on the Irish Sea would therefore have a direct effect upon trade between Member States.

(e) Conclusion

46. On the evidence available at present, there is a sufficient prima facie case of abuse under Article 86 to order interim measures.

(2) Likelihood of Serious and Irreparable Harm; Urgency

47. Due to the physical limitations of the port at Holyhead, the implementation of changes in SSL's schedule for the summer season, will have several consequences for B&I's operations. Firstly, B&I's loading will usually be interrupted twice, and the total time B&I's linkspan is disconnected will be lengthened because two SSL ships will pass while B&I's ship is berthed, both during the daytime and the nighttime schedules. While the linkspan is disconnected B&I cannot load its ship, its operations are thus interrupted, and, in this sense, each disconnection is in itself a disruption. It necessarily obliges B&I to carry out its operations within a shorter time than it would otherwise have - a disadvantage not suffered by SSL in its operations at the Station berth. It may be that, despite the time constraints inherent in B&I's timetable, a certain amount of such disruption will not affect B&I's services to a great degree, but if that disruption is doubled and combined with other factors, in particular, the high load factor in the summer, it is likely to cause serious harm to B&I. These disruptions come on top of the inevitable constraints and natural disruptions due to external factors such as weather conditions, and constraints upon the manner in which B&I is able to load its boat (freight and lorries must be loaded first, and the time at which the raising of the ramp will occur under SSL's 1992 summer season schedule is the time at which B&I would normally begin loading cars). During the peak season, these disruptions may also be accentuated by traffic congestion onshore, although thus far, prior to the summer season, it has been avoided by effective traffic control by SHL. The need to avoid on shore congestion puts an extra onus upon B&I to load faster. During the summer, when the load factor is higher and there is likely to be a build-up of traffic on shore because of the disruptions to the loading operations of B&I, it will be impossible to avoid traffic congestion entirely, a fact that Sealink seems to admit in its Reply to the Statement of Objections.⁽⁵⁾ Such congestion is likely to cause delay to B&I's sailing times.

(5) See paragraph 4.2.18.

Lateness on one journey has effects on B&I's ability to maintain the rest of its ferry schedule. B&I would generally use the longer period on the berth during the early hours of the morning in order to compensate for any delays which may have occurred previously. This period will also be subject to a longer disconnection time, leaving a shorter time in which B&I's schedule can recover from disruptions whether due to the SSL schedule or to other factors.

Thus, the disruption caused by the disconnection is likely to result in delays, both to the loading operations of B&I and its sailing times, as well to congestion on shore. This will in turn lead to customer dissatisfaction with B&I's service, with its consequential bad effects on the commercial reputation of B&I.

48. In particular, these interruptions and their effects are likely to cause dissatisfaction among B&I's passengers because they face waiting longer periods to board the B&I vessel in an area of the port which is not equipped with satisfactory facilities for waiting passengers. Two interruptions - or one longer interruption - of loading, affecting B&I's passengers alone, can only create an impression of inefficiency. Sealink argues (paragraph 4.4.2 of the Reply to the Statement of Objections) that customer dissatisfaction can be avoided by B&I by explaining the reasons for it (thus blaming SHL). Such an argument implies that there is likely to be customer dissatisfaction, and that there is a real risk of disruption to cause it; and it overlooks the fact that if such an announcement is made, it could even be seen as an incentive to travel with Sealink. The risk to B&I through such dissatisfaction is imminent: commercial customers, using the services regularly themselves, or in close contact with both their customers who use the services regularly, and with ferry operators, are likely to react quickly and give expression to their dissatisfaction by deserting B&I. All of the foregoing involves a serious risk to B&I's commercial reputation.

49. In 1991⁽⁶⁾, gross revenue earned by B&I on the Dublin-Holyhead ferry route constituted [36.4 %] of its total annual turnover, for both freight and passenger operations, so this route is very important to B&I's operations as a whole. The percentage figures of total turnover earned on its only other multi-purpose ferry route, Rosslare-Pembroke, is much less. Thus any loss of commercial operators and customers to the only other competitor on the Dublin-Holyhead route would be serious for B&I.
50. This damage to B&I's commercial reputation and business activities while SSL's schedule is in operation is not only serious but also irreparable, as it could not be satisfactorily remedied by paying compensation. The revenue lost to B&I due to passengers changing to SSL could not be calculated with confidence. Moreover, in the ferry business, a reputation for efficiency of service is of the utmost importance. It can take a considerable period of time for a company to recover from a reputation for delay and inefficiency. A reputation for efficiency is particularly important to a company running only one ship competing with a company with two ships. It would not be possible to estimate accurately the loss of revenue or the loss due to the adverse effects on B&I's commercial reputation, losses which would subsist after the SSL schedule was changed. And even if it could be quantified, no final decision taken by the Commission in the main proceedings concerning the abuse of dominant position would be able to provide a remedy for the damage suffered by B&I while SSL's 1992 schedule is in operation.
51. The particular urgency in this case arises out of the fact that, unless prevented, SSL will continue to implement its summer season schedule involving two additional daily interruptions of B&I's loading and unloading, until 27th September.

In view of the matters set out in points 30, 31 and 43 above the Commission does not think it necessary for the purposes of the present decision to try to estimate in detail or precisely the probable average additional length of time of interruption to B&I's

(6) The latest figures available prior to the takeover of B&I Line by Irish Continental Group in January 1992

loading and unloading. Given that B&I is about to suffer additional disruption as described above in paragraphs 48-50, with the likely consequences also described above, it is not necessary for the purposes of the present decision to determine the precise effects of the discrimination even though they are likely to be relevant to any final decision. Some insight into the likely effects of the peak season schedule was obtained from experience over the Easter period. However, bad weather conditions interrupted the period before Easter, that most comparable to the summer peak season in terms of load factor, and it is difficult to make an assessment based on the experience of only eight days following the Easter weekend. Of those eight days, on only one was the B&I ship at full-load. On that day the ship did sail 20 minutes late. At least two other days out of the eight did not provide good examples of normal operations in the busy season due, respectively, to a very low load, and to a crash between two lorries. However, based on figures provided by Sealink, it has been calculated that the average disconnection time during that period was more than 20 minutes.

(3) The Interim Measures envisaged : Proportionality and Balance of Interests

52. The interim measures envisaged would allow B&I to continue to operate its services from Holyhead during the Summer season without more inconvenience and disruption than in 1991. If interim measures were not granted, there is a risk of serious and irreparable harm to B&I, for the reasons set out above.
53. The granting of the interim measures, on the other hand, would result in SSL suffering some additional costs and inconvenience. These costs would involve notifying passengers booked on Sealink sailings of its revised sailing times and other administrative costs connected with changing its Summer schedules. These costs would be significantly less than the damage suffered by B&I due to a direct loss of traffic and commercial standing, and they would also be of a once-off and therefore limited nature. Furthermore, the costs incurred by Sealink would arise as a direct result of its own actions in changing its schedule in full knowledge of B&I's

concerns and the Commission's own views regarding the applicability of Article 86 in this matter.

For these reasons the balance of interests requires interim measures in favour of B&I. The Commission does not consider that the inconvenience to SSL as a result of granting the interim measures envisaged would be disproportionate when compared to the damage which will be caused to B&I if they are not granted. The measures envisaged are limited to five months in the expectation that a technical solution will be implemented before the next peak season at Christmas 1992.

HAS ADOPTED THIS DECISION:

Article 1

SSL is hereby ordered to return to its published ship schedules for 1991 in respect of its first morning departure from Holyhead, and in respect of its second afternoon arrival into Holyhead, or to any other schedule for these two operations which does not cause two ships to pass the Admiralty berth during B&I's loading and unloading operations. This obligation shall take effect within four weeks of the notification of this Decision to its addressee.

Article 2

This Decision shall enter into force on the day of its notification and shall be valid until midnight on 27th September 1992 or until the date of coming into force of any other agreed schedule notified to the Commission by the two parties, whichever is the earlier.

Article 3'

This Decision is addressed to Sealink Stena Line (Holdings) Limited of Charter House, Park Street, Ashford, Kent TN24 8EX, United Kingdom.

Brussels, 11 June 1992

For the Commission
Sir Leon BRITTAN
Vice-President

CERTIFIED COPY
The Secretary General,

D.F. WILLIAMSON