



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 23 July 2004

SCANDLINES SVERIGE AB
Knutpunkten 43
S-252 78 Helsingborg,
SWEDEN

For the attention of Mr Henrik
RØRBAEK

Subject: Case COMP/A.36.568/D3 – Scandlines Sverige AB v Port of Helsingborg
(Please quote this reference in all correspondence)

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

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

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

The preliminary conclusion was in particular based on the fact that the Commission considers that there is insufficient evidence to state that HHAB has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty by charging excessive and discriminatory port fees. As regards the allegation on excessive pricing, and bearing in mind that the burden of proof is on the Commission to show the existence of excessive pricing, the Commission drew the preliminary conclusion that there is not sufficient evidence to conclude that the port charges have no reasonable relation to the economic value of the services provided by the port to the ferry-operators. In respect of the allegation on discriminatory charges between ferry operators and the other users of the port, the Commission concluded that it has not been demonstrated that HHAB applies dissimilar conditions to equivalent transactions between the ferry-operators and the cargo operators, when comparing the overall set of services provided by HHAB to the level of the total port charges respectively paid by the two categories of customers.

¹ OJ 13, 21.2.1962, p. 204/62.

² OJ L 354, 30.12.98, p. 18.

By letter dated 29 April 2003, you submitted a reply to the Article 6 letter in which you maintain the allegations of abuse of dominant position by HHAB.

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

As regards development since the comments submitted by HHAB and Scandlines to the Article 6 letter, it should be noted that both HHAB³ and Scandlines⁴ have made additional submissions notably completing information submitted earlier and providing clarifications. Since these submissions do not contain any new information, but rather reiterate the arguments already put forward, they are not further considered in this decision. However, in April 2004, Scandlines wrote to the Commission about a new circumstance relating to how HHAB treats and charges the ferry operators, as Scandlines thinks this may affect the examination of the case, and this aspect is further dealt with under section I.B.3. below.

I. THE FACTS

I.A. THE PARTIES

I.A.1. The port of Helsingborg

1. The port of Helsingborg is located in the Southwest of Sweden, at the narrowest point of Øresund between Sweden and Denmark. The port located in Denmark on the opposite side of Helsingborg on the Sound is the port of Elsinore. Both Helsingborg and Elsinore benefit from excellent geographic locations - these ports provide the shortest crossing distance (4 km) between Sweden and Denmark.
2. The port of Helsingborg has good rail and road connections. It is a very diversified port which is engaged in many different types of activities. In addition to ferry activities (the most important), the port of Helsingborg can handle practically all types of cargo, such as containers, general cargo and bulk (including oil). It is composed of four harbours :
 - The North Harbour is dominated by ferry services to Denmark.
 - The West Harbour (inaugurated in 1985) is used principally for handling unitised cargo (containers); it also includes a coal terminal.
 - The South Harbour represents a more diversified operation than other areas of the port by virtue of four very different ship-handling facilities: a

³ Letters from HHAB of 18 November 2003 (Document 1113, File A 32) and 4 February 2004 (Document 1134, File A 32).

⁴ Letter from Scandlines of 17 February 2004 (Document 1096, File A 31).

train ferry terminal (DanLink terminal), a multipurpose terminal, a grain terminal and an oil terminal.

- The deepwater Bulk Harbour is the port's southernmost facility, built to serve the major chemical plant of Kemira Kemi AB that owns the harbour, in which Helsingborgs Hamn AB (HHAB) provides the port operations since 1991 in joint agreement.

3. As of the end of the 1980s (Railway Agreement signed on 29 October 1984), the South Harbour was gradually transformed to become the train ferry terminal for goods on the direct route Helsingborg-Copenhagen. A tunnel was dug under the city to connect the northbound and southbound railway systems. Passenger wagons (together with foot passengers, cars, trucks and trailers) continued to use the Helsingborg-Elsinore route ("HH-route) departing from the North Harbour. These transformations entailed considerable investments in the years between 1985-1990 borne by the municipality of Helsingborg. As of 30 June 2000, the train ferry terminal DanLink is no longer in use as the trains are using the Øresund Bridge.
4. The port of Helsingborg is the biggest ferry port in terms of volume and second biggest in terms of value (after Stockholm) in Sweden and is among the biggest ferry ports in the world (according to its web-site). In 2001, approximately 12 million passengers⁵, 7,5 million tonnes of cargo, and 2,3 million vehicles passed through the port of Helsingborg.

The ferry traffic in the port of Helsingborg

5. Most of the traffic in the port of Helsingborg is ferry-traffic on the HH-route. In 2001, some 50.000 vessels called at the port of Helsingborg, out of which the ferries accounted for 45.000 calls, 90% (due to the frequent ferry service on the HH-route). In addition to Scandlines, there are two other ferry operators on the HH-route, Sundbusserne (transporting only passengers) and HH-Ferries⁶. The number of calls (arrivals) made by each ferry operator were: Scandlines 22.120 (60/day), Sundbusserne 10.120 (30/day) and HH-ferries 12.440 (35/day). The importance of the ferry traffic is also shown by the fact that out of the total volume of cargo passing through the port of Helsingborg (7,5 million tonnes), the majority (4,5 million tonnes) is transported on the ferries (onboard lorries).
6. The market shares of the three ferry operators active on the HH-route, Scandlines, Sundbusserne and HH-Ferries, are as follows :

	Passengers	Vehicles
Scandlines	[CONFIDENTIAL]	[CONFIDENTIAL]

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

⁶ HH-Ferries was acquired by Steneo AB, a company within the Stena sphere, to which also Scandlines AB belongs, in 2001. This acquisition was approved by a decision of the Swedish competition authority on 14 March 2002. The change in ownership has, to the Commission's knowledge, not had an impact on the services offered by HH-Ferries.

Sundbusserne	[CONFIDENTIAL]	[CONFIDENTIAL]
HH-Ferries	[CONFIDENTIAL]	[CONFIDENTIAL]

7. They all operate from the North harbour: Scandlines uses berths (no 301-302) in Södra Hamnen (South harbour); Sundbusserne adjacent berths (no 203-204) in Inre Hamnen (Inner harbour), whereas HH-Ferries uses a berth (no 410) further away in the Sundsterminalen (Sound terminal).
8. For the sake of completeness, it may be noted that apart from the three ferry operators active on the HH-route, there is only one other ferry operator providing regular ferry services calling the port of Helsingborg. This is DFDS (Scandinavian Seaways), which operates a cruise ferry service between Copenhagen and Oslo, and its ferries call at Helsingborg once a day (at Sundsterminalen). This is, however, a rather different service compared with the ferry service on the HH route in that DFDS operates a cruise ferry, which is a larger vessel operating on a much longer route, between Copenhagen and Oslo. In the light of the different characteristics of the DFDS ferry service compared with the ‘shuttle’ operations on the HH-route, DFDS is not regarded as one of HHAB’s customers on the relevant market (see section II.A.1. below).
9. Consequently, as pointed out by Scandlines in its reply to the Commission’s Article 6 letter dated 29 April 2003 (hereinafter referred to as ‘Scandlines reply to the Article 6 letter’), the Södra Hamnen, Inre Hamnen and Sundsterminalen, to the extent it is used by HH-Ferries, with the above mentioned berths are parts of the North harbour which are relevant in this case. To this end, port services and facilities provided in these parts of the North Harbour by HHAB to ferry operators on the HH-route are to be taken into account. Therefore, costs relating to other parts of the North harbour, such as the Ocean Hamnen and the City Hamnen which are not used by the ferry operators on the HH-route, should, according to Scandlines, not be included among the costs relating to ferry operators. The Commission has taken these comments onboard.

I.A.2 The parties

I.A.2.1. *Helsingborgs Hamn AB*

10. Ports in Sweden are to a large extent municipal ports which are often operated by companies owned by the municipalities. While port tariffs used to be regulated by the State in the past, certain deregulation of port operations in Sweden took place in the early 1980’s when the tariff regulation was abolished and ports could freely set their tariffs.
11. The City of Helsingborg decided on 26 May 1987 that the port operations, including cargo-handling activities should be transferred as of 1 January 1988 to a wholly owned subsidiary, namely Helsingborgs Hamn AB (“HHAB”). The assets, however, were not transferred to HHAB at that time. Most of the assets of the port of Helsingborg were transferred from the City of Helsingborg to HHAB at the end of December 1993 and June 1994 (assets related to the rail ferry terminal, DanLink), except the land which remains the property of the City.⁷ HHAB is therefore the owner of all assets on land such as gangways, ferry ramps, cranes and buildings,

⁷ Document 292, File A4, section 3, p 7-8; Document 925, File A24.

whereas the City of Helsingborg owns the land, quays, docks, breakwaters and terminal areas. All assets not owned, but used by HHAB, are leased from the City of Helsingborg, however HHAB is responsible for their maintenance⁸.

12. HHAB is a Swedish limited liability company wholly owned by the City of Helsingborg. HHAB is fully responsible for the running of the port, i.e. the construction and maintenance of the port facilities, the provision of facilities and services to vessels using the port, such as ferries, and the determination of the fees that each user of the port has to pay for those facilities and services. HHAB has an average yearly turnover of about 340 MSEK (37 Million €) over the period 1995-2000. In a city with 110.000 inhabitants, HHAB, which employs approximately 250 people, is among the eight biggest undertakings. See in attached Appendix 1 the financial results of HHAB from 1993 to 2001.

I.A.2.2. Scandlines

13. The complaint against HHAB has been lodged by Scandlines Sverige AB, a Swedish limited liability company. It is a wholly owned subsidiary of Scandlines AB, previously indirectly owned by the Swedish State Railways and which as of 1 July 2000 is 100% indirectly owned by Stena AB. It should be noted that Scandlines Sverige AB does not operate the ferry services on the HH-route which are today carried out by Scandlines Øresund I/S. Scandlines Sverige AB's sole activity is to be the port agent of Scandlines Øresund I/S with the responsibility of paying the port charges in the port of Helsingborg. Scandlines Øresund I/S is owned in equal shares by Scandlines AB and Scandlines Danmark A/S, the latter is a wholly owned subsidiary of Scandlines AG (a company owned by Danish State and Deutsche Bahn AG)^[9]. The turnover of Scandlines Øresund I/S in 2001 was approximately 860 MSEK (95 million €). The daily management of the joint operation has been assigned to Scandlines AB. In 2001, Scandlines Sverige AB had a turnover of 20,000 SEK (2,207 €). The decision uses the term "Scandlines" to interchangeably refer to the complainant (Scandlines Sverige AB), but also to the ferry operator (Scandlines Øresund I/S).
14. Ferry operations on the HH-route have for more than 100 years been carried out by predecessors of the current operators (in 1980 as a subsidiary of the Swedish and Danish State Railways, which since 1983 has been wholly owned by the Swedish State Railways). The importance of this route is highlighted by the fact that until July 2000 (when the fixed link over the Øresund commenced operations), this route carried more or less all freight and passenger vehicle traffic between Sweden and Danish Zealand^[10].
15. Scandlines Øresund I/S operates 3 ferries on the HH route for a 20-minute shuttle service, departing every 20 minutes during daytime (two services per hour during the

⁸ Cf. Document 319, File A5, section 2.2, p 4-5.

⁹ [CONFIDENTIAL]

¹⁰ Scandlines AB and Scandlines Danmark A/S previously offered also a joint service between (Swedish) Limhamn and (Danish) Dragør, which however had limited capacity and ceased operation in November 1999.

night). The 20-minute shuttle service is operated during more hours per day during the summer season resulting in more departures during this period (until 1998 Scandlines Øresund I/S used additional ferries during the Summer time). In 2001 Scandlines Øresund I/S transported [CONFIDENTIAL] passengers, [CONFIDENTIAL] cars, [CONFIDENTIAL] buses and [CONFIDENTIAL] lorries on the HH-route.

I.B. THE COMPLAINT

I.B.1. The complaint lodged by Scandlines to the Commission

16. Scandlines lodged a complaint to the Commission on 2 July 1997 alleging that HHAB has infringed Article 82 of the EC Treaty, by levying excessive and discriminatory charges for services provided to ferry operators:
 - port charges are deemed to be excessive because they do not reflect the actual costs borne by HHAB for the provision of services to the ferry-operators;
 - port charges are deemed to be discriminatory because ferry operators are charged substantially higher prices than the other users of the port. They further argue that the port fees charged by HHAB to other cargo operators do not cover the costs for the services provided to them.¹¹
17. This is a result, according to Scandlines, of HHAB viewing the port as a whole, single operational and economic unit and not charging the different users of the port according to an allocation of the costs corresponding to their respective use of the port. The complainant states that charges should be considerably lower for ferry operators and higher for the other users of the port.
18. The complainant considers that it should only have to pay individually for the infrastructure and facility that it actually uses plus, in principle, its fair share of costs relating to common infrastructure and facilities.
19. Scandlines has complemented its complaint by its letter dated 29 April 2003 mentioned above in the introduction¹². In its reply to the Article 6 letter, Scandlines focuses upon the following claims:
 - the prices actually charged to ferry operators for port services in the port of Helsingborg are **excessive** since they are unfair in themselves when compared to the costs (plus a reasonable profit) of providing the services. According to the reply, this is confirmed by the comparison with prices charged to the ferry operators by the port of Elsinore in Denmark, and also by the comparison with prices charged by HHAB to non-ferry operators;

¹¹ Document 785, File A22, section 2.2.2. p 49

¹² Conclusion of Scandlines' reply to the Article 6 letter, points 63-65

- the prices charged to ferry operators are **discriminatory** when compared to at least certain cargo operators that compete with the ferry operators, placing the latter at a competitive disadvantage (thus arguing that the services provided to the two categories of users are comparable); and
 - finally, that HHAB's port charges are excessive and discriminatory because they are **not cost-based** and the **pricing is not transparent**.
20. The Commission is also addressing a decision in respect of the complaint by Sundbusserne of 3 July 1997 against HHAB concerning port fees, which has been subject to a separate proceeding.
21. During the proceedings, the Commission has encouraged the parties to try to reach a mutually acceptable agreement on port fees, which has, however, failed.
22. The complaint of Scandlines was sent to HHAB, followed by several requests for information under Article 11 of Regulation 17 to HHAB and to other concerned parties.

I.B.2. National proceedings in the District Court of Helsingborg and the Swedish Competition Authority

23. In the early nineties, Scandlines initiated discussions with HHAB in order to reach agreement on future port fees. Scandlines considered at the time that the principles used by HHAB for determining the port fees for providing port services were unreasonable (since according to Scandlines they were not based on HHAB's actual costs plus a reasonable profit margin). *[CONFIDENTIAL¹³]*.
24. *[CONFIDENTIAL]...* which led to Scandlines and HHAB signing an agreement which provided for certain discounts on the port fees for the period *[CONFIDENTIAL¹⁴]*.
25. At the end of 1996 and prior to the expiration of the agreement, Scandlines claimed that the charges were too high and not cost-related, and during the discussion with HHAB for a new agreement on the future port charges, it requested access to HHAB's book-keeping (to the IMR "Internal Monthly Report"). For this purpose Scandlines assigned an auditor.
26. Access to the IMR documents was denied by HHAB claiming that some of the information constituted business secrets. As a result, Scandlines, through the auditor, brought an action against HHAB before the Administrative Court of Appeal in Göteborg¹⁵. Sundbusserne was also involved in this proceeding. However, the Appeal Court in its judgement of 26 June 1998, decided that HHAB had the right to deny

¹³ Document 785, File A22, sections 1.5.1 and 1.5.2., p. 17, section 1.6.4., p. 22.

¹⁴ Document 785, File A22, section 1.5.2., p 17 and Document 214, File A2, p. 15 [+ Document 200 – the 1993 Agreement - and documents 201 and 202].

¹⁵ See judgement of 26 June 1998, Document 854, File A23.

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

27. Scandlines and HHAB did not agree on conditions for a new agreement and Scandlines decided in January 1997 [*CONFIDENTIAL*] to pay only [*CONFIDENTIAL*] % of HHAB's invoices. HHAB threatened in September 1997, to put an arrest on one of Scandlines's ferries, but abstained from doing so because Scandlines AB and Scandlines Denmark A/S issued a joint guarantee to HHAB for the payment of Scandlines' debt, if so required as a result of the proceedings.
28. In June 1997, HHAB sued Scandlines in the District Court of Helsingborg for the non-payment of the full charges. In the meantime, in July 1997, Scandlines lodged the present complaint before the European Commission against HHAB. The proceedings of the District Court of Helsingborg have been stayed pending the outcome of the complaint to the Commission.
29. HHAB also submitted, on 14 May 1998, an application to the Swedish Competition Authority alleging notably that Scandlines was abusing its dominant position in the market for ferry services between Elsinore and Helsingborg. In its decision of 26 June 1998, the Swedish Competition Authority decided not to deal with the complaint in view of the investigation by the Commission in this matter¹⁶.
30. Scandlines has, since January 1997, continued to pay only [*CONFIDENTIAL*] % of the invoices to HHAB and at present the disputed outstanding payments are valued at approximately [*CONFIDENTIAL*] SEK (*[CONFIDENTIAL] €*), and growing. The full value of the invoices is included in the revenues of HHAB in its accounts, with a reservation of [*CONFIDENTIAL*] % as a matter of caution for their recovery. Scandlines too has accounted for the full value of the invoices in its own accounts with the disputed [*CONFIDENTIAL*] % value of the invoices, including accrued interest, currently held in a separate bank account.
31. According to HHAB, it had proposed different charging models in 2001 to Scandlines with reduced port fees based on traffic volumes, either yearly or for a three year period (2001-2004), which Scandlines, however, refused since the proposals were not based on a [*CONFIDENTIAL*] % reduction of the port charges (without explaining further the basis for choosing a [*CONFIDENTIAL*] % reduction)¹⁷. Scandlines states that it is interested in a fair structure for the setting of port charges as of 1 January 1997 and beyond (not ending 2004). According to Scandlines, attempts in 2001 to agree on port fees failed since "HHAB is not willing to discuss the structure for setting the port charges."¹⁸

¹⁶ Document 334, File A5.

¹⁷ Document 578, File A13, section 4.6, p. 12

¹⁸ Document 974, File A26, section 4.4., p. 12

I.B.3. Latest developments since the comments made by Scandlines on the Article 6 letter

32. In a letter of 9 March 2004¹⁹, HHAB informed the Commission about the launch of another court proceeding before the District Court of Helsingborg on 9 March 2004. In this proceeding HHAB has sued HH-Ferries (that belongs to the Stena Sphere to which Scandlines also belongs, as explained in footnote 6), requesting retroactively the payment by HH-Ferries of the difference between the port charges as applicable to Scandlines and Sundbusserne and the invoiced prices paid by HH-Ferries for the period 1 January 2001 until 31 January 2004 (i.e. the amount of the reduction on the port charges applicable in 2000, which was based on the previous agreement for 1997-2000).
33. In its letter of 6 April 2004²⁰ concerning the above court proceeding, Scandlines states that HHAB has requested HH-Ferries to pay the port charges in accordance with each of the annual tariffs for the period 2001-2004, which is thus incorrect. In this letter, Scandlines also makes the general remark that the annual, official port charges for the period 2000-2004 have significantly increased e.g. compared with the official Swedish consumer index for the same period. Scandlines also considers that HHAB has invoiced the ferry operators differently, which in its opinion suggests that HHAB applies discriminatory prices to the ferry operators. According to Scandlines, this is also reflected by the fact that HHAB has not made reservations in its books to cover the level of port charges in the 1998 proposal with respect to Scandlines (and Sundbusserne). However, Scandlines still is of the view that a reasonable amicable settlement with HHAB would be in the best interest of the parties.
34. The Commission notes that the allusions made by Scandlines to discriminatory prices vis-à-vis the ferry operators do not substantiate or specify in what manner the alleged different invoicing would have placed Scandlines in a competitive disadvantage compared to the other ferry operators, nor for which period HHAB would have allegedly applied such discriminatory prices, or explain how HHAB is applying dissimilar conditions to similar transactions (apart from vague references to different invoicing and suggestions that the port services provided by HHAB to all ferry operators are similar). The Commission also notes that as a matter of fact HHAB has requested HH-Ferries to pay the same port charges that it has applied vis-à-vis Scandlines and Sundbusserne for the period in question. Therefore, it seems that the purpose of Scandlines' letter is to bring the law suit by HHAB against HH-Ferries to the Commission's attention in order to support and reinforce its earlier allegations on abuse of dominant position, and is not to be seen as a request for the Commission to start examining an alleged new abuse of discriminatory pricing vis-à-vis the ferry operators (also bearing in mind the additional investigation this would require). This understanding is supported by the fact that Scandlines considers an amicable settlement as in the interest of all parties.
35. Moreover, it should be borne in mind that the court proceeding before the District Court of Helsingborg concerns the level of port charges applicable to HH-Ferries

¹⁹ Document 1135, File A 32.

²⁰ Document 1090, File A 31.

(that is not a party to the current proceeding) and not those applicable to Scandlines (the latter being subject to another proceeding before the District Court in Helsingborg, as explained above in section I.B.2.). The heart of the dispute between HHAB and HH-Ferries is essentially the very agreement (its existence and/or interpretation) between the two parties on port charges under Swedish contract law. In view of the above, the mere allusion to discriminatory prices between ferry operators is not taken as an allegation of an abuse within the meaning of Article 82 of the EC Treaty to which Scandlines would have been subject, and will not be further considered.

I.C. SERVICES AND CHARGES BY HHAB

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

36. HHAB provides a number of services and facilities to users of the port, which comprise notably access to the port (including dredging and maintenance of breakwaters), traffic control, access to quay and traffic infrastructure in the port area and facilities for mooring. While these services are normally provided to all users of the port, certain services, notably pilotage, towage, cargo-handling and warehousing, are provided on request.
37. The above port services could be regrouped into services relating to :
 - the vessel itself (irrespective of what is transported onboard the vessel, i.e. these services do not vary depending on whether the ship is empty or full, according to what and how much is transported onboard);
 - and what is transported onboard the vessel.
38. This distinction is also in line with the Green Paper on Sea Ports and Maritime Infrastructure.²¹
39. The services which relate to the vessel mainly correspond to the services and facilities on the sea-side (hereinafter “the sea-side”), i.e. when the vessel arrives in the port area until it is moored at the quay, and comprise notably:
 - traffic control,
 - pilotage and towing,
 - use of fairways for entering and leaving the port,
 - use of navigational aids (lighthouses, beacons, buoys and piers),
 - access to berths, quays, anchoring and mooring facilities in the port during the call.

²¹ Green Paper on Sea Ports and Maritime Infrastructure, COM(97) 678 final of 10 December 1997, paragraph 79.

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

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

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

however, buys more “value added” services than the companies carrying only passengers”.²²

44. In its reply to the Article 6 letter, Scandlines considers that the above distinction into sea-side and land-side services and facilities may be misleading, and suggests rather to take as a starting point only those services and facilities which are, de facto, provided by HHAB to the ferry operators. However, the purpose of the above distinction is merely to facilitate the description of the services and facilities that are provided by HHAB to vessels (i.e. not only ferries) calling the port. Those services and facilities which are actually provided and charged for by HHAB to the ferry operators are referred to below in section I.C.2.1.

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

45. All services and facilities on the sea-side (with the exception of pilotage and towage which is charged for separately) are provided and charged by HHAB through the port fees to all vessels calling at the port. As regards the services and facilities on the land-side, only some are covered by the port fees, while others, such as stevedoring and warehousing, are charged for separately.
46. According to HHAB, the services it provides and charges in the port fees comprise access to the port (including maintenance of breakwaters and dredging), access to quay and related traffic infrastructure in the port area (including maintenance), facilities to secure the vessel, traffic control, 24 hours technical and electrical service (e.g. for ramps, gangways, pumps etc.), access to fresh water, electricity etc. Scandlines has specified in its reply to the Article 6 letter that while HHAB offers mooring facilities and access to fresh water and electricity, Scandlines does not actually need or use any of these facilities or services. Scandlines uses its own mooring facilities, purchases the fresh water from the municipal water company and any additional electricity it needs (the ferries generate electricity for their own needs) from the electricity company Öresundskraft AB. Additional services, such as towing²³, cargo-handling and warehousing, are paid for separately, if used²⁴. In addition to the above, HHAB naturally also performs administrative tasks and, as the infrastructure manager, allocates terminals and other facilities to individual operators, supervises the safety in the port etc.

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

47. The three ferry operators operate from the North Harbour which is close to the city centre, where they use different terminals and different quays and berths. The ferry operators normally do not use any of the additional services provided by HHAB, such as towage. [CONFIDENTIAL] charges separately by making special arrangements

²² Document 578, File A13, section B.1.1, p. 15, second paragraph.

²³ Towage services are provided at request of the vessels by Helsingborg Bogser AB, a subsidiary (100%) of HHAB.

²⁴ Document 578, File A13, page 4, section 2.

agreed on a case-by-case basis²⁵. It may also be noted that the ferry operators on the HH-route carry out their own operations using their own personnel. Only 4 out of HHAB's employees (250 in total) are directly involved in the ferry-operations of Scandlines. However, these services are not charged within the port fees.

48. The sea-side services and facilities provided by HHAB and covered by the port fees to the ferries include the provision and maintenance of all sea-side facilities and services, including the fairways within the port area²⁶, quays, fenders, quay walls and berths (towage and pilotage being charged separately). In this respect, there is no difference between the ferries and other cargo vessels.
49. In its reply to the Article 6 letter, Scandlines maintains that it only uses the vessel traffic control in the port to a very limited extent, and, furthermore, clarifies that it uses towage services very rarely and when doing so, such service is charged for separately. According to Scandlines, the only relevant navigational aid for its operations is the lighthouse in the port of Helsingborg. Scandlines recognises, however, that the costs of keeping most of such services available to the vessels are common costs (which should generally be rather low), but argues that in the allocation of these costs, the share of the ferry operators should be very minor because of the limited use that the ferry operators make of these services. In terms of other services and facilities provided by HHAB on the sea-side to the ferry operators and covered by the port fees, HHAB has further added that its technical emergency service group is at the ferry operators' disposal 24 hours per day. The ferries have first priority and also Scandlines has made use of this service.
50. All the services indicated above, i.e. vessel traffic control, navigational aids, towage and emergency service are linked to maintaining sufficient maritime safety in the port. These services, albeit the fact that all of these services are not used regularly by the ferries, have nevertheless to be kept available by HHAB in case they are needed. It can be considered normal and acceptable that all vessels, including the ferries, calling the port (i.e. not only those who actually use the service) contribute to the costs of keeping such safety-related services and facilities available.
51. The land-side services and facilities provided by HHAB to ferry operators relate to the embarking/disembarking of passengers and vehicles, which differ considerably from those used by cargo vessels. While cargo vessels use cranes and other equipment for loading/unloading cargo, the ferries use ramps and gangways for embarking/disembarking vehicles and passengers. The three ferry-operators do not use the same port facilities on the land-side and only part of these facilities used by the ferry-operators on land is provided by HHAB. Concretely, the land-side facilities provided by HHAB to Scandlines which are covered by the port fees comprise the provision and maintenance of ramps and gangways (including a 24-hour technical and electrical service) for embarking/disembarking the passengers and vehicles, and a land

²⁵ Document 774, File A21, section 2.2, p. 2

²⁶ HHAB has refuted Scandlines claim (in its reply to the Article 6 letter) that no dredging is being carried out in the North harbour, and asserts that it has carried out dredging works very relevant for the ferries (also clarifying that there is no net on the bottom of the North harbour, as alleged by Scandlines, which would prevent dredging).

area, including the marshalling area (excluding the land on which its buildings are located). The responsibility for the marshalling area, according to HHAB, involves the maintenance of the surface, fences etc., the night lighting and the emptying of waste baskets.

52. Scandlines owns most of the facilities it uses on the land-side and leases others from HHAB, or from third parties, under separate leasehold agreements— i.e. Knutpunkten Terminal. Of all the facilities provided by HHAB to the ferry-operators, only some of them are actually covered by the port fees as explained in the previous paragraph, as the provision of most facilities on the land-side is covered by separate leasehold agreements. The main leasehold agreements between HHAB and Scandlines concern *[CONFIDENTIAL]*. As clarified in Scandlines' reply to the Article 6 letter, other services and facilities, such as light signal system and information systems cameras and monitors for the embarking/disembarking of passengers and vehicles are carried out by Scandlines itself. The same applies to the loading/unloading of goods transported onboard the ferries, which Scandlines carries out with its own equipment (lifts, fork trucks etc.) and personnel.

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

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

I.C.3. Port fees charged by HHAB

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

I.C.3.1. Basic structure of tariffs

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

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

The ship fee, charged per vessel entering HHAB of Helsingborg, is expressed per unit of the ship's gross tonnage (GT) as per international tonnage certification²⁷ and varies according to the type of the vessel (tankers, liners, ferries).

A minimum fee per vessel is specified.

B. Passenger and vehicles fees (applicable to ferries)

The ferry-operators are charged for every passenger and vehicle transported onboard the arriving or departing ferries.

C. Cargo fee ("varuhamnavgift") (applicable to cargo vessels)

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

56. A charging system whereby vessels pay per port call (i.e. ship fee/port due) and per passenger and vehicles (passenger and vehicle fee) is commonly used in ports with ferry traffic. However, the explanation provided by HHAB as to what port services and facilities are covered on the one hand by the ship fee and the passenger and vehicle fees on the other is not entirely clear.
57. According to HHAB, the services provided under the ship fee are "...access to the port which requires, inter alia, maintenance of breakwaters and water areas such as dredging, access to quay and related traffic infrastructure in the port area which requires maintenance, facilities to secure the vessel, traffic control, 24 hours technical and electrical service (e.g. for ramps, gangways, pumps etc.), access to fresh water, electricity (used quantities are charged separately) etc."²⁸
58. As regards the goods fees (i.e. passenger, vehicle or cargo fees), HHAB states that "...the services provided under the goods fee is as described above but the fee is dependant on volume of goods." Furthermore, HHAB states that "the requirement for maintenance of the port facilities varies according to a number of factors including the load of the ships. The work in respect of traffic control varies in relation to the traffic density. In some cases, fees are charged without a split-up in the invoices between various types of fees, but the fees are still based on services provided."²⁹
59. The Commission has looked at all services and facilities provided and assumed that if there is an underlying rationale behind the charging system, it would appear that the charging of ship fees, which are based on the gross tonnage of the vessel (the maximum capacity of the vessel depending on the size of the vessel), could

²⁷ The gross tonnage is defined as $K \times V$, where V is the volume of the vessel and K is a coefficient determined in an annex to the International Convention on Tonnage measurement of Ships (1969). The gross tonnage represents the maximum capacity of the vessel expressed as a weight function of the volume.

²⁸ Document 578, File A13, section 2.1., p. 4.

²⁹ Document 578, File A13, section 2.1., p. 4.

correspond to the provision of the facilities and services on the sea-side. The other fees, which depend on what and how much is transported on board (passengers and vehicles fees for ferries, cargo fees for cargo vessels), could then correspond to the provision of port facilities and services on the land-side.

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

60. As regards the ship fees, the ferry-operators active on the HH-route are charged only once per day and per vessel (category 1.3.1 of the tariff applicable to “ferries and passenger vessels with regular calls to the Danish ports at the Sound”). The ship fee is based on the ship’s gross tonnage (GT) but a minimum tariff is specified. The ferries are also charged per unit of passenger and vehicle transported.
61. HHAB states that the ferries operating regular traffic to/from Danish ports on the Sound have historically been subject to lower passenger fees than other ships due to the relatively higher number of passengers (creating higher income for the port) and the relatively low ticket price for passengers compared to other routes. HHAB further argues that it actually shares the risks and opportunities with the ferry operators as the structure of the port fees is linked to the actual volume of traffic (the more passengers, vehicles and cargo transported by the ferries, the more income for the port and vice versa).³⁰
62. As stated above, several users of the port benefit from special agreements with HHAB whereby they do not pay the full amount of port fees indicated in HHAB’s official tariff. This was also the case for some of the ferry operators on the HH-route before 1997, including Scandlines as explained below.
63. HHAB has granted reductions in respect of the passenger and vehicle fees as a result of increases in the volume of traffic transported by the ferry operators :
 - According to the agreement of *[CONFIDENTIAL]* between HHAB and Scandlines, certain reductions were granted for the period *[CONFIDENTIAL]* based on the volume of traffic for the years *[CONFIDENTIAL]*.
 - In *[CONFIDENTIAL]*, HHAB made a proposal to the three ferry operators Scandlines, Sundbusserne and HH-Ferries for a rebate system on the port fees for the period *[CONFIDENTIAL]* based on volume increases. According to HHAB, the offer was possible as the number of passengers had increased more than expected in the previous years, and it was hoped that such a rebate system would lead to lower ticket prices which would help to meet the additional competition from the Øresund bridge³¹. The offer was conditional on Scandlines withdrawal from its action against HHAB before the Administrative Court of Appeal in Göteborg³².

³⁰ Document 214, File A2, section 2.2., p. 6.

³¹ Document 319, File A5, p. 4.

³² Document 839, File A23, section 5.1., page 16 (and Annex 45 for the proposed agreement).

Scandlines rejected the proposal. In [CONFIDENTIAL], HHAB made proposals based on various volume reductions, which did not lead to an agreement on port fees (see section I.B.2).

64. As of 1 January 1997, Scandlines only pays [CONFIDENTIAL] % of the port fees. The invoices to Scandlines are established by HHAB on the basis of [CONFIDENTIAL] tariffs, which differ slightly from the current official price list (see Appendix 2).³³
65. Another exception from the tariff is the fact that HHAB agreed in [CONFIDENTIAL] that Scandlines pays a fee for passenger cars and buses which is SEK [CONFIDENTIAL] below the [CONFIDENTIAL] tariff (i.e. HHAB decided not to increase the tariff between [CONFIDENTIAL] and [CONFIDENTIAL]). This arrangement is still in place.
66. HHAB's tariff specifies a fee for cargo (dues per tonne) transported by ferries. As regards lorries, there is a special arrangement between HHAB and Scandlines, according to which [CONFIDENTIAL]. HHAB explained that this exception was introduced to facilitate the calculation of the charges.
67. It is worthwhile to note that the largest part of the port charges (about 80% over the period 1993-2000) is dependant on the volume of traffic transported onboard the ferries, i.e. the number of passengers and vehicles plus the volume of cargo.

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

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

II. LEGAL ASSESSMENT

II.A. MARKET DEFINITION AND DOMINANCE

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

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

³³ Document 578, File A13, p. 11, sections 4.1. and 4.3.

- The relevant market constitutes a substantial part of the Common Market.
70. In its reply to the Article 6 letter³⁴, Scandlines agrees with the definition of the relevant market and with the preliminary conclusions drawn by the Commission that HHAB holds a dominant position on this market and that the relevant market constitutes a substantial part of the common market.
71. In its comments on the Article 6 letter, HHAB maintains its position about the definition of the relevant market.³⁵ HHAB does not bring further arguments, but in previous submissions to the commission, HHAB contended that the market is the market for the provision of infrastructure for transport from the Swedish part of the Sound to the Danish part. According to HHAB, the market at least includes other ports around the Sound and also the Øresund Bridge.³⁶ HHAB therefore argues that it does not hold a dominant position on this market. In addition, HHAB claims that “even if the Bridge is not taken into account when the relevant market is defined, it is a fact that the Bridge is very relevant as a threat to HHAB. This threat as such hinders HHAB from charging excessive or unfair prices, as this would result in a repercussion on HHAB.”³⁷

II.A.1. The relevant market

72. As set out by the Commission in the Article 6 letter³⁸, the relevant market in this case is the market for the provision of port services and facilities in HHAB of Helsingborg to ferry-operators transporting passengers and/or vehicles on the Helsingborg-Elsinore route (the HH-route).
73. HHAB and the Øresund Bridge (which is located about 60 km South of Helsingborg between Malmö and Copenhagen) do not operate on the same product market. The reason is that the customers (in this case, the ship-operators who require provision of port infrastructure services and facilities at Helsingborg) cannot use the bridge infrastructure instead of the port infrastructure. On the market for the provision of port infrastructure and facilities, the Øresund Bridge is not a substitute for the port infrastructure. The Bridge does not compete with HHAB of Helsingborg on the market for the provision of port infrastructure facilities, but with the ferry operators on the downstream market for the provision of transport services to passengers, vehicles.
74. Unlike what HHAB has alleged, Danlink and DFDS are not regarded as HHAB’s customers on the relevant market:

³⁴ Point 2 of the Reply to the Article 6 letter, Sections I.A.1-I.A.4 of Annex 1 to the Reply to the Article 6 letter

³⁵ Document 1038, File A29, Section 5, p 6.

³⁶ Doc 578, File A13, Section B.1. and doc 774, File A21, Section 5

³⁷ Doc 1038, File A 29, Section 7.1.1., p 10

³⁸ See Section II.A.1. of the Article 6 letter.

- Following the termination of the Danlink rail service on 30th June 2000, as a result of which there is no rail connection on the Helsingborg-Copenhagen route, it is not necessary to consider rail transport as all rail traffic now uses the bridge between Malmö and Copenhagen.
 - DFDS (Scandinavian Seaways) is a cruise ferry-line between Copenhagen and Oslo. DFDS calls only once per day in Helsingborg. Most of the passengers and vehicles transported by DFDS are carried between Copenhagen and Oslo and only a very limited volume is added at Helsingborg. As regard the port charges, DFDS is not submitted to the same tariff conditions as the ferries active on the HH-route. DFDS has a special agreement with HHAB³⁹.
75. As concerns the provision of services by HHAB in Helsingborg, at least two neighbouring but different markets can be identified: one is related to the provision of port facilities and services to ferry-operators active on the HH-route (the relevant market) and the other to the provision of port facilities and services to ships loading and unloading cargo at Helsingborg.
76. As developed in the Article 6 letter⁴⁰, there is no other Swedish port that can be a substitute for Helsingborg for the provision of port facilities and services to ferry-operators active on the HH-route.
77. As regards the market for the provision of port facilities and services to cargo vessels, there are genuine alternatives to HHAB of Helsingborg (all major cargo ports in and around the Øresund region: Copenhagen, Frederikshavn, Gothenburg, Trelleborg, Halmstad and Malmö⁴¹), which supports the assumption that HHAB does not hold a dominant position on this neighbouring market.

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

78. In assessing the position of HHAB on the relevant market, there is no evidence whether the Øresund Bridge's pricing represents a binding constraint on HHAB. In any event, it does not exert a direct competitive constraint on HHAB and there is no evidence that it would prevent HHAB to "behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."⁴²
79. For the purposes of the present decision and as set out in the Article 6 letter⁴³, it is therefore assumed that HHAB holds a dominant position on the relevant market. It is the sole provider of port facilities and services for ferry services transporting passengers and vehicles on the HH-route. There is no possibility for any other

³⁹ [Doc 182, File A2, p. 7.]

⁴⁰ See Section II.A.2. of the Article 6 letter.

⁴¹ The substitutes could even be extended to include Stockholm, Oslo, Helsinki, and Esbjerg and other Nordic ports depending on the nature and final destination of the cargo.

⁴² Case 85/76, *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, at para. 38.

⁴³ See Section II.A.3. of the Article 6 letter.

undertaking to enter the upstream market as regards the provision of port facilities and services at Helsingborg.

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

80. Finally, as established in the Article 6 letter⁴⁴, the relevant market defined as the market for the provision of port facilities and services in the port of Helsingborg to ferry-operators transporting passengers and/or vehicles on the HH-route constitutes a substantial part of the Common Market.

II.A.4. Conclusion

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

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

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

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

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

- (i) the port business must carry its own costs, “in particular in consideration of the considerable investments in the port for the benefit of ferry operators” ;
- (ii) all customers should be treated equally ;
- (iii) the port fees should not entail any link to any specific service or facility in the port;
- (iv) the cost calculations for the port facilities must reflect the current value (replacement value) of the assets.

⁴⁴ See Section II.A.4. of the Article 6 letter.

84. HHAB argues that “it is imperative to see the port as a whole as one business unit” whereby all activities and services provided are interconnected⁴⁵. The different activities “cannot be split up and regarded as separate markets.”⁴⁶ It would thus not be correct “to single out an individual investment and its current user/customer and argue that the cost should be allocated only to this customer or its proportionate part of HHAB’s total revenues”.⁴⁷ HHAB explains that its different lines of business and the corresponding revenues are continuously changing over time. “Hence investments in one part may have to be paid by revenues generated in another part of the port – this will inevitably change over time.”⁴⁸
85. Moreover, according to HHAB, “investments made in one part of the port may be the result of changes in the demand of services in other parts of the port.”⁴⁹ For instance, HHAB argues that it was forced, in 1984-85, to undertake a number of non-ferry related investments (e.g. building of a new container terminal, the West Harbour) in order to provide further space for ferry-operations⁵⁰. “Hence, although a new container facility has been built, the costs therefore should not be allocated to container traffic only where such investment to a large extent was caused by an increase in ferry traffic requiring additional space and thus driving a move of the container handling”.⁵¹
86. According to HHAB “costs are naturally taken into account every time when HHAB sets the port charges”. “When new port charges are set, the investment costs – the cost of capital and costing depreciation – constitute the basis for the charging process. Every time HHAB has decided on the port charges, charges in competing and other ports have been taken into consideration”. In the context of the yearly budget process of HHAB, the expected ferry traffic volumes, and other revenues are also taken into account. However, “a precise mathematical model for the cost calculation, has not been practised every year as a formula for calculating the port charges”.⁵²
87. According to HHAB, its “...general policy is to apply the tariff and not allow any discount on the port charges”. However, “HHAB has occasionally entered into special agreements with ferry operators under which they do not pay the full amount of the port charges indicated in HHAB’s tariff⁵³. HHAB has also entered into special

⁴⁵ Document 251, File A3, section 4.1., p 5.

⁴⁶ Document 214, File A2, section 2.1.

⁴⁷ Document 214, File A 2, section 2.1., p 4-5

⁴⁸ Document 214, File A 2, section 2.1., p 4

⁴⁹ Document 214, File A 2, section 2.1., p 4

⁵⁰ Document 319, File A5, section 2.9., p 8-9 ; Document 222, File A2, (History of the port and HHAB, non confidential version)

⁵¹ Document 214, File A 2, section 2.1., p 4

⁵² Document 359, File A6, p. 2

⁵³ Document 214, File A2, section 4. p 6.

agreements with other port users, i.e. cargo vessel operators, whereby the latter do not pay the full amount of port fees under the tariff. The special agreements are dealt with under sections I.C.3.2 and I.C.3.3.

Scandlines' comments

88. In its complaint, Scandlines alleged that HHAB has infringed Article 82 of the EC Treaty, by levying excessive and discriminatory charges for services provided to ferry operators.⁵⁴ This is the result, according to Scandlines, of HHAB viewing the port as a whole, single operational and economic unit and not charging the different users of the port according to an allocation of the costs corresponding to their respective use of the port.
89. Scandlines considers that it should only have to pay individually for the infrastructure and facility that it actually uses plus, in principle, its fair share of costs relating to common infrastructure and facilities. Port charges would then be considerably lower for ferry operators and higher for the other users of the port.
90. In its reply to the Article 6 letter⁵⁵, Scandlines sums up that HHAB's port charges are excessive and discriminatory because they are not cost-based and the pricing is not transparent.
91. More specifically, Scandlines argues⁵⁶ that HHAB's alleged guiding principles for its pricing policy are not as clear as it claims. Scandlines referred in particular to paragraph 47 of the Article 6 letter where the Commission stated that the explanation provided by HHAB as to what port services and facilities are covered by the ship fee and the goods fee respectively is not entirely clear.
92. Scandlines considers that, unlike what is stated by HHAB, all customers are not treated equally. According to Scandlines, specialised cargo operators and ferry operators carrying cargo are treated differently. Even the ferry operators are treated differently which can be exemplified by the fact that HHAB charges HH-Ferries in accordance with the proposed agreement from April 1998, whereas Scandlines is charged in accordance with the 1996 tariffs.
93. According to Scandlines, the Commission's assessment that HHAB is dominant on the relevant market shows that HHAB's argument that the port should be seen as one business unit is unfounded.
94. According to Scandlines, HHAB's argument "that it was forced, in 1984-85, to undertake a number of non-ferry related investments ... in order to provide further space for ferry-operations" is not true and does not correspond with HHAB's statement that all customers are treated equally.

Assessment by the Commission of Scandlines' comments

⁵⁴ Document 785, File A22, section 2.2.2. p 49

⁵⁵ Reply to the Article 6 letter, point 65

⁵⁶ Section II.B.1. of Annex 1 to the Reply to the Article 6 letter

95. The Commission cited, in Section II.B.1. of the Article 6 letter, the explanations provided by HHAB as concerns its pricing policy as regards the port charges. The Commission did not take position on each of HHAB's statements in the Article 6 letter (such as, for instance, the comments made by HHAB outlined in paragraph 85 above).
96. Scandlines did not define precisely what it means by "a non-transparent pricing" system. It seems to refer to the fact that HHAB's principles as concerns its pricing policy are not as clear as it claims or that HHAB does not follow them. Scandlines also refers to paragraph 47 of the Article 6 letter where the Commission stated that the explanation provided by HHAB as to what port services and facilities are covered by the ship fee and the goods fee respectively is not entirely clear. However, Scandlines did not explain why this should necessarily lead to HHAB charging discriminatory or unfair prices.
97. The fact that the port charges would be non cost-based or the pricing non transparent do not constitute as such abuses under Article 82 of the EC Treaty. The method of charging a ship fee, which depends on the characteristics of the vessel (tonnage or size or length of the vessel) and goods fees (passenger, vehicles or cargo fees), which depend on what and how much is transported onboard is commonly used by most ferry ports (see further below section II.B.2.2 section d). The arguments put forward by Scandlines will be addressed below in section II.B.2. (Unfair/excessive pricing) and II.B.3. (Price discrimination between the ferry-operators and the other users of the port). More specifically:
- The question of the relation between the port charges and the costs incurred by HHAB in providing services and facilities to the users of the port will be examined in section II.B.2. (Unfair/excessive pricing).
 - The question whether the users of the port are treated equally by HHAB will be examined in section II.B.3. (Price discrimination between the ferry-operators and the other users of the port).
 - The question whether the port of Helsingborg should be considered as "one single business unit" will be examined in below sections II.B.2.1.c).

II.B.2. Unfair/excessive pricing

98. Article 82 of the EC Treaty prohibits as incompatible with the common market insofar as it may affect trade between Member States, the abuse by one or more undertakings of a dominant position within the common market or in substantial part of it, consisting of "*directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions*".
99. In United Brands⁵⁷, the European Court of Justice (hereafter "ECJ") has set out a definition of what may constitute an excessive or unfair pricing abuse under Article 82. In paragraph 250 of that judgment it stated that "*charging a price which is*

⁵⁷ Case 27/76, United Brands v Commission [1978] ECR 207

excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse”.

100. The Court did not specifically set out how the “economic value” of a product should be determined, although it stated in paragraph 251 of its judgement that “*the excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which could disclose the amount of the profit margin*”.
101. The Court further stated in paragraph 252 that “[t]he questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products”.
102. It is important to note that the decisive test in United Brands focuses on the price charged, and its relation to the *economic value* of the product. While a comparison of prices and costs, which reveals the profit margin, of a particular company may serve as a first step in the analysis (if at all possible to calculate), this in itself cannot be conclusive as regards the existence of an abuse under Article 82.
103. In this decision, the Commission will follow the methodology set out by the Court in paragraph 252 of the United Brands judgement. The Commission will therefore assess the costs actually incurred by HHAB in providing the products/services in question (the costs of production) and make a comparison with the prices actually charged (section II.B.2.1). The Commission will then assess whether the prices are unfair when compared to prices charged to other users or by other ports (section II.B.2.2), or whether the prices are unfair in themselves (section II.B.2.3).

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

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

104. The Commission has sought to establish the relevant costs by requiring HHAB “to produce particulars of all the constituent elements of its production costs”⁵⁸ related to the ferry operations.
105. At the request of the Commission, HHAB has explained its pricing policy as regards the port charges and provided an allocation of its costs to ferry operations (including the train-ferry operations (Danlink) and the services provided to DFDS) for the year 1996.⁵⁹

Costs	Amount (in MSEK)	Comment
Depreciation costs	70	1 for buildings, 28 for Machinery, 41 for ground facilities
	64	10% of 50% of 1278 MSEK

⁵⁸ Ibid, paragraph 256.

⁵⁹ [Document 198, File A2]

Cost of capital		
Direct operational expenses	4 ⁶⁰	
Overhead expenses	18	(147/329 = 45%) of 42 MSEK
Total	156	

106. In 1996, according to HHAB, the costs related to ferry operations would amount to 156 MSEK, which exceeds the gross revenue derived from ferry operations (147 MSEK). The total costs figure is also compared by HHAB to the revenues generated by ferry-operations from 1993 to 1997 (114 MSEK to 143 MSEK) in order to suggest that the ferry-operations are not profitable in the long run.
107. In the Article 6 letter, the Commission showed that the full application of the cost allocation principles used by HHAB (not only to the ferry-operations but also to the other activities of the port) would, according to the Commission's estimations, give the following results for the year 1996⁶¹ :

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

[Document 198, File A2] MSEK

108. The Commission considered, based on the above table, that this allocation of the costs by HHAB cannot be realistic and reflect the level of the costs actually incurred by HHAB to provide facilities and services to the ferry-operators and to the other users of the port of Helsingborg. If it were so, HHAB would face bankruptcy, something which is not reflected in its audited financial reports.
109. The Commission has then set out, in section II.B.3. of the Article 6 letter, which aspects of the cost allocation made by HHAB look questionable. The Commission took the preliminary view that:

- The fixed assets leased from the City of Helsingborg⁶² should not be included in the base for calculation of the depreciation costs and cost of capital incurred by

⁶⁰ HHAB has confirmed that this value, calculated in 1997, corresponds to the average direct operating costs of the previous years. It has indicated that the amount of these costs (which are related to the operations of the three ferry-operators, plus DFDS and Danlink) "is now a little low but is still used as a minimum amount in the model" (Document 774, File A21, section 4.4, p 6. [Document 770, File A21]).

⁶¹ The figures of the first column, related to ferry-operations and of the 3rd and 6th lines of last column (total overhead costs, total depreciation costs) have been directly provided by HHAB. The others are derived by difference from data provided by HHAB (depreciation costs and cost of capital for the other users) and from the official financial report and the IMR reports for the year 1996, on an aggregate basis.

⁶² These assets correspond to land areas, quays, docks, and channels, breakwaters and terminal areas that were not transferred in 1993-94 from the City of Helsingborg. These assets are leased from the City of Helsingborg.

HHAB. In counterpart, the operating costs borne by HHAB should include the rent paid to the City for these assets and the maintenance costs of these assets.

- In order to reflect the costs actually incurred by HHAB, the book values of the assets owned by HHAB should be used instead of the replacement values. The depreciation costs would then correspond to the figures registered in the audited financial reports of the company.
- The cost of capital should be calculated on the basis of the financial result and the equity instead of half the replacement value of the assets of the port as done by HHAB. The cost/remuneration of the capital would then amount on average to [40 - 60] MSEK per year between 1994 and 2000, for the whole company, instead of [160 - 190] MSEK.

Scandlines' comments on the allocation made by HHAB of its costs to ferry-operations and on the Commission's assessment of this cost allocation⁶³

110. Scandlines states that it "agrees with the Commission's rejection of the cost analysis put forward by HHAB."⁶⁴ Scandlines argues that "it is therefore crucial to find an approach that reflects a realistic level of costs incurred by HHAB in order to provide facilities and services to the ferry-operators and to the other users of the port of Helsingborg"⁶⁵. Scandlines makes in its reply to the Article 6 letter a number of comments to support this conclusion⁶⁶.

Assessment by the Commission of Scandlines' comments

111. Scandlines agrees with the Commission's preliminary conclusion that the allocation of the costs submitted by HHAB does not appear to be realistic and cannot reflect the level of the costs actually incurred by HHAB to provide facilities and services to the ferry-operators and to the other users of the port of Helsingborg.

112. In view of this, there is no need to address each of the arguments raised by Scandlines against the cost allocation submitted by HHAB, although some of these arguments (e.g. the ferry-operations should not include the train ferry operations of Danlink or the services provided to DFDS), will be addressed below in a specific context.

113. In its comments to the Article 6 letter⁶⁷, HHAB maintains that, for the purpose of making a fair allocation of costs, the City and HHAB should be looked upon as one entity. As regards the value of the assets, HHAB maintains that the replacement value of the assets should be applied when making a fair allocation of the costs. According to HHAB, a calculation of costs based on replacement values is applied in many large

⁶³ Points 112-145 of Annex 1 to the reply to the Article 6 letter

⁶⁴ Point 21 of the reply to the Article 6 letter;

⁶⁵ Point 118 of Annex 1 to the reply to the Article 6 letter

⁶⁶ See section II.B.3. of Annex 1 to the Reply to the Article 6 letter (points 120-145)

⁶⁷ Document 1038, File A29, section 6.3.

manufacturing companies. This method of calculating costs is a tool for determining the actual price, but many other factors should be taken into consideration such as “the owner’s goals, market conditions, financial needs, etc”. “HHAB reiterates that its cost model is conservative in that only 50% of the replacement value is used and that prices taking such replacement values into consideration, allows HHAB to secure reasonable funds for future investments.” This argument will be addressed in paragraph 223 below.

114. For the detailed reasons set out in sections II.B.2. and II.B.3. of the Article 6 letter, the allocation by HHAB of its costs to the ferry-operations is rejected and is not used further in the present decision in the determination whether the port charges are excessive.

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

115. As stated above there are aspects of HHAB's cost allocation that seem questionable. The Commission has therefore sought to establish an approach that would reflect a more realistic level of the costs incurred by HHAB to provide the relevant services. This allocation aims at assessing the level of the costs *incurred* by HHAB (the production costs), according to whether they are related to services provided to the ferry-operators active on the HH-route (Scandlines, Sundbusserne and HH-Ferries) or to the other activities of the port.
116. As HHAB did not provide a realistic allocation of its costs to the ferry-operators, the Commission has sought to make an approximate calculation and allocation of these costs, based on data made available by the port, mainly from the audited financial reports.
117. It must be stressed that this is only an *approximate* cost allocation made for the purposes of addressing the present complaint. In particular, it has not been possible to determine with certainty all relevant incurred costs. The Court has recognised in United Brands the “considerable and at times very great difficulties in working out production costs which may sometimes include a discretionary apportionment of indirect costs and general expenditure and which may vary significantly according to the size of the undertaking, its object, the complex nature of its setup, its territorial area of operations, whether it manufactures one or several products, the number of its subsidiaries and their relationship with each other”⁶⁸.
118. It should be noted that most of the costs of the port are fixed costs and that the variable costs (i.e. costs that would vary with the number of calls by the ferry-operators or the number of passengers/vehicles transported onboard the ferries) are minor. Furthermore, most costs (the overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg) had to be treated as distributed costs. These indirect costs are not allocated by HHAB between the different categories of users of the port and the Commission and this renders the task of allocating these costs very difficult. The Commission has applied a key of repartition of those costs between the different users of the port. However, as explained in section 4 of Appendix 3.1, the choice of which

⁶⁸ Ibid, paragraph 254.

key to apply is not evident and that choice naturally affects the outcome. However, for the purposes of the present decision, the Commission has proceeded based on assumptions that are in any event more favourable to the complainant.

119. In addition, due to a lack of precise data and to the intricacy existing between the services and facilities provided by HHAB within the port charges and those provided within specific agreements, it has not been possible to segregate out of the approximate total costs (all costs incurred by HHAB which have been attributed to all services provided to the ferry-operators active on the Helsingborg-Elsinore route), the costs incurred attributable to services covered by the port charges. See Section 3 of attached Appendix 3.1.

120. The Complainant makes in its reply to the Article 6 letter a number of comments on specific elements of the approximate calculation made by the Commission. These comments are addressed in Appendix 3.1, which is an integral part of the present decision.

121. Part of the comments made by Scandlines is taken into account in a revised approximate cost/price analysis as set out in Appendix 4.2 [WHICH IS CONFIDENTIAL] of the present decision.

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

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

123. In the Article 6 letter, the Commission stated that it does not appear that, as a whole, the profits derived from the ferry-operations generate significant profits at the overall company level.

124. Previously, the Commission had quoted HHAB's argument that "it is imperative to see the port as a whole as one business unit" whereby all activities and services provided are interconnected⁶⁹. The different activities "cannot be split up and regarded as separate markets."⁷⁰

Scandlines' comments

125. Scandlines has compared the approximate cost allocation made by the Commission in the Article 6 letter to its own cost allocation as set out in its submission of 4 July 2000.⁷¹ Scandlines notes that "it is striking that the two sets of calculations show

⁶⁹ Document 251, File A3, section 4.1., p 5.

⁷⁰ Document 214, File A2, section 2.1.

⁷¹ Scandlines' Reply to the Article 6 letter, points 160-162; Section 3 of Appendix 2 to the Reply to the Article 6 letter; Appendix 1.10 to the Reply to the Article 6 letter.

broadly the same picture, even though the Commission has allocated a larger share of the costs to HHAB's ferry operations”⁷². It concludes that “despite the difference in the treatment of specific elements in the calculations of the Commission and Scandlines it would appear that there is no real dispute between the Commission and Scandlines that the prices to ferry operators are very high compared to costs.”⁷³

126. Scandlines does not however accept the relevance of the conclusion in the Article 6 letter stating that the profits from the ferry operators do not generate significant profit at the overall company level.⁷⁴ It explains that “this sentence seems to suggest that the profits on the Ferries business are somehow responsible for the company’s overall profits, and that the level of the profits in the Ferries business is to be assessed in the light of the company’s overall profits”. It would be invalid for the Commission “to assess the level of the profitability of the Ferries business not on its own but by taking account of the lack of profitability of the Others business”.⁷⁵
127. Scandlines adds that such a conclusion is akin to the “portfolio pricing” argument that was rejected by the British Competition Commission Appeal Tribunal (CCAT) in the Napp case.⁷⁶ The CCAT rejected the argument that the price of the product in which Napp was dominant had to be considered as merely one of a portfolio of prices for different products supplied by Napp and that it was then necessary to judge whether Napp’s return on its investment was reasonable judged by reference to prices of all its products. The CCAT concluded: “In our view, it is not appropriate, when deciding whether an undertaking has abused a dominant position by charging excessive prices in a particular market, to take into account the reasonableness or otherwise of its profits on other, unspecified, markets comprised in some wider but undefined “portfolio” unrelated to the market in which dominance exists.” (paragraph 413 of the Judgement).
128. Scandlines does not either accept that the port be viewed by HHAB as one single operational and business unit. In its complaint, Scandlines argues that it leads HHAB to infringe Article 82 of the EC Treaty, by levying excessive and discriminatory charges for services provided to ferry operators.⁷⁷
129. Scandlines considers that it should only have to pay individually for the infrastructure and facility that it actually uses plus, in principle, its fair share of costs relating to common infrastructure and facilities. Port charges would then be considerably lower for ferry operators and higher for the other users of the port.

⁷² Reply to the Article 6 letter, point 23.

⁷³ Reply to the Article 6 letter, point 5

⁷⁴ Reply to the Article 6 letter, point 27.

⁷⁵ Section 6 of Appendix 2 to Scandlines’ Reply to the Article 6 letter.

⁷⁶ *Napp Pharmaceutical Holdings Limited and Subsidiaries v The Director general of fair Trading*. Decision of 15 January 2002 taken by the Competition Commission Appeal Tribunal. See Reply to the Article 6 letter, point 27 and point 17.

⁷⁷ Document 785, File A22, section 2.2.2. p 49

Assessment by the Commission of Scandlines' comments

130. Section 6 of attached Appendix 3.1 explains the differences between the approximate cost/price analysis made by the Commission in the Article 6 letter and the cost allocation made by Scandlines in its submission of 4 July 2000⁷⁸.
131. Despite the difference of treatment of some specific elements in the calculations made by Scandlines and the Commission, it appears indeed that the results of the approximate cost/price analysis made by the Commission are very close to those of the cost allocation submitted by Scandlines. The same conclusion would apply as regards the amended approximate cost/price analysis set out in Appendix 4.2 [WHICH IS CONFIDENTIAL].
132. It should be noted that unlike what Scandlines states above, the share of the costs allocated by the Commission to the ferry-operations is very close to Scandlines' assumption according to which the operating costs attributable to the ferry-operations (excluding the leasehold paid by HHAB to the City of Helsingborg) would amount to 15% of HHAB's total operating costs. This explains why "the two sets of calculations show broadly the same picture".
133. When the Commission quoted HHAB's argument that "it is imperative to see the port as a whole as one business unit" it was in a section of the Article 6 letter presenting the cost/price analysis submitted by HHAB. The Commission did not specifically take position on this statement. However, it is clear from what follows that the port has not been treated by the Commission as "one single business unit".
134. The preliminary conclusion of the Article 6 letter stating that it does not appear that, as a whole, the profits derived from the ferry-operations generate significant profits at the overall company level should not be interpreted as supporting a position that only the profits at the overall level should be considered when assessing whether the prices charged to the ferry-operators are excessive. On the contrary, as noted by Scandlines, the Commission has made considerable efforts to calculate separate revenues, costs and profits for the ferry-operations and the other activities in the port.
135. The Commission made reference in the Article 6 letter⁷⁹ to the judgement by the Court of First Instance (hereafter "CFI") in United Parcel Services Europe⁸⁰, which upheld a Commission decision rejecting a complaint by UPS. UPS had alleged that Deutsche Post AG abused its dominant position on the reserved postal market where it has been granted exclusive rights, by using profits derived from this market in order to acquire control of undertakings active in neighbouring markets or to subsidise activities in a liberalised market.
136. In paragraph 55 of this judgement, the CFI clarified that the acquisition at issue "could raise problems in the light of the Community competition rules where the

⁷⁸ Document 937-940, File A25.

⁷⁹ Article 6 letter, Section II.C.1.1. c)

⁸⁰ Case T-175/99, United Parcel Europe SA (UPS) v Commission, Judgement of the CFI of 20 March 2002

funds used by the undertaking holding the monopoly derived from excessive or discriminatory prices or from other unfair practices in its reserved market". It stated that "in such a situation, where there are grounds for suspecting an infringement of Article 82 EC, it is necessary to examine the source of the funds used for the acquisition in question in order to determine whether that acquisition stems from an abuse of a dominant position."

137. In view of the above, the Commission considered in the Article 6 letter, that "even if HHAB would use profits derived from the market for the provision of facilities and services to the ferry-operators active on the HH-route (where it holds a dominant position) to cover the losses generated by its other activities, this would not in itself constitute an abusive conduct on this market. In such a situation, it is necessary to examine the source of the profits in order to examine whether they come from an abuse of dominant position on the relevant market."
138. The revenues, costs and profits of HHAB related to the ferry-operations need therefore to be determined and examined separately from the other activities of the port, in order to compare the price actually charged by HHAB to the ferry-operators and the costs actually incurred by HHAB for the provision of port services. This is the approach taken by the Commission in the Article 6 letter and in the present decision, which is consistent with the approach taken by the CCAT in the Napp case.

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

139. On the basis of the approximate cost/price analysis set out in Appendix 3 of the Article 6 letter, the Commission noted that the revenues (through the port charges) derived from the ferry-operations would seem to exceed the costs actually incurred by the port to provide services and facilities to these users.
140. The same finding can be made on the basis of the attached amended approximate cost/price analysis set out in Appendix 4.2 [WHICH IS CONFIDENTIAL]. It should be noted that the calculations in this amended approximate cost/price analysis account for all HHAB's revenues derived from the ferry-operations (the aggregated port charges invoiced by HHAB to Scandlines, Sundbusserne and HH-Ferries, plus the amounts charged to them pursuant to specific agreements) and all costs incurred by HHAB which can be reasonably attributed to services provided to the ferry-operators active on the Helsingborg-Elsinore route.
141. As explained in Section 3 of Appendix 3.1, a comparison should be made between the contested port charges and the costs incurred by HHAB in providing the services provided against these port charges. As the costs to be covered by the port charges are necessarily lower than the total costs, it can be concluded, as in the Article 6 letter, that the revenues derived from the ferry-operations (through the port charges) would seem to exceed the costs actually incurred by the port in providing the services and facilities against these port charges.
142. In paragraph 173 of the Article 6 letter, the Commission drew the preliminary conclusion that the mere fact that revenues may exceed costs actually incurred is not sufficient to conclude that the difference is "excessive" in the meaning of the first question posed by the Court in paragraph 252 of the United Brands judgement. In any event, the Commission considered that even if it were to be assumed that the

difference is "excessive", the Commission would have to proceed to the next question as laid down in United Brands in the same paragraph, in order to determine whether the prices charged to the ferry-operators are unfair, either in themselves or when compared to other ports.

Scandlines' comments

143. The complainant does not agree that even if it were to be assumed that the difference between the revenues derived from the ferry-operations through the port charges and the costs incurred is "excessive", the Commission would have to proceed to the question (as laid down in paragraph 252 of the United Brands judgement) whether the prices charged to the ferry-operators are unfair, either in themselves or when compared to other ports⁸¹.
144. Scandlines submits that a price which exceeds, above a reasonable margin, the costs of providing the services in question is both "unfair in itself and abusive" within the meaning of Article 82:
 - Scandlines refers to paragraph 251 of the *United Brands* judgement and points out that "in the present case, the Commission has carried out an analysis of HHAB's cost structure, whereas in United Brands, the Commission did not carry out any analysis of United Brands' cost structure".⁸²
 - "Where, as here, an analysis of a dominant undertaking's cost structure shows that the difference between the cost of product or service and its selling price is so excessive that it has no reasonable relation to the economic value as measured by the cost of providing the service, such a price is both unfair in itself and abusive. A price that is excessive compared to costs incurred is unfair when compared to the cost of providing the product in question."⁸³"
 - Scandlines refers to the average ROCE⁸⁴s for Swedish industry as a whole, compiled by the Swedish Employers' Confederation, which varied from 11.8-14.8% during 1994 to 1998 and concludes that "A price resulting in a ROCE of 94 % is so excessive compared to costs that it is unfair in itself".⁸⁵"
 - "Scandlines has been unable to find anything in the case law of the European courts which suggests that a price that is excessive by reference to costs is not abusive"⁸⁶.

⁸¹ Reply to the Article 6 letter, point 6

⁸² Reply to the Article 6 letter, point 8

⁸³ Reply to the Article 6 letter, point 9

⁸⁴ Return on Capital Employed. See Section 6 of Appendix 3.1.

⁸⁵ Reply to the Article 6 letter, point 24

⁸⁶ Scandlines refers to the cases cited at paragraph 9-073 at page 722 of *Bellamy & Child, European Community Law of Competition (5th Edition)* at footnote 15 and in particular to Case C-242/95 *GT-Link v. DSB* [1997] ECR I-4449, a case involving port charges.

Assessment by the Commission of Scandlines' comments

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

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

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

147. The questions to be determined are as follows:

- (i) “whether the difference between the costs actually incurred and the price actually charged is excessive and, if the answer to this question is in the affirmative,” (emphasis added)
- (ii) “whether a price has been imposed which is either unfair in itself or when compared to the price of competing products.”

148. Scandlines considers that a positive difference between the price charged and the costs incurred, exceeding a reasonable margin, is sufficient to conclude that the price is unfair. Scandlines notably submits that a price which exceeds, above a reasonable margin, the costs of providing the services in question is both “unfair in itself and abusive” within the meaning of Article 82.

149. In paragraph 252 of the United Brands judgement, the Court made a clear distinction between, on the one hand, the question whether the difference between the price and the production costs – the profit margin - is “excessive” and, on the other hand, the question whether the price is unfair. Had it been otherwise, there would have been no reason for the Court, once the first question has been answered in the affirmative, to proceed to the question whether the price is unfair in itself or when compared to the price of competing products.

150. A comparison between the price charged and the costs incurred (in the present case, the *approximate* incurred costs) can only serve as a first step in an analysis of excessive or unfair pricing. The United Brands judgment made clear (in paragraph 250) that such an abuse can only be established where the price bears no reasonable relation to the economic value of the product concerned.

151. In this case, the question whether the price is unfair in relation to the economic value of the service will be examined in a second step.
152. With regard to the first question posed by the Court in United Brands, on the relation between the price and the costs, the Commission considers that the comparison made by Scandlines between the yearly average Return on Capital Employed “ROCE” derived by HHAB from the ferry-operations and the yearly average ROCE of the Swedish industry is not conclusive in itself.
153. It should first be noted that the ratio referred to by Scandlines as concerns HHAB 94 % between 1997 and 1999⁸⁷) is not a “ROCE” ratio but the “EBIT (operating income) over Equity” ratio. This latter ratio differs in principle from the ROCE which is usually defined as the ratio “Income Before Taxes/Net assets”. The definition of the ROCE is not necessarily important in a comparison, provided that it is applied consistently and the figures which are compared are calculated on the same basis. In this respect, there is no evidence that the figures calculated by Scandlines can be compared with the average ROCEs for the Swedish industry as compiled by the Swedish Employers’ Confederation⁸⁸.
154. The average ROCE for the Swedish Industry as a whole amalgamates figures which relate to various different sectors and companies which may not be comparable between themselves. It cannot be considered as a reference for a “reasonable” profit or return on equity. It is well known that some sectors are structurally more profitable than others, depending on many factors.
155. Even a comparison between the profitability of different ports made at the overall company level, as Scandlines made in its complaint⁸⁹, would be of limited use, because a detailed analysis reveals that each port differs substantially from the others in terms of its mix of activities, the volume of its assets and investments, the level of its revenues and the costs of each activity. As Scandlines rightly noted, a port should not be regarded as one single business as concerns its profitability⁹⁰. If, like in the port of Helsingborg, some activities of a port are run at a loss, these will mask the possible profits derived by ferry-operations when considering the overall profits of the port.
156. There would be insuperable difficulties in this case in establishing valid benchmarks which would imply that, for the port taken as reference, the profits (and the equity) related to the ferry-operations are segregated from those of the other activities. Such a comparison would need the same amount of effort for each port as the one required

⁸⁷ Annex 2 to the Reply to the Article 6 letter, Section 3

⁸⁸ The document published by the Swedish Employers’ Confederation does not specify the definition used to measure the average ROCEs for the Swedish industry.

⁸⁹ Scandlines made a comparison of key financial ratios (return on equity, profit/turnover ratio, cost/turnover ratio, margin based on the years 1995-1996) between Malmö, Göteborg and Helsingborg pursuant to the annual accounts of HHABs. See Documents 784, File A22, section 1.7. p 32-36 ; Document 835, File A23 (1996).

⁹⁰ See Section II.B.2.1.d) above. This is true for Helsingborg and also for any other port, except when it runs one single activity (a specialised port).

for the port of Helsingborg, with similar uncertainties as regards the precise level of the costs, profits and equity attributable to the ferry-operations.

157. In addition, such a comparison between the profits of the ferry-operations in different ports would be too dependent on the markets on which they operate, the individual cost structure of the companies (possible economies of scope and scale, existence of cost efficiencies), the level of their investments, how these are financed as well as internal decisions as regards the remuneration of the share-holders.
158. In any event, even if it were to be assumed that the profit margin of HHAB is high (or even "excessive"), this would not be sufficient to conclude that the price charged bears no reasonable relation to the economic value of the services provided. The Commission would have to proceed to the second question as set out by the Court in United Brands, in order to determine whether the prices charged to the ferry-operators are unfair, either in themselves or when compared to other ports.
159. In those conditions, the arguments brought by Scandlines supporting that a price which exceeds the costs of providing the services (plus a reasonable margin) is unfair in itself will be examined below in section II.B.2.3.

Conclusion

160. On the basis of the approximate cost/price analysis set out in Appendix 4.2, HHAB's revenues (through the port charges) derived from the ferry-operations would seem to exceed the costs actually incurred by the port to provide services and facilities to these users.
161. The Commission will in the following first examine whether the port charges can be considered unfair when compared to port charges in other ports (section II.B.2.2.) and then, whether the port charges can be considered unfair in themselves (section II.B.2.3.).

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

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

162. In the Article 6 letter, the Commission explained that it is not possible to draw any conclusion from comparisons with other ports, as regards the level of the respective fees, for the following reasons:
 - While the method of charging a ship fee, which depends on the characteristics of the vessel (tonnage or size or length of the vessel) and goods fees (passenger, vehicles or cargo fees), which depend on what and how much is transported onboard is commonly used by most ferry ports, each port applies its own specific charging system. In particular, the repartition between the ship fee and the goods fee is not necessarily the same in different ports. The relative importance of the two types of fees therefore varies, i.e. there are ports where the ship fee is higher while the goods fee is lower compared to other ports.

- Most of the ship-owners that call a certain port regularly, such as ferry operators, have individual agreements with the port in question whereby they pay less than

the price indicated in the official tariff on which such a comparison is based, or on a different basis (lump sum).

- The list of the services provided on the land-side and on the sea-side within the port charges varies between ports. The comparison is made more difficult by the existence of separate agreements between the ports and the port users (as for HHAB) for the provision of these services.
 - Each port differs substantially from the others in terms of its activities, the size of its assets and investments, the level of its revenues and the costs of each activity.
163. The Commission took the view that such a comparison would need the same amount of effort for each port as the one required for the port of Helsingborg and, given the constraints set out above, would be very unlikely to allow the Commission to draw any conclusions of relevance to the determination of whether there has been abusive conduct.

Scandlines' comments⁹¹

164. Scandlines agrees that the repartition between the ship fee and the goods fee is made in an arbitrary way in different ports. Nevertheless, it pretends that relevant comparisons between different ferry ports can be made on the total port charges (including both ship fees and goods fees).
165. Scandlines also admits that the provision of services on the sea-side and on the land-side may vary between ports. However, it argues that the same fundamental and major services are provided in each ferry port, namely the access to berths (and fairways) and access to embarking/disembarking facilities.
166. Scandlines considers that, even though ferry-operators may have individual agreements, it does not imply that a relevant comparison on port charges cannot be made. The complainant mentions that these agreements usually consist of rebates applied on the public tariffs.
167. Scandlines considers that the comparison in its complaint⁹², based on net port charges paid by Scandlines in different Swedish ports, is relevant within this context in this case.
168. Scandlines adds that, in the present case, the most obvious prices to which the prices in the port of Helsingborg should be compared, would be:
- (i) the prices charged at Helsingborg by HHAB to non-ferry operators since those prices reflect a competitive market, and
 - (ii) the level of port charges in the port of Elsinore, which were, during the relevant period, subject to domestic regulatory control.

⁹¹ Scandlines' Reply to the Article 6 letter, points 12-13, points 55-56 ; Annex 1 to the Reply to the Article 6 letter, points 174-176

⁹² Document 40, File A1, section 1.8.1.

Assessment by the Commission of Scandlines' comments

169. It may be possible in the abstract, as Scandlines suggests, to make a comparison between different figures representing prices of products or services. The problem is to assure that the comparison is valid and that the result of the comparison is meaningful. It must be ensured that the figures which are compared are really comparable. The conditions under which such a comparison is made are therefore of the utmost importance.
170. If it were possible to find a substitutable product or service provided by competitors on the same relevant market, the price of such a product/service on this market could serve as a reference for the price of the product/service in question (to be compared with the contested price). However, such a reference cannot be found in this case, since HHAB holds a monopoly position on the relevant market.
171. According to case law and the decisional practice of the Commission, the contested price may however be compared to (i) other prices charged by the dominant company on a market different from the relevant market or (ii) prices charged by other firms providing similar products/services on other relevant markets.
172. In the former alternative above, two profitable prices that the dominant company charges for the same product/service, respectively on the relevant market and on another market, may be compared. This would notably address the situation of an undertaking charging, for the same product/service, higher prices on a market where it holds a dominant position than on other markets where it faces competition.⁹³ This approach was followed by the Commission in General Motors⁹⁴ and British Leyland⁹⁵ and implicitly endorsed by the Court in United Brands. Such a comparison is made in section II.B.2.2.b) below where the prices charged by HHAB to the ferry-operators on the relevant market (where HHAB holds a monopoly position) is compared to the prices it charges to cargo vessels, on a competitive market.
173. The approach in the latter alternative was upheld by the Court in Bodson v Pompes funèbres des régions libérées⁹⁶. In this case, the Court referred to the possibility, in order to determine whether the prices charged by concession holders are excessive, to make a comparison between those prices (offered on a market which is not competitive) and “prices charged elsewhere” (on a market which is not covered by the public concession and which is therefore open to competition).

⁹³ See the reference made by Scandlines to the Napp case in its Reply to the Article 6 letter, points 15-16

⁹⁴ Commission Decision of 19 December 1974 O.J. [1975] L 29/14

⁹⁵ Commission Decision of 2 July 1984 O.J. [1984] L 207/11

⁹⁶ Case 30/87 *Bodson v Pompes funèbres libérées*, Judgement of 4 May 1998 [1988] ECR 2479, see paragraph 31

174. Reference can also be made to the judgement of the court in *François Lucaleau and others v SACEM and others*⁹⁷. SACEM is a national copyright-management society dealing with musical works which also manages the repertoires of national societies of other Member States. The markets concerned were not clearly defined, but the Court seems to have considered that each Member State constituted a separate relevant market. The Court explained that: “When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States”.⁹⁸

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

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

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

176. As explained in section II.B.2.2.a) above, a comparison may be made between two prices charged by a dominant company for the same product/service, respectively on the relevant market (where it holds a dominant position) and on another market. In this respect, Scandlines considers that “the most obvious prices to which the prices in the port of Helsingborg should be compared, would be the prices charged by HHAB to non-ferry operators since those prices reflect a competitive market”.⁹⁹ It must be recalled that as regards the market for the provision of port facilities and services to cargo vessels, there are genuine alternatives to the port of Helsingborg which supports the assumption that this market is competitive¹⁰⁰.

177. The Commission conducted such a comparison in Section II.C.2. of the Article 6 letter (see also Section II.B.3 of the present decision), when examining whether there is price discrimination between the ferry-operators and the other users of the port (cargo vessels). This is a good illustration of the difficulties met in conducting a meaningful comparison between port charges. In particular, the fact that several cargo vessels have individual agreements whereby they pay a lump sum in port charges without distinction between the types of fees complicates to a certain degree this comparison.

⁹⁷ Joint cases 110/88, 241/88 and 242/88, Judgement of 13 July 1989 [1989] ECR 2811, see paragraph 25

⁹⁸ This statement is quoted by Scandlines in point 11 of its Reply to the Article 6 letter.

⁹⁹ Scandlines’ Reply to the Article 6 letter, point 12

¹⁰⁰ See above section II.A.1. “The relevant market”.

178. The Commission has compared the services provided by HHAB to the cargo vessels and to the ferry-operators and the corresponding port charges (as they appear in the official tariffs) and has found that:

- The land-side facilities provided by HHAB to ferry operators differ considerably from those used by cargo vessels. Therefore, it is not possible to compare the level of the total port charges respectively paid by the ferry-operators and the cargo operators, since the overall services provided by the port to these two categories of users are not equivalent.
- The only conceivable comparison would be between the ship fees paid by the two categories of users, since they would correspond to the provision of services and facilities on the sea-side which are broadly equivalent. However, the Commission has found that Scandlines pays less per call and per unit of gross tonnage than the other vessels¹⁰¹.

179. Even if the services provided by HHAB to the cargo vessels and to the ferry-operators were equivalent and the port fees charged to the ferry-operators higher than to the cargo vessels, this would not enable the Commission to conclude that the former are excessive. The fact that the cargo operations are run at a loss would imply that the price charged to the cargo-operators could not be taken as a reference for the port charges¹⁰².

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

c) Comparison with the port of Elsinore

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

- The ferry-operations constitute nearly the sole activity of the port of Elsinore.
- Since it is active on the HH-route Scandlines naturally calls the same number of times per day in Elsinore as in Helsingborg, with the same vessels.
- The traffic (passengers, vehicles) transported by the ferries which is embarked/disembarked is the same in Elsinore as in Helsingborg.

182. It appears that the port charges (ship fees, plus goods fees) paid by Scandlines to HHAB in Helsingborg are on average 3,6 times higher than the charges it would pay

¹⁰¹ This is due to the fact that the cargo-vessels (and the other ships calling at the port) pay a ship fee to HHAB for each call whilst the ferry-operators are charged a ship fee only once per day and per vessel (each ferry-operator makes 17 to 20 calls per day and per vessel).

¹⁰² In *United Brands*, the Court considered that the Commission had not sufficiently proven that prices were excessive, as it was not apparent that the prices taken for reference (the prices charged to Irish customers) were profitable (see paragraph 261 of the judgement).

in Elsinore if it paid port charges to the State Harbour instead of Scandlines Denmark A/S¹⁰³ (see table in attached Appendix 5). Both the ship fees and the goods fees are higher, the difference, however, being larger for goods fees (x 3,8) than for ship fees (x 2,5).

183. In the Article 6 letter the Commission set out that the cost structure of the Helsingborg and Elsinore ports are very different. The level of the costs in Elsinore is much lower than in Helsingborg¹⁰⁴ (according to estimates by the current manager of the port, total costs amount to MDKK 6,1, which corresponds to MSEK 7,5 and which have to be compared to the total operating costs of HHAB related to ferry-operations > 50 MSEK). The infrastructure of the port of Elsinore is much less developed than in Helsingborg, both on the sea-side and on the land side. This results in much lower maintenance costs in Elsinore than in Helsingborg. Elsinore, as a state-owned port, does not depreciate its assets.
184. HHAB explained¹⁰⁵ that the situations in Elsinore and in Helsingborg are not comparable as far as the port charges are concerned. HHAB argued that the investments in the two ports have differed substantially over the years, and that, Elsinore is geographically better protected against the prevailing winds and water streams in the area, as a result of which no breakwaters are necessary to protect the berths, while the port of Helsingborg on the other hand, had to make investments in this respect.¹⁰⁶
185. The Commission drew the preliminary conclusion that in any event, the fees applied in Elsinore would be too low to be applied as such to the port of Helsingborg as a basis for comparison, because the total revenues derived from the port charges in Elsinore (about 45 MSEK, including Scandlines) would not cover the costs borne by HHAB to provide its services to ferry operators (which amount to approximately 50 MSEK, cost of capital excluded).

Scandlines' comments¹⁰⁷

186. Scandlines considers that the port of Elsinore is a very relevant port for comparison with the port of Helsingborg as regards the provision of port services to ferry operators.

¹⁰³ Unlike in Helsingborg, Scandlines runs its operations under its own regime in Elsinore. Berths 2 and 3, used by Scandlines Øresund IS, are situated outside the State harbour, and are owned by Scandlines Danmark A/S. The other ferry-operators on the HH-route use berth 1 which belongs to the state owned port. Since 1 July 1996, Scandlines Øresund IS pay to Scandlines Denmark A/S port charges equal to the port charges set for berth 1 by the Danish Ministry of Transport (see Document 839, File A23, section 1.2., p 4).

¹⁰⁴ Document 732b, File A20, section 3., p 4

¹⁰⁵ Document 214, File A2, section 1.8., p 20

¹⁰⁶ Document 214, File A2, section 1.8., p 21

¹⁰⁷ Reply to the Article 6 letter, points 57-58; Annex 1 to Scandlines' Reply to the Article 6 letter, points 177-186

187. It argues that the port of Elsinore has all the essential services for the ferry operators active on the HH-route. “The port of Elsinore provides the ferry operators (Scandlines, HH-Ferries and Sundsbusserne) with exactly the same service and in the same way as HHAB does; namely access to berths, and access to embarking/disembarking facilities at the same service level.”
188. Scandlines does not agree that the cost of providing services to the ferries is so significantly different in Elsinore and Helsingborg that a comparison of the two sets of charges is of no value.
189. As concerns the investments in the two ports, Scandlines contends that both the ferry port in Helsingborg and Elsinore were modernised and renovated in 1987-1991. The costs related hereto amounted in Elsinore to approximately MSEK 400 and in Helsingborg to MSEK 273. In addition Scandlines has made investments of its own in Helsingborg, as per [CONFIDENTIAL] in [CONFIDENTIAL] amounting to MSEK [CONFIDENTIAL]. As regards the need for breakwaters, Scandlines argue that its ferries are constructed for berthing without any breakwaters.
190. Scandlines contests the Commission’s argument that if the revenues derived from the port charges in Elsinore (MSEK 45) were to be used in the Commission’s approximate cost/price analysis, the port charges would not cover the costs borne by HHAB to provide its services to ferry operators. According to Scandlines, the calculation made by the Commission is flawed and a substantial EBIT relating to ferry operations would actually be generated.
191. Scandlines finally argues that it is important to note that prices in Elsinore were, during the relevant period settled by the Elsinore port authority under a domestic regulatory regime while those in Helsingborg are not.

Assessment by the Commission of Scandlines’ comments

192. As explained above in section II.B.2.2.a), one may compare the contested price to prices of comparable products offered by other companies on a different relevant market. In the case at hand, a comparison may be made between the prices charged at Helsingborg and the prices charged at Elsinore.
193. However, it is questionable whether the services provided in the two ports could be regarded as equivalent. It cannot not be considered, as Scandlines argues, that the two ports provide the same basic services, namely the access to berths (and fairways) and access to embarking/disembarking facilities for the following reasons:
- The port of Helsingborg has a much more developed infrastructure spread around a much larger area than Elsinore. The North Harbour consists of several different Harbours with several quays. The three ferry operators on the HH-route use in total 5 different berths in various parts of the North Harbour: Scandlines two berths in Södra Hamnen, Sundbusserne two berths in Inre Hamnen and HH-Ferries one berth in Sundsterminalen. The port of Helsingborg has not had any difficulties in accommodating new ferry operators, such as HH-Ferries when it started operating in 1997, or to allocate additional berths for the existing ferry operators, including berths for mooring ferries which are not in use.

- At least as regards Scandlines, the services provided by the ports of Helsingborg and Elsinore are not equivalent. The state owned port of Elsinore only provides traffic control to Scandlines' vessels. It does not provide Scandlines with any quay or berth. Unlike in Helsingborg, Scandlines runs its operations under its own regime in Elsinore. Berths 2 and 3, used by Scandlines Øresund IS, are not part of the state owned port, where the port charges are applicable. They are situated outside the State harbour, and are owned by Scandlines Danmark A/S (HH Ferries uses berth 1 in the State harbour¹⁰⁸, whereas Sundbusserne leases the neighbouring quay).

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

- The costs incurred by the port of Elsinore for the provision of port services to Scandlines are very minor as compared to Helsingborg (as explained above, the state-owned port only provides traffic control to Scandlines' vessels). Berths 2 and 3, used by Scandlines Øresund IS, are not owned by the State harbour and the port does not bear the related costs [¹⁰⁹].
- Even if the level of investments in the two ports would be comparable, as Scandlines contends, the fact that the port of Elsinore, as a State-owned port, does not depreciate its assets would make a difference in the cost-structures of the two ports and possibly in the prices.
- In Elsinore, the Danish State owns the land and the installations of the port and the State-owned port does not have therefore to pay any rent to the owner of the land, unlike in Helsingborg (in Helsingborg, the leasehold paid to the City amounts to about MSEK [CONFIDENTIAL] per year). This also makes a difference in the cost-structures of the two ports and possibly in the prices.

195. Scandlines argues that it is important to note that during the relevant period, prices in Elsinore were set by the Elsinore port authority under a domestic regulatory regime while those in Helsingborg were not. This does not, however, lead the Commission to conclude that the port charges at Elsinore should be taken as a benchmark for the following reasons:

- As explained above, there is no evidence that the services provided in the two ports could be regarded as equivalent.

¹⁰⁸ Also berth 1 used to belong to Scandlines, but it was compulsorily purchased by the Danish government in 1996 in order to provide access to a quay to Mercandia (HH-Ferries' predecessor) following the Commission's intervention against the Danish state (see Commission's IP/96/456 of 30 May 1996).

¹⁰⁹ [CONFIDENTIAL]

- There is no evidence either that the conditions of supply of the services provided by the two ports would be equivalent.
- The principles of regulation of the port charges applied to the State-owned port of Elsinore (i.e. the basis and criteria used in establishing and regulating the port charges) are not known. There is no evidence that they would be applicable as such to HHAB or that they would lead to the same price-level in Helsingborg as in Elsinore.

196. In its comments to the Article 6 letter, HHAB refers to a decision of 18 June 1997 taken by the Danish competition authority¹¹⁰ following a complaint by Stena Line and Larvik Line. This decision concerned alleged excessive port charges in Frederikshavn (Northern Denmark), and it concluded that the revenues and expenditures for Elsinore were the lowest of all compared ports. A preparatory note relating to this decision of the Danish competition authority of 17 June 1997¹¹¹, mentions that the various ports, essentially state-owned, do not levy port charges considering their own costs and market expectations.
197. In any event, as set out in the Article 6 letter, if the revenues derived from the port charges in Elsinore were to be used in the Commission's approximate cost/price analysis, the port charges would hardly cover the costs borne by HHAB to provide its services to the ferry operators.
198. In this respect, the calculation made by Scandlines¹¹² in its reply to the Article 6 letter is seriously flawed because Scandlines has allocated the distributed costs (overhead costs, maintenance costs and the leasehold to the City) incurred by HHAB at Helsingborg proportionally to the revenues of HHAB of Elsinore¹¹³. This cannot be the test. The tariff grid applicable at Elsinore should rather be applied as such at Helsingborg, the costs of the latter being naturally unchanged (there is no reason to believe that these costs would change when a different tariff is applied). HHAB's revenues (through the port charges) can then be replaced with the revenues of HHAB of Elsinore (through the port charges, including Scandlines¹¹⁴). This is strictly equivalent to applying to Helsingborg the tariff grid applicable at Elsinore, since the volumes of traffic and the numbers of calls by the ferries active on the HH-route, on which both charging systems are based, are exactly the same in the two ports.
199. The table below compares the revenues derived from the port charges at Elsinore to HHAB's costs:

¹¹⁰ Document 239, File A2

¹¹¹ Document 238, File A2

¹¹² Appendix 1 to Scandlines' reply to the Article 6 letter, points 177-186

¹¹³ It should be noted that Scandlines contests that the allocation of the distributed costs to the ferry-operators at Helsingborg be made proportionally to the revenues (see point 25 of the Reply to the Article 6 letter; points 157-158 of Annex 1 to the Reply to the Article 6 letter; points 3.11-3.13 of Annex 2 to the Reply to the Article 6 letter).

¹¹⁴ Scandlines does not pay port charges to HHAB of Elsinore but to Scandlines Denmark A/S but it was assumed that those were revenues of HHAB of Elsinore.

- allocated to the ferry-operators by the Commission (see attached Appendix 4.2, WHICH IS CONFIDENTIAL). The costs do not include the financial costs or the capital costs.
- allocated to the ferry-operators by Scandlines (based on the assumption that the operating costs allocated to ferry-operations account for 10%¹¹⁵ of HHAB's total operating costs).¹¹⁶ The costs include the financial costs but not the capital costs.
- allocated to the ferry-operators by Scandlines (based on the assumption that the operating costs allocated to ferry-operations account for 15% of HHAB's total operating costs). The costs include the financial costs but not the capital costs.

[CONFIDENTIAL]

200. It can be concluded from this table, that the tariff applied in Elsinore is too low to be applied as such in Helsingborg, because it would hardly allow HHAB to cover its costs incurred in the provision of services to the ferry-operators.
201. In conclusion, there is no evidence that the port fees charged by HHAB to the ferry-operators are unfair when compared to the port fees charged to them by the port of Elsinore.

d) Comparison with port fees charged in other ports

202. As explained in the Article 6 letter, there are difficulties in making meaningful comparisons with other ports, as regards the level of the respective fees.
- The list of the services provided on the land-side and on the sea-side within the port charges varies between ports. It cannot be considered, as Scandlines argues, that all ports provide and charge for the same basic services, namely the access to berths (and fairways) and access to embarking/disembarking facilities:
 - Some ports have a much more developed infrastructure than others and are therefore able to provide more extensive services. Also the particular geographic and other circumstances in ports vary, which may affect the basic services provided, e.g. some ports require dredging to ensure access to the port.
 - The users do not necessarily use the same services and facilities within the same port and this often varies also from one port to another, e.g. depending if the user is based in the port or just calling the port in question. Users that have their base in a given port often invest in their own equipment and/or installations in this port. For example, Scandlines has invested in its own mooring facilities in Helsingborg.

¹¹⁵ The 10% figure relates, in Scandlines' submission of 10 July 1998, only the percentage of HHAB's operating costs relating to Scandlines (including all the distributed costs, except the leasehold paid to the City). A figure also including Sundbusserne and HH-Ferries should therefore logically be higher.

¹¹⁶ Document 527, File A11

- In Helsingborg, a large part of the total services and facilities provided by HHAB to the ferry-operators on the land-side is charged for under specific agreements, separate from the port charges. In other ports, the provision of these services and facilities (or part of them) is charged within the port charges. The list of the services and facilities provided to each individual customer in each port and charged within the port charges is actually different from one port to the other. These differences render a comparison of the services provided by different ports against the port charges very difficult.
- While the method of charging a ship fee, which depends on the characteristics of the vessel (tonnage or size or length of the vessel) and goods fees (passenger, vehicles or cargo fees), which depend on what and how much is transported onboard is commonly used by most ports, each port applies its own specific charging system and there are discrepancies in the specifications of the charging systems. For instance, the ship fees are usually based on the capacity of the ship, however, the measurement used for calculating it varies between ports (e.g. gross or net tonnage of the vessel or geometric volume).
- Moreover, the repartition between the ship fee and the goods fee is not necessarily the same in different ports. There are ports where the ship fee is higher and the goods fee lower than in others.
- As Scandlines has itself acknowledged¹¹⁷, in most cases, main customers in particular the ones that call frequently at a port, such as ferry operators, have separate individual agreements (like Scandlines and Sundbusserne with HHAB) for the provision of the port services, whereby they pay less than the official price on which such a comparison is based or on a different basis (lump sum or rebates). The official tariff does not therefore represent what these users are actually charged.
- Ports might differ substantially among themselves both in terms of economies of scope and scale, which respectively relate to the number of activities and the scale of production.

203. Against this background, the Commission has nevertheless drawn up a comparison of the official tariffs published by several European ports relating to their port charges vis-à-vis ferry operators. The detailed comparison is set out in Appendices 6.1 to 6.3 [6.2 - 6.3 ARE CONFIDENTIAL].

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

205. The tables attached as Appendices 6.2. and 6.3. [WHICH ARE CONFIDENTIAL] confirm that there are discrepancies in the different charging systems and in the

¹¹⁷ Document 781, File A22, sections 1.8.1.1. and 1.8.1.2., p 37-38.

repartition between the ship fee and the goods fee. All ports charge a ship fee and most ports a passenger fee and vehicle fees for cars and busses, whereas the practice differs in respect of cargo transported on lorries. In respect of the latter, some ports only charge a vehicle fee per lorry (irrespective of the cargo carried), some charge only for the cargo carried and some for both the lorry and the cargo carried.

206. On the basis of this comparison, there is no evidence that the prices charged by HHAB to the ferry-operators at Helsingborg would stand out, in particular as compared to tariffs applied in other Swedish ports, but also in comparison with other ports, such as Calais and Dover, which are of similar size in terms of numbers of passengers and cars transported as Helsingborg.

Conclusion

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

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

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

- The economic value of the services and facilities provided by HHAB to the ferry-operators would be much higher than the production costs incurred by the port.
 - The port charges are not unfair in themselves because there is no sufficient evidence that they would exceed the economic value of the services and facilities provided by the port to the ferry-operators (even if they may exceed the costs actually incurred by HHAB to provide these services and facilities).
209. In assessing the "economic value of the product supplied" the Commission considered in the Article 6 letter that account must be taken not only of the costs actually incurred by the port in providing these services, but also additional costs and other factors which are not reflected in the audited profits and losses of HHAB. The Commission listed three elements which could be taken into consideration, in this case, when assessing the economic value of the services provided by HHAB to the ferry-operators:

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

- The Commission argued that the land used by the port for the ferry-operations is very valuable in itself. Keeping the ferry-operations there instead of using the land for other purposes is likely to represent an opportunity cost for the City of Helsingborg (the unique shareholder of the port).

210. In view of the above, the Commission drew the preliminary conclusion that the economic value of the services should be considered to be much higher than the costs accounted for by HHAB to provide port services to the ferry-operators. It is, however, difficult to determine the precise economic value of the services provided by HHAB, because most of its components are intangible. This is even rendered more difficult due to the following additional factors:

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

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

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

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

Scandlines' comments

213. Scandlines submits that a price which exceeds, above a "reasonable margin", the costs of providing the services in question is both unfair in itself and abusive within the meaning of Article 82:

- Scandlines considers that "non-cost factors" should not be taken into account when assessing the economic value of a service. In any case, according to Scandlines, "none of the "factors" put forward by the Commission in the Article 6

letter are sufficient to rebut the conclusion that the excessive prices charged to ferries are unfair and abusive".¹¹⁸ The "economic value" of the services provided to the ferry operators should, and can be, measured by the cost (also including a "reasonable profit") of providing these services.¹¹⁹

- "Where, as here, an analysis of a dominant undertaking's cost structure shows that the difference between the cost of product or service and its selling price is so excessive that it has no reasonable relation to the economic value as measured by the cost of providing the service, such a price is both unfair in itself and abusive. A price that is excessive compared to costs incurred is unfair when compared to the cost of providing the product in question."¹²⁰,
- Scandlines calculated the yearly average Return on Capital Employed (ROCE) of HHAB (94 % between 1997 and 1999¹²¹) by using the Commission's approximate calculations and compares it to the average ROCEs for the Swedish industry as compiled by the Swedish Employers' Confederation, which varied from 11.8-14.8% during 1994 to 1998¹²². Scandlines concludes that "a price resulting in a ROCE of 94 % is so excessive compared to costs that it is unfair in itself"¹²³.
- "Scandlines has been unable to find anything in the case law of the European courts which suggests that a price that is excessive by reference to costs is not abusive".¹²⁴.

Assessment by the Commission of Scandlines' comments

214. As explained in section II.B.2.1.d), an analysis of excessive or unfair pricing abuse must focus on the price charged, and its relation to the *economic value* of the product. While a comparison of prices and costs, which reveals the profit margin of a particular company may serve as a first step in such an analysis, this in itself cannot be conclusive as regards the existence of an abuse.
215. In line with what the Court has stated in paragraph 252 of the United Brands judgement, a distinction must be made between the assessment of the difference between the price and the production costs – the profit margin - and the assessment of whether the price is unfair.

¹¹⁸ Reply to the Article 6 letter, point 10.

¹¹⁹ Reply to the Article 6 letter, point 9, points 32-33.

¹²⁰ Reply to the Article 6 letter, point 9

¹²¹ Annex 2 to the Reply to the Article 6 letter, Section 3

¹²² Document 523, File A11, point 14

¹²³ Reply to the Article 6 letter, points 23-24

¹²⁴ Scandlines refers to the cases cited at paragraph 9-073 at page 722 of *Bellamy & Child, European Community Law of Competition (5th Edition)* at footnote 15 and in particular to Case C-242/95 *GT-Link v. DSB* [1997] ECR I-4449.

216. At the end of section II.B.2.1.d), the Commission concluded that in any event, even if it were to be assumed that the profit margin of HHAB is high or even "excessive", this would not be sufficient to conclude that the price charged bears no reasonable relation to the economic value of the services provided.
217. The case law of the Court of First Instance and the European Court of Justice as well as the decisional practice of the Commission provide little guidance on how to determine whether a price must be considered unfair in itself.
218. While the ECJ in United Brands stated that "charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse"¹²⁵, it provided no further details on how to determine this "economic value" of the product/service provided.
219. In its comments on the Article 6 letter, the complainant implicitly acknowledges that the fairness/unfairness of the price should be assessed in relation to the economic value of the product/service provided. However, it considers that the economic value of the product/service should be determined by following a "cost-plus approach". According to such an approach, the economic value of a product/service should be calculated by adding to the costs incurred in the provision of this product/service a reasonable profit which would be a percentage of the production costs. Any price exceeding the so-determined economic value of the product/service should then be found unfair.
220. According to Scandlines, finding that the difference between the price and the production costs exceeds what it considers as a reasonable margin (which would be a determined percentage of the production costs) would necessarily lead to the conclusion that the price is unfair (see section II.B.2.1.d) above).
221. The Commission does not exclude that the question whether a price is unfair may be assessed within a cost-plus framework which encompasses the respective relations between the production costs, the price (or the profit margin) and the economic value of the product/service. However, in such an assessment, the economic value of the product/service cannot simply be determined by adding to the costs incurred in the provision of this product/service a profit margin which would be a pre-determined percentage of the production costs.
222. First, it should be recalled that there are uncertainties, in this case, as regards the precise determination of the incurred costs (the production costs) that the Commission has taken into account. For the reasons explained above in Section II.B.2.1.b), the assessment of the incurred costs by the Commission is based on an *approximate* cost allocation. The Commission has proceeded based on assumptions (notably the key of repartition of the distributed costs), which naturally affect the level of the incurred costs by HHAB in providing services to the ferry-operators.
223. Moreover, due to the fact that HHAB did not provide a realistic cost model for its pricing, the Commission had to refer to the data available in the audited financial reports. This approach adopted by the Commission is rather strict as regards the

¹²⁵ Case 27/76, United Brands v Commission [1978] ECR 207, at paragraph 250.

determination of the production costs. In particular, in the Commission's approximate cost allocation, the depreciation costs are based on the historical values of the assets (for the reasons developed in Section II.B.3.b) of the Article 6 letter, the replacement values provided by HHAB in its cost allocation could not be retained). However, a company that sets its prices on the basis of depreciated historical costs may – depending on how the production costs of the relevant assets have developed over the years – well find itself in a position that its return does not (i.e. no longer) allow it to finance future capital expenditures for the replacement of existing assets.

224. In addition, when setting a price *a priori*, a company does not necessarily only refer to the incurred costs (production costs). For instance, it is legitimate that a company may want to cover the cost of capital. As explained in section 7 of Appendix 3.1, the cost of capital (which corresponds to the profit which would allow the company to remunerate its shareholders at the appropriate level) is not a cost accounted for as such in the audited financial reports and is therefore not counted in the approximate costs allocation made by the Commission for the purposes of this decision (in absence of any reliable information on what the capital market would expect as a remuneration for investments in HHAB). Such a cost can, however, be viewed *a priori* as a charge for a company when setting the price for a product/service.
225. In any event, in the present case, there is no information on what a reasonable profit margin should be. The Commission explained in section II.B.2.1.d) that there would be insuperable difficulties in establishing valid benchmarks as concerns the profitability of ferry-operations in ports. A comparison, as suggested by Scandlines, between the yearly average ROCE derived by HHAB from the ferry-operations and the yearly average ROCE of the Swedish industry, provided it is made on a consistent basis¹²⁶, could in principle only be considered as an indication and not as sufficient evidence in itself in determining whether the port charges are unfair in themselves.
226. Moreover, the “cost-plus approach” suggested by Scandlines only takes into account the conditions of supply of the product/service. The determination of the economic value of the product/service should also take account of other non-cost related factors, especially as regards the demand-side aspects of the product/service concerned.
227. The demand-side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However it is valuable for the customer and also for the provider, and thereby increases the economic value of the product/service.
228. As a consequence, even if it were to be assumed that there is a positive difference between the price and the production costs exceeding what Scandlines claims as being a reasonable margin (whatever that may be), the conclusion should not necessarily be drawn that the price is unfair, provided that this price has a reasonable relation to the economic value of the product/service supplied. The assessment of the reasonable relation between the price and the economic value of the product/service must also take into account the relative weight of non-cost related factors.

¹²⁶ See the Commission's remark in paragraph 153.

229. Scandlines states that it has not found anything in the case law of the European courts which suggests that a price which is excessive by reference to costs is not abusive and refers notably to the cases cited at paragraph 9-073 at page 722 of Bellamy & Child, European Community Law of Competition (5th Edition) at footnote 15 and in particular to Case C-242/95 GT-Link v DSB¹²⁷.
230. The Court in *United Brands* suggested one possible approach to establish whether a price is unfair (in paragraph 252). However, it also acknowledged at paragraph 253 that “*other ways may be devised – and economic theorists have not failed to think up several - of selecting the rules for determining whether the price of a product is unfair*”.
231. Secondly, case C-242/95 GT-Link v DSB mentioned by Scandlines, concerned alleged discriminatory and unfair port duties by the port of Gedser in Denmark. However, in this case, as regards the question of alleged unfair port duties, the ECJ explicitly referred (in paragraph 39) to *United Brands* and re-stated that “unfair prices for the purposes of Article 82(a) means prices which are excessive because they have no reasonable relation to the economic value of the service supplied”. Furthermore, the ECJ stated (in paragraph 46) that it was for the national court to determine whether, having regard to the level of the duties and the economic value of the services supplied, the amount of duties is actually fair.

Conclusion

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

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

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

¹²⁷ Case C-424/95 GT-Link v. DSB [1997] ECR I-4449.

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

Scandlines' comments

236. Scandlines agrees that the port of Helsingborg represents a value to Scandlines and its customers because of its unique location close to Elsinore. It claims that this is the reason why the port holds a dominant position on the relevant market for the provision of port services in the port of Helsingborg to ferry operators operating on the HH-route. However, according to Scandlines, “the dominant position of HHAB is not the result of its ability to deliver a superior product in a competitive market but rather the result of a historic municipal monopoly owned, controlled and operated by the City by Helsingborg”¹²⁸.
237. Scandlines however questions what an intangible value would mean. “While the meaning is not altogether clear, it seems to be something along these lines: the location gives rise to a value that is somehow additional to the value to users of the actual ferry services, and also give rise to a value to the ferry operators (for which they do not pay) that is additional to the value to them of the port services that HHAB supplies to them. [...] But this statement would be akin to a statement that the value of bananas to consumers of the fruit includes the value of the fruit itself (for which they pay) plus an intangible value (for which they do not pay) that emanates from the particular flavour, texture and smell of bananas.”¹²⁹
238. Moreover, “it cannot be seriously contended that it is HHAB that supplies the supposed intangible benefits of location for which it is not paid”.¹³⁰ “The location does not incur any costs for HHAB for providing port services. This argument cannot therefore justify HHAB’s pricing behaviour.”¹³¹
239. In addition, Scandlines claims that “if the port services to ferry-operators in Helsingborg were supplied in a “competitive environment”, the competitive price of the product they supplied would not incorporate the supposed intangible value of the port’s location but would reflect costs actually incurred”.¹³²
240. Scandlines further claims that the argument that the port’s location represents an intangible value would provide any company holding a dominant position established on the fact that it delivers a non-substitutable product, with a justification for

¹²⁸ Scandlines’ reply to the Article 6 letter, point 40

¹²⁹ Annex 2 to Scandlines’ reply to the Article 6 letter, point 5.13.

¹³⁰ Annex 2 to Scandlines’ reply to the Article 6 letter, point 5.14.

¹³¹ Scandlines’ reply to the Article 6 letter, point 41.

¹³² Annex 2 to Scandlines’ reply to the Article 6 letter, point 5.15.

charging excessive prices¹³³. Scandlines does not see any reason “why HHAB is not a profit-maximising business. It can therefore be expected to take full advantage of whatever market power it has vis-à-vis the ferry-operators on the HH-route. It is a price-maker in the relevant product market identified by the Commission.”¹³⁴ “HHAB, therefore, can be expected to make use of the opportunities arising out of its dominant position [...] “in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition” (to use the language of the ECJ in paragraph 249 of its United Brands judgement).”¹³⁵

Assessment by the Commission of Scandlines’ comments

241. The Commission has explained above in section II.B.2.3.a) that the economic value of the product/service should also reflect the demand side features of this product/service (i.e. the valuation by the customers and consumers of the product/service). Scandlines acknowledges that the port of Helsingborg represents a value to Scandlines and its customers because of its unique location close to Elsinore. The Commission takes the view that this should be taken into account in the assessment of the economic value of the service provided by HHAB and in its price.
242. The services provided by HHAB may not be superior in terms of quality or performance to ones provided elsewhere by other ports, but the fact that they are provided at this place allows both passengers and ferry-operators to cross the Øresund in an expeditious way, which is in itself valuable, creates and sustains demand both on the downstream and the upstream markets. In this case, the demand by customers for the provision of transport services on the downstream market to cross the Øresund between Helsingborg and Elsinore sustains the demand by the ferry-operators for the provision of port services at Helsingborg.
243. The port of Helsingborg holds a dominant position on the relevant market for the provision of port services in the port of Helsingborg to ferry operators operating on the HH-route. However, the mere finding that a company holds a dominant position is not in itself a recrimination¹³⁶.
244. An abuse must be established, i.e. that a dominant undertaking is engaged in exclusionary and/or exploitative practices. To this end, the burden of proof is on the Commission to demonstrate, based on cogent evidence, the existence of such an abuse. In this respect, the ECJ stated in United Brands that "however unreliable the particulars supplied by [the dominant company]..., the fact remains that it is for the Commission to prove that [the dominant company] charged unfair prices".¹³⁷ In that particular case, the Court found that the basis for the calculation adopted by the

¹³³ Scandlines’ reply to the Article 6 letter, point 41

¹³⁴ Annex 2 to Scandlines’ reply to the Article 6 letter, points 2.1-2.9.

¹³⁵ Annex 2 to Scandlines’ reply to the Article 6 letter, point 2.8.

¹³⁶ Case 322/81 Nederlandsche Banden-Industrie Michelin v. Commission [1983] ECR 3461, paragraph 57.

¹³⁷ Case 27/76, United Brands v Commission [1978] ECR 207, at paragraph 264

Commission was open to criticism, and that any doubt must benefit the alleged infringer.¹³⁸

245. In the case at hand, despite an extensive analysis including an approximate calculation and allocation of HHAB's costs based on the available information, the Commission considers that there is not sufficient evidence to establish that HHAB charges unfair/excessive prices that would constitute an abuse of dominant position within the meaning of Article 82 of the Treaty.

Conclusion

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

II.B.3. Price discrimination between the ferry operators and the other users of the port (cargo vessels)

249. In the Article 6 letter, the Commission drew the preliminary conclusion that there is not sufficient evidence that HHAB applies dissimilar conditions to equivalent transactions between the ferry-operators and the cargo operators, when comparing the overall set of services provided by HHAB to the level of the total port charges respectively paid by the two categories of customers.
250. Scandlines provided a calculation of the difference between fees paid by ferry-operators carrying cargo and by the other specialised cargo operators.¹³⁹ Scandlines argues that this shows that HHAB applies dissimilar conditions to equivalent transactions.

[CONFIDENTIAL]

251. In the Article 6 letter, the Commission considered that this calculation was flawed, because it amalgamated the ship fees (which depend on the capacity of the vessel but not on what is transported onboard) and the passengers/vehicles/cargo fees (which is based on what and how much is transported onboard).

¹³⁸ Ibid, at para 265

¹³⁹ Document 893, File A 24, replies to question 13, p 33-36.

252. The Commission set out that there is actually no equivalent overall transaction to which it could be said that the port applies dissimilar conditions:

- The provision of sea-side facilities the two categories of users (i.e. both ferries and cargo vessels) calling at the port is to a large extent the same.
- However, the land-side facilities provided by HHAB to ferry operators differ considerably from those used by cargo vessels. Even though stevedoring (which corresponds to actual loading/unloading of cargo, including manpower) and warehousing services provided by HHAB are charged separately by HHAB to the cargo operators, the provision and the maintenance of land-side facilities (see section I.C.1 above) differ considerably between the ferries and the cargo vessels. While cargo vessels use cranes and other equipment for loading/unloading cargo, the ferries use ramps and gangways for embarking/disembarking vehicles and passengers. Further, it should be recalled that a distinction has to be made between different cargo types, e.g. containers and oil, since they require different equipment and thus have their own specialized terminals in the port of Helsingborg. The type and the level of investments also differ between the cargo vessels and the ferry operators, as Scandlines itself has admitted.¹⁴⁰

253. The Commission considered that it is therefore not possible to compare the level of the total port charges respectively paid by the ferry-operators and the cargo operators and that the only conceivable comparison would be between the ship fees paid by the two categories of users, since they correspond to the provision of services and facilities on the sea-side which, as noted above, are broadly equivalent.

254. Based on the table below, the Commission found that there is no discrimination against the ferry operators with regard to the ship fees. The cargo vessels (and the other ships calling at the port) pay a ship fee to HHAB for each call whilst the ferry-operators are charged a ship fee only once per day and per vessel (Scandlines makes 17 to 20 calls per day and per vessel). When the fact that the ferry-operators pay only once per day per vessel has been taken into account, the average ship fee per unit of gross tonnage¹⁴¹ is actually highly advantageous to Scandlines.

[CONFIDENTIAL]

255. In the Article 6 letter, the Commission also found that there is no evidence that a difference in the port charges paid by the ferry-operators and the cargo operators would place one of those two categories of customers at a competitive disadvantage.

256. It has not been established that the ferry-operators and the cargo operators compete on the same market as concerns the transportation of goods. Scandlines asserts that it competes with other cargo operators on the market for the provision of shipping services for goods between Sweden and Denmark and Sweden and Germany in respect of transportation of goods.¹⁴² The HH-route ferry services are used *inter alia*

¹⁴⁰ Document 893, File A 24, replies to question 13, p 32.

¹⁴¹ Calculated as the ratio “ship fees/(number of calls x tonnage of the vessel)”

¹⁴² Document 780, File A22, section 2.2.2., p 49; Document 893, File A 24, replies to question 12, p 31 and to question 2 , p 19.

by transport operators transporting cargo of various kinds loaded on lorries. These cargo transporters, depending on the circumstances, can also use (non-ferry) cargo shipping services operating to and from Helsingborg. The degree of substitutability between the two alternatives varies according to such factors as the nature of the goods to be carried and the price charged for the two competing alternatives.¹⁴³

257. However, Scandlines has not provided sufficient information in its complaint regarding the degree of substitutability of the two alternatives referring to such parameters.

258. The Commission drew the preliminary conclusion in the Article 6 letter that, even if it were to be assumed that the ferry-operators and the cargo-operators compete for the transportation of freight, Scandlines has not provided any evidence that a difference in the port charges paid by the ferry-operators and the cargo operators would place the former at a competitive disadvantage as compared to the latter. The comparison between the port fees charged by HHAB to the ferry-operators on one side and to the cargo operators on the other side would not in itself allow such a conclusion, since there are other costs that must be taken into account in order to compare the two alternatives (for instance, the additional stevedoring costs on both sides of the maritime route, the costs of the crossing on ferries/cargo vessels, the costs of any additional road distance...).

Scandlines' comments

259. Scandlines considers that "it is quite obvious that HHAB has an incentive to price discriminate between different categories of customers, in particular between ferry operators and others. The demand from cargo operators is significantly more elastic since they can use other ports. Demand from ferry operators on the HH-route is inelastic."¹⁴⁴

260. "Scandlines maintains that HHAB engages in discriminatory pricing, which is evidenced by the fact that the fees charged to the cargo operators do not cover the costs for the services provided to them (as the Commission itself has found in its approximate cost/price analysis in Appendix 3), while the fees charged to the ferry operators grossly exceed the cost of providing those services."¹⁴⁵ The complainant argues that, as the Commission has pointed out, the variable costs of HHAB are very minor and therefore the question is not whether the prices are set below such variable costs, but whether the prices to cargo operators cover the total costs or not.¹⁴⁶

261. Scandlines maintains that it is possible to compare the prices charged to ferries and non-ferry operators and that its comparison presented in paragraph 205 of the Article 6 letter is relevant, for the following reasons:

¹⁴³ Document 893, File A 24, reply to question 16, p 38.

¹⁴⁴ Annex 1 to Scandlines' reply to the Article 6 letter, points 204-210, p 23.

¹⁴⁵ Scandlines' reply to the Article 6 letter, point 61.

¹⁴⁶ Annex 1 to Scandlines' reply to the Article 6 letter, points 204-210, p 24.

- The distinction made by the Commission between sea- and land-side services for which ship and goods fees are charged respectively is not relevant. HHAB is not making this distinction when charging its customers. Thus the total port charges must be used when making a comparison between ferry and cargo operators.¹⁴⁷
- The only significant difference between the services provided and needed to ferry operators and cargo operators is that the ferry operators have access to gangways and ramps while cargo operators use cranes. All other services which are provided and needed are similar.¹⁴⁸
- Broadly speaking, the annualised cost to HHAB in ramps and gangways for ferry operators and in cranes for cargo operators are similar. It can therefore be concluded that the costs for providing these services should be at the same level.¹⁴⁹

262. Moreover, “in so far as the “services are not “equivalent”, this does complicate the comparison of the level of charges. But any lack of equivalence matters only if it gives rise to differences in the costs incurred. In that case, however, it is nevertheless valid to compare the level of “operating income” (i.e. the difference between revenues and costs) for Ferries and Others, as the Commission has done in the tables in Appendix 3 of the letter.”¹⁵⁰

263. According to Scandlines¹⁵¹, the discussion of the Commission of particular items in the tariff (i.e. ship fees/goods fees) and how they are applied is not relevant. The customer pays for a “bundle of items”. It “cannot pick and chose from among the items particularised in the tariff”. “What matters to the customer, in terms of what it has to pay HHAB, is the sum of the “prices”, and not how that sum made up”.

264. In addition, “even if the recalculated ship fees, i.e. [CONFIDENTIAL] for Scandlines, were to be accepted, which they are not, and applied in the analysis made in paragraph 205, there is no evidence that a difference in costs would justify a price ratio in the range 1,3 (paper: [CONFIDENTIAL]) to 2,4 (ash: [CONFIDENTIAL]).”¹⁵²

265. As regards the existence of a possible competitive disadvantage in competition brought by a difference in the port charges paid by the ferry-operators and the cargo operators, Scandlines argues that “the presumption must be that a discriminatory

¹⁴⁷ Scandlines’ reply to the Article 6 letter, point 59

¹⁴⁸ Scandlines’ reply to the Article 6 letter, point 60.

¹⁴⁹ Scandlines’ reply to the Article 6 letter, point 61; Annex 1 to Scandlines’ reply to the Article 6 letter, points 204-210, p 24.

¹⁵⁰ Annex 2 to Scandlines’ reply to the Article 6 letter, point 4.7.

¹⁵¹ Annex 2 to Scandlines’ reply to the Article 6 letter, Section 5 (a).

¹⁵² Annex 1 to Scandlines’ reply to the Article 6 letter, points 204-210, p 24.

price that adds to the cost of the customer puts it in a competitive disadvantage in the down-stream market".¹⁵³

266. Scandlines argues that there is at the moment a clear move towards increased containerisation of goods¹⁵⁴ and that ferry operators compete with cargo operators operating conventional maritime transport services, at least with respect to Ro/Ro-relevant goods, i.e. goods suitable for unitised freight (containers or standardised units). They do not however compete as regards transport of goods like heavy bulk, coal and petroleum products.¹⁵⁵
267. The decision to use one of the different means of unit loads (lorry, trailer, container, swap body) and connected transport modes (ferry, ro/ro, container feeder, train, combined traffic, car carrier) is not made by the direct customer of the ferry lines but by the shipper/owner. It is the shipper/owner who decides to switch from one mode to another and can therefore evaluate the interchange-ability between ferry and other modes of transport rather than the direct customers.¹⁵⁶

Assessment by the Commission of Scandlines' comments

268. The Commission considers that at least two neighbouring but different markets can be identified as concerns the provision of services by HHAB in Helsingborg: one is related to the provision of port facilities and services to ferry-operators active on the HH-route (the relevant market) and the other to the provision of port facilities and services to ships loading and unloading cargo at Helsingborg. Whereas HHAB holds a dominant position on the relevant market, the existence of genuine alternatives to the port of Helsingborg supports the assumption that HHAB does not hold a dominant position on this neighbouring market for the provision of port facilities and services to cargo vessels.
269. Holding a dominant position on the relevant market does not mean that the company in question necessarily abuses this dominant position by charging discriminatory prices to the ferry-operators¹⁵⁷. In this respect, Scandlines' argument that "it is quite obvious that HHAB has an incentive to price discriminate between different categories of customers, in particular between ferry operators and others" is purely speculative and, in any event not sufficient, as long as it is not supported by evidence of such an alleged behaviour.
270. With regard to Scandlines' argument that the fees charged to the cargo operators do not cover the costs for the services provided to them, while the fees charged to the ferry operators exceed the cost of providing those services, the Commission has

¹⁵³ Annex 1 to Scandlines' reply to the Article 6 letter, points 204-210, p 24.

¹⁵⁴ Annex 1 to Scandlines' reply to the Article 6 letter, points 211-214, p 24.

¹⁵⁵ Scandlines' reply to the Article 6 letter, point 62; Annex 1 to Scandlines' reply to the Article 6 letter, points 211-214, p 24.

¹⁵⁶ Annex 1 to Scandlines' reply to the Article 6 letter, points 211-214, p 24.

¹⁵⁷ See footnote 130.

devoted one full section of the Article 6 letter¹⁵⁸ to explain that the use of profits derived from the ferry-operations to cover the losses generated by the other operations cannot be regarded as being an abuse in itself. This section did not give rise to any comment by the Complainant.

271. In the Article 6 letter, the Commission recalled that to date, "cross-subsidisation" has only been considered an abuse in the context of state-supported monopoly rights (in the postal sector, for instance¹⁵⁹). Outside the context of such monopolies, the extension of a dominant position to another market would normally constitute an infringement only when it weakens or reduces the degree of competition in the subsidised market.
272. In some cases, it may be necessary for the establishment of an abuse to demonstrate that the abuse has the actual or potential effect of eliminating all competition in the adjacent market¹⁶⁰. In this respect, the complainant has not provided any evidence that the use of profits derived from the ferry-operations to cover the losses generated by the other operations would weaken or reduce competition in the neighbouring market for the provision of port facilities and services to cargo vessels where HHAB is in competition with other ports.
273. The Commission maintains this analysis. The fact that the fees charged to the cargo-operators do not cover the costs for the services provided to them, while the fees charged to the ferry-operators exceed the cost of providing those services is not sufficient to prove that HHAB applies discriminatory prices between the ferry-operators and the cargo operators.
274. The Commission maintains that the comparison made by Scandlines and presented in paragraph 205 of the Article 6 letter is flawed and irrelevant for the following reasons:
 - flawed because, as regards the ship fees, it does not take into account the fact that the ferry-operators pay only once per day per vessel. The average ship fee per unit of gross tonnage¹⁶¹ is actually *[CONFIDENTIAL]* instead of *[CONFIDENTIAL]*;
 - irrelevant, because it is not possible to compare the level of the total port charges respectively paid by the ferry-operators and the cargo operators.
275. It is true that HHAB does not refer to the services provided on the sea-side and on the land-side when it charges the users of the port. However, HHAB publishes a tariff which makes a clear distinction between, on one hand, a ship fee applicable to all

¹⁵⁸ Article 6 letter, Section II.C.1.1. c)

¹⁵⁹ See paragraph 3.4. of the Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C 39).

¹⁶⁰ CFI judgement of 6.10.1994 in Case T-83/91 Tetra Pak v Commission [1994] ECR II-755, para. 115 (Tetra Pak II).

¹⁶¹ Calculated as the ratio "ship fees/(number of calls x tonnage of the vessel)"

vessels entering the port and, on the other hand, a passenger and vehicles fee (applicable to ferries) and/or a cargo fee (applicable to cargo vessels). Even if several cargo vessels have individual agreements whereby they pay a lump sum in port charges without distinction between the types of fees, HHAB is in principle able to target the different types of customers and apply to them distinct prices based on a ship fee (common to all) plus a specific fee which depends on what is transported onboard (passenger and vehicles fee for the ferries and/or cargo fees for the cargo vessels).

276. Discrimination within the meaning of Article 82(c) EC may consist of an undertaking holding a dominant position either a) applying dissimilar conditions to equivalent transactions or b) applying equivalent conditions to dissimilar transactions to other trading parties, thereby placing them at a competitive disadvantage. At the request of the Commission, Scandlines has clarified that its allegation regarding discrimination is that HHAB is charging different prices for equivalent services between ferry-operators and cargo operators¹⁶².
277. The Commission could accept that there is no need to discuss particular items in the tariff (i.e. ship fees/goods fees) and that only the final total price should be considered, if an equivalent overall transaction between ferry-operators and cargo operators corresponding to the total port charges (ship fees + goods fees) could be found. However, this is not the case.
278. There is no doubt that, whereas the provision of facilities and services provided on the sea-side to ferries and cargo vessels are to a large extent the same, the services and facilities provided by HHAB on the land-side to ferry operators differ considerably from those used by cargo vessels. While cargo vessels use cranes and other equipment for loading/unloading cargo, the ferries use ramps and gangways for embarking/disembarking vehicles and passengers.
279. The fact that the costs for providing the services on the land-side to ferry-operators and to cargo-operators should be broadly equivalent is not relevant. What matters is whether HHAB applies dissimilar conditions to equivalent transactions. If equivalent transactions cannot be found, there is no need to look at the costs of those transactions. In such a case, differences in pricing conditions could be justified even though the costs incurred in the provision of the respective transactions were equivalent.
280. Scandlines' argument that there is no evidence that a difference in costs would justify a price ratio in the range 1,3 (paper) to 2,4 (ash) is not relevant either. The calculation of the ratios is not meaningful in itself, since, as explained by the Commission, the overall price paid by the ferry-operators (ship fees + goods fees) cannot be compared to the overall price paid by the cargo-operators. Moreover, the question whether the difference between the cargo fee for paper (*[CONFIDENTIAL]*) and the cargo fee for ash (*[CONFIDENTIAL]*) is justified by different level of costs borne by HHAB is not relevant. It should not have any influence on the price charged to the ferry-operators.

¹⁶² Document 893, File A 24, replies to question 12, p 31 and to question 21, p 42.

281. It is the Commission's view that, if there is an underlying rationale behind the charging system, the charging of ship fees, which are based on the gross tonnage of the vessel, should correspond to the provision of the facilities and services on the sea-side and the other fees, which depend on what and how much is transported onboard (passengers and vehicles fees for ferries, cargo fees for cargo vessels), should correspond to the provision of port facilities and services on the land-side.

282. If this is correct, then a comparison between the ship fees paid by the two categories of users is conceivable, since the provision of services and facilities on the sea-side are broadly equivalent. If it is not correct, then such a comparison cannot even be made.

283. First, as explained in the Article 6 letter, the fact that the ferry-operators pay a ship fee only once per day and per vessel is actually highly advantageous to Scandlines (The detailed calculation is provided in a table attached as Appendix 7 /WHICH IS PARTLY CONFIDENTIAL).

[CONFIDENTIAL]

284. The conditions under which the ferry-operators and the cargo operators would compete on the same downstream market for the transportation of goods are not clear. The move towards increased containerisation of goods is not a proof of the substitutability of the two means of transportation, even limited to the transportation of unitised freight. The degree of substitutability between the two alternatives depends on a number of other factors amongst which the origin and destination of the goods and the compared global costs. Scandlines has not provided sufficient information in its complaint regarding the degree of substitutability of the two alternatives referring to those parameters.

285. Finally, even if it were to be assumed that the ferry-operators and the cargo-operators compete for the transportation of freight, Scandlines has not provided any evidence that a difference in the port charges paid by the ferry-operators and the cargo operators would place the former at a competitive disadvantage as compared to the latter. As Scandlines itself argues: "The decision to use one of the different means of unit loads (lorry, trailer, container, swap body) and connected transport modes (ferry, ro/ro, container feeder, train, combined traffic, car carrier) is not made by the direct customer of the ferry lines but by the shipper/owner. It is the shipper/owner who decides to switch from one mode to another and can therefore evaluate the interchange-ability between ferry and other modes of transport rather than the direct customers."¹⁶³ In doing so, the shipper/owner must take into account many other costs (for instance, the additional stevedoring costs on both sides of the maritime route, the costs of the crossing on ferries/cargo vessels, the costs of any additional road distance...) in addition to the port charges at Helsingborg. In those circumstances, there is no evidence that transportation by ferries could not remain competitive as compared to transportation by cargo-ship if ferries were charged higher than cargo vessels at Helsingborg.

¹⁶³ Annex 1 to Scandlines' reply to the Article 6 letter, points 211-214, p 24.

286. There is therefore no evidence that higher port fees charged to the ferry-operators as compared to the cargo-operators would place the former at a competitive disadvantage on the downstream market for the transportation of goods.

Conclusion

287. In view of the above, the Commission concludes that there is insufficient evidence that HHAB levies discriminatory port charges for services provided to the ferry-operators as compared to the port charges charged to the cargo operators. Scandlines' complaint in this regard must therefore also be rejected.

III. CONCLUSION

Despite an extensive analysis of the facts available, which involves in particular an approximate cost calculation and efforts to find benchmarks with other ports, the Commission considers that there is insufficient evidence to conclude that the prices charged by HHAB are unfair/excessive and thus constitute an abuse within the meaning of Article 82 of the Treaty. In addition, there is no evidence that HHAB levies discriminatory port charges for services provided to the ferry-operators as compared to the port charges charged to the cargo operators.

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

For these reasons, I inform you that the final decision of the Commission is to reject your complaint of 2 July 1997 pursuant to Article 7(2) of Council Regulation No 1/2003 of 16 December 2002¹⁶⁴ and Article 7(2) of Commission Regulation No 773/2004 of 7 April 2004¹⁶⁵.

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

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

Done at Brussels, 23.07.2004

¹⁶⁴ OJ L 1, 4.1.2003, p. 1.

¹⁶⁵ OJ L 123, 27.4.2004, p. 18.

For the Commission

(signed)

Mario Monti
Member of the Commission

APPENDIX 3.1

Scandlines' comments on the Commission's allocation of HHAB's costs

1. In Appendix 3 of the Article 6 letter, the Commission has set out an approximate calculation and allocation of HHAB's costs according to whether they are related to services provided to the ferry-operators active on the HH-route (Scandlines, Sundbusserne and HH-Ferries) or to the other activities of the port, from consistent data made available by the port, mainly from the audited financial reports.
2. This cost-allocation shows the revenues and the approximate costs of HHAB related to the three ferry-operators active on the HH-route (Scandlines, Sundbusserne and HH-Ferries) on one side and the other revenues and approximate costs of HHAB on the other side, for the years 1993 to 2000.
3. Scandlines has submitted a number of comments on the approximate cost-allocation made by the Commission in the Article 6 letter, which are addressed in turn below.
4. For the purposes of the present decision, the Commission will base itself on the following assumptions:
 - the allocation of costs to ferry-operations should not include the train ferry operations of Danlink nor the services provided to DFDS;
 - the port charges should be taken before the reduction applied on the port fees charged to HH-Ferries;
 - the use of a key of repartition of the distributed costs (the overhead costs, the maintenance costs of the leased assets and the leasehold paid to the City of Helsingborg) which varies with the level of the disputed port charges will not be used;
 - the leasehold paid by HHAB to the City of Helsingborg for the land assets should be allocated to the ferry-operations in proportion to the surface they occupy on the land-side in the port.
5. The Commission has compared the approximate cost/price analysis made in the Article 6 letter and the cost allocation made by Scandlines in its submission of 4 July 2000. The Commission notes that Scandlines considers that despite the difference in the treatment of specific elements in the calculations, "the two sets of calculations show broadly the same picture, even though the Commission has allocated a larger share of the costs to HHAB's ferry operations"¹.

¹ Reply to the Article 6 letter, point 23.

6. The share of the costs allocated by the Commission to the ferry-operations is very close to Scandlines' own allocation. This may explain why, in Scandlines' view, "the two sets of calculations show broadly the same picture".²

1. Scope of the ferry-operations

7. In relation to the cost allocation submitted by HHAB, Scandlines argues that the allocation of costs to ferry-operations should not include the train ferry operations of Danlink nor the services provided to DFDS³.
8. The Commission notes that this is actually in line with the approximate allocation of HHAB's costs to ferry-operations made by the Commission in the Article 6 letter, where only the revenues and the costs of HHAB related to the three ferry-operators active on the HH-route (Scandlines, Sundbusserne and HH-Ferries) were considered. This is still the case in the revised version of this approximate allocation attached in Appendix 4.2.

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

9. In the Commission's cost allocation, the revenues derived from the ferry-operations correspond to the port charges invoiced by HHAB to Scandlines, Sundbusserne and HH-Ferries (see Appendix 3 to the Article 6 letter). Those were taken before the application of a reservation of [CONFIDENTIAL] % on the unpaid amounts by Scandlines (Scandlines has been paying only [CONFIDENTIAL] % of HHAB's invoices since January 1997). This reservation was advised by the auditors. As a consequence, the revenues considered by the Commission are, from 1997 onwards, slightly higher than the revenues reported in HHAB's audited annual reports.
10. HHAB offered in April 1998 to Scandlines, Sundbusserne and HH-Ferries to reduce the port charges over the period 1997-2000⁴. Scandlines and Sundbusserne did not accept this offer, whereas HH-Ferries did.
11. The offer only concerned vehicle and passenger fees. Proposed reductions, based on [CONFIDENTIAL] published tariffs, were [CONFIDENTIAL]⁵. The agreement between HHAB and HH-Ferries terminated at the end of the year 2000. HHAB indicated that the charges applied were still invoiced in 2000 to HH-Ferries on an interim and provisional basis, waiting for an "agreement pending the outcome of the present case at the Commission"⁶ (concerning the latest developments, see section I.B.3. above).

Scandlines' comments

² Reply to the Article 6 letter, point 23.

³ Points 112 and 117 of Annex 1 to the reply to the Article 6 letter

⁴ Document 636, File A16, letter from HHAB to the Commission dated 22 April 1998

⁵ Document 636, File A16, Article 1 of the attached proposed agreement.

⁶ Document 578, File A13, reply to question 4.3., p11.

12. Scandlines does not contest that the port charges are taken before the application of the [CONFIDENTIAL] % reservation.
13. It considers that the revenues in the annual reports of HHAB should also be increased by an amount corresponding to the reduction on port charges which has been granted by HHAB to HH-Ferries since 1997⁷. According to Scandlines, the reason why the Commission has taken the port charges before the deduction of the reservation of [CONFIDENTIAL] % would be that this reservation is a direct consequence of Scandlines' complaint on the abusive port charges. The same should then apply to the reduction on port charges granted to HH-Ferries, because this reduction would also be another direct consequence of Scandlines' complaint.

Assessment of Scandlines' comments by the Commission

14. The Commission will for the purposes of this decision base itself on the assumption that the port charges should be taken before the reduction applied on the port fees charged to HH-Ferries, although not for the reasons invoked by Scandlines.
15. The reason why the Commission has taken the port charges before the application of the reservation of [CONFIDENTIAL] % is not that this reservation would be a consequence of Scandlines' complaint. Scandlines' argument that the reduction granted to HH-Ferries would also be a consequence of Scandlines' complaint is therefore not relevant.
16. The Commission has taken the port charges before the application of the reservation of [CONFIDENTIAL] % because what matters in determining whether the port charges are excessive is the amount of those port charges invoiced to the ferry-operators in application of the charging system of the port. The facts that Scandlines pays the totality or only half of the invoiced port charges, that there is or not a reservation on the unpaid amounts by Scandlines and the value of this reservation, should not affect the conclusion whether the port charges are excessive or not.
17. The three ferry-operators are subject to the same charging system, apart from the reduction on vehicle and passenger fees granted to HH-Ferries. This reduction should not either affect the conclusion whether the port charges charged to the ferry-operators active on the HH-route are excessive or not. The assessment should then be made as if HH-ferries were charged the full price. The Commission therefore considers that, for the purpose of its approximate cost allocation, the reduction applied to HH-Ferries should be added to the revenues of the port (to the revenues of the ferries and to the total revenues) since 1997 and onwards.

3. Relation between the port charges and the costs

18. In paragraph 159 of the Article 6 letter, the Commission explained that as regards the ferry-operations, the revenues considered in the approximate cost allocation correspond to the aggregated port charges invoiced by HHAB to Scandlines, Sundbusserne and HH-Ferries. The costs correspond to all approximate costs

⁷ Point 145 of Annex 1 to the reply to the Article 6 letter

incurred by HHAB which can be reasonably attributed to services provided to the ferry-operators active on the Helsingborg-Elsinore route.

19. The Commission recalled that the provision by HHAB of a number of services and facilities to the ferry-operators in the port are in principle covered by specific agreements and stated that the amounts of these agreements (about [CONFIDENTIAL] per year in total for the three ferry-operators) should be deducted from the costs to be covered by the port charges on the ferry-operations' side and from the revenues on the side of the other operations; they would therefore increase the imbalance between the ferry-operations and the other operations.

[CONFIDENTIAL]

Scandlines' comments

20. Scandlines confirms that these agreements relate to specific services, which are not covered by the general port charges and in respect of which Scandlines makes no complaint.⁸
21. According to the complainant, the explanation given by the Commission in paragraph 159 of the Article 6 letter contradicts the approach taken elsewhere, notably in paragraphs 195-197 of the Article 6 letter⁹.
22. Scandlines considers that all charges paid by the operators should be “bundled” together (including the amounts paid in addition to the port charges, pursuant to the specific agreements), and similarly all costs incurred by HHAB. In this way, the question of excessive pricing can be assessed as regards “the charging system as a whole”.¹⁰
23. Scandlines indicates that the figures taken by the Commission are not correct. The correct figures would be the following¹¹:

[CONFIDENTIAL]

Assessment by the Commission of Scandlines' comments

24. Scandlines considers that the question of excessive pricing should be assessed as regards “the charging system as a whole” and that all charges paid by the operators (including the amounts paid pursuant specific agreements) should be related to all costs incurred by HHAB.

⁸ Scandlines' reply to the Article 6 letter, point 48.

⁹ Annex 2 to Scandlines' reply to the Article 6 letter, points 5.25-5.26.

¹⁰ Annex 2 to Scandlines' reply to the Article 6 letter, point 5.25.

¹¹ The figures above are the amounts invoiced by HHAB to Scandlines AB relating to the HH-route. The amounts include costs for the four persons employed by HHAB and for lease of parking lots.

25. The Commission takes the view that this would, in principle, not be the appropriate test because the complaint relates only to the port charges, not to “the charging system as a whole” nor to the amounts charged by HHAB pursuant to specific agreements for the provision of specific services and facilities on the land-side.
26. The right approach would ideally consist in relating the contested port charges to HHAB’s costs incurred in providing the services covered by these port charges. However, due to a lack of precise data and to the intricacy (the importance of which varies from one operator to the other) existing between the services provided within the port charges and within specific agreements, it would be insuperably difficult and hazardous to try to segregate out of the approximate total costs (all costs incurred by HHAB which have been attributed to all services provided to the ferry-operators active on the Helsingborg-Elsinore route), the costs incurred attributable to services covered by the port charges.
27. If it were assumed that the amounts charged pursuant to specific agreements (about *[CONFIDENTIAL]*¹² per year in total for the three ferry-operators) cover the costs of the corresponding services, these amounts could be deducted from the costs to be covered by the port charges on the ferry-operations’ side and from the revenues on the side of the other operations, as the Commission suggested in paragraph 159 the Article 6 letter. But there is no sufficient evidence that such an assumption can be made, notably because these amounts appear to be low when compared to the port charges and to the list of the services covered by the agreements. The Commission did not therefore deduct the amounts charged under specific agreements from the costs to be covered by the port charges.
28. While maintaining that a first step in the assessment would consist in a comparison between the contested port charges and the costs incurred by HHAB in providing the services covered by these port charges, it can be accepted, for consistency reasons, that the amounts charged by HHAB to the ferry-operators pursuant to specific agreements are taken into account in the approximate cost/price analysis (these amounts are deducted from the revenues on the side of the other operations).
29. The amended approximate cost/price analysis would therefore take into account, as regards the ferry-operations:
 - on the one hand, HHAB’s total revenues derived from the ferry-operations (the aggregated port charges invoiced by HHAB to Scandlines, Sundbusserne and HH-Ferries, plus the amounts charged to them pursuant to the specific agreements),
 - and on the other hand, all costs incurred by HHAB that can be reasonably attributed to services provided to the ferry-operators active on the Helsingborg-Elsinore route.
30. The costs to be covered by the port charges are necessarily lower than the total costs. If the port charges were to be found excessive in relation to the total costs, they

¹² *[CONFIDENTIAL]*

would a fortiori be excessive in relation to the costs of the services charged within the port charges.

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

31. For the purpose of its approximate cost allocation (see Appendix 3 to the Article 6 letter), the Commission has considered that the overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg could be reasonably allocated to the ferry operations proportionally to the revenues (port charges) they generate out of HHAB's total income (between 30 and 40% each year).
32. The Commission considered that such an allocation based on revenue may in fact underestimate the costs allocated to the ferry-operations, as compared to the proportion of all activities they represent in the port. If another key were to be used, for instance the number of the calls of the different vessels at the port of Helsingborg, in order to better reflect the importance of the ferry-operations in the port (90%)¹³, the distributed costs allocated to the ferry-operations would be much higher than to the other operations, which would affect the resulting relative profits and losses of the ferry-operations and the other operations, without changing the final result at the overall company level. Nevertheless, the Commission has opted in the Article 6 letter to base the allocation on revenue, as this is in any event more favourable to the complainants.

Scandlines' comments

33. Scandlines believes that a company similar in size and activities to HHAB would normally have set up their general ledger to be able to break down profitability on the different services and to directly allocate most of the costs to them (notably maintenance and depreciation costs).¹⁴
34. Scandlines does not agree that costs can be reasonably allocated to the ferry operations proportionally to the revenues (port charges) for the following reasons¹⁵:
 - Scandlines' complaint relates to HHAB's excessive port charges. The port's revenues being directly affected by the level of the port charges, it is therefore problematic to make the costs incurred heavily depend on the revenues achieved.
 - The Commission has not demonstrated any logical connection between changes in the revenues from the ferry-operations and changes in HHAB's total operating costs or any constituent of that total.

¹³ Most of the traffic in the port of Helsingborg is ferry-traffic on the Helsingborg-Elsinore route (HH route). In 2001, some 50.000 vessels called at the port of Helsingborg, out of which the ferries accounted for 45.000 calls, i.e. 90%.

¹⁴ Appendix 1.10 to the Reply to the Article 6 letter, p 3, under "IMR Reports".

¹⁵ Point 25 of the Reply to the Article 6 letter; points 157-158 of Annex 1 to the Reply to the Article 6 letter; points 3.11-3.13 of Annex 2 to the Reply to the Article 6 letter

- The Commission has failed “to show why, how and to what extent (if any) “importance” is related to indirect operating costs”.¹⁶

Assessment of Scandlines’ comments by the Commission

35. The Commission has tried to obtain from HHAB a precise allocation of its costs to the ferry-operations.
36. It appears that only a small part of the costs incurred by HHAB are directly attributable to the ferry-operations. The ferry-operators share the use of the port with other vessels. Some quays are devoted to the ferry-operations. But others (for instance, quays n° 308-312 and 401-407) have over the years been used partly by the ferries and partly by other vessels. This means that all the costs incurred by HHAB on the sea-side (including the costs of maintenance of the assets, dredging, traffic control...) cannot be directly allocated to the ferry-operations and must be distributed between the different users of the port.
37. In the Article 6 letter¹⁷, the Commission has explained that, due to historical reasons, the IMR¹⁸ (“Internal Monthly reports”) does not allocate the costs borne by HHAB to the different areas of activities in a way that would allow the identification of the costs related to providing services for ferry-operators from those related to the other users of the port. It is not possible, for instance, to identify the costs related to Scandlines and Sundbusserne, on the one hand, and the costs related to Danlink and the other activities in the same area on the other hand. Neither is it possible to identify and allocate the costs related to HH-Ferries in the Sundterminal area.
38. Moreover, it should be borne in mind that the question of the use of the traffic control services or some specific part of the harbour is disputed between the ferry-operators and HHAB.
39. The overhead costs, the maintenance costs of the fixed assets leased from the City of Helsingborg and the leasehold paid by HHAB to the City of Helsingborg, which are not allocated by HHAB between the different categories of users of the port before being registered in the financial accounts of HHAB, had therefore to be treated by the Commission as distributed costs.
40. As concerns the leasehold paid by HHAB to the City of Helsingborg for the land assets, the Commission will assume for the purposes of the present decision, as argued by Scandlines, that it could reasonably be allocated to the ferry-operations in proportion of the surface they occupy on the land-side in the port.

¹⁶ Point 3.13 of Annex 2 to the Reply to the Article 6 letter

¹⁷ Article 6 letter, Section II.B.4.

¹⁸ The IMR is structured in several parts, corresponding to different areas/activities of the port. For each area/activity, the IMR specifies the revenues (in particular the port charges), the direct costs, some indirect costs (the rent paid to the City of Helsingborg, the overhead costs, the depreciation costs) and the results. The financing costs are included at the aggregate company level and are not allocated to each area/activity.

41. In its Submission of 4 July 2000¹⁹, Scandlines has allocated 32.7% of the leasehold paid by HHAB to the City of Helsingborg to the ferry-operations. This ratio is based on the fact that, according to Scandlines, the ferry-operations occupy 105.300 m² out of 174.000 m² in the North and Ocean harbours, for which HHAB pays a total rent of MSEK 20. MSEK 12.1 should then be allocated to the ferry-operations, which represents 32,7% of the total rent paid by HHAB to the City of Helsingborg.
42. This is consistent with the comments made by HHAB on the Article 6 letter²⁰, provided that the totality of the surface of the Ocean Harbour is taken out (Scandlines considers that the ferry-operations do not use any part of the Ocean Harbour). HHAB explains that, out of 174.000 m² in the North and Ocean harbours, 3000 m² are used by DFDS and 65.000 m² correspond to the Ocean Harbour. Then, 106.000 m² are used by the ferry operations which correspond to 60,9% of the surface of the North and Ocean Harbour.
43. The shares of the leasehold paid by HHAB to the City of Helsingborg which should be allocated to the ferry-operators for the years 1994-2000 are therefore the following:

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

MSEK

44. As concerns the other distributed costs, the Commission used in the Article 6 letter a key of repartition of those costs between the different users, based on the revenues they generate out of HHAB's total income (between 28,9% and 38,6% between 1993 and 2000 - 33,7% on average - for the ferry-operations).
45. Despite Scandlines' argument that the use of a key of repartition which depends on the level of the disputed port charges is not appropriate, the Commission nevertheless maintains that, for the purposes of the present decision, the order of magnitude of such a key (about 1/3 for ferry-operations) can be used for an approximate cost allocation, based on the following reasons:
- Such a figure reflects to a certain degree the relative importance of the ferry-operations, as compared to the other activities in the port. HHAB's revenues consist of port charges (about **50%** of the total revenues; Scandlines alone

¹⁹ Document 526, File A11, p 2

²⁰ Doc 1038, File A29, point 6.2., p 7

accounts for about [CONFIDENTIAL] % of HHAB's total revenues, HH-Ferries about [CONFIDENTIAL] % and Sundbusserne a little more than [CONFIDENTIAL] %), revenues derived from stevedoring (32%), storage services (8%), tug services (2,5%) and rents paid by third parties for leaseholds in the port area (6%). Without any other available precise indication on how the distributed costs could for present purposes be allocated between these different activities, referring to the relative importance of these activities in terms of revenues for HHAB provides an objective and reasonable key for an approximate distribution of those costs. However, this only provides an order of magnitude and does not mean that these costs should vary with the level of the port charges in question.

- Other keys of repartition could have been envisaged which would be more accurate for one specific category of costs, as mentioned above the surface occupied by the different users is accurate for the allocation of the leasehold paid by HHAB to the City of Helsingborg for the land.

A key based on the number of calls (i.e. the number of access) of the different vessels in the port of Helsingborg would reflect the relative importance of the ferry-operations in the port on the sea-side. Such a key would be accurate for instance, for the costs related to traffic control in the port or for the maintenance of assets on the sea-side. If this key were to be used, 90%²¹ of the distributed costs should be allocated to the ferry-operations. The Commission decided not to use this key for the allocation of the distributed costs, because it would not be accurate for costs incurred by HHAB on the land-side. It would be disproportionate, due to the importance of the cargo operations in the port on the land-side (stevedoring, storage services for instance).

- Another key, used by Scandlines²² for the allocation of the financial costs and the equity, would be the percentage of assets used by the ferry-operations (i.e. the ratio "book value of the assets used by the ferry-operations/total book value of the assets"). The book value of the assets used by the ferry-operators amount as per 31 December 2001 to MSEK 151,5 (27,9 MSEK for buildings, MSEK 16,0 for ground facilities and MSEK 107,6 for port facilities) that represents 26,8% of the total value of HHAB's registered assets (including the cranes). However, this calculation is based on the assets owned by HHAB only, which are all used in operations on the land-side. Most of the assets related to activities on the sea-side (excluding traffic control) are owned by the City of Helsingborg. Such a key would therefore only reflect the relative importance of the ferry-operations in the port on the land-side.
- Except as concerns the allocation of the leasehold paid by HHAB to the City of Helsingborg above, Scandlines does not propose any alternative for the allocation

²¹ Most of the traffic in the port of Helsingborg is ferry-traffic on the Helsingborg-Elsinore route (HH route). In 2001, some 50.000 vessels called at the port of Helsingborg, out of which the ferries accounted for 45.000 calls, i.e. 90%.

²² Document 526, File A11, p 1

of the other distributed costs. In its Submission of 4 July 2000²³, Scandlines does not allocate the distributed costs between the ferry-operators and the other users of the port. Scandlines considers that, overall, the total operating costs (including all the distributed costs, except the leasehold paid to the City) relating to ferry-operations should represent 10%, or alternatively, 15% of the total operating costs.

The 10% figure is based on Scandlines' submission of 10 July 1998²⁴ and concerns, in its submission, only the percentage of HHAB's operating costs relating to Scandlines. A figure including also Sundbusserne and HH-Ferries should therefore logically be higher.

In the table attached as Appendix 3.3, which sets out a comparison between the approximate cost-allocation made by the Commission in its Article 6 letter and the one made by Scandlines in its submission of 4 July 2000, it appears in any event that the percentage of the total operating costs allocated by the Commission to the ferry-operations (including all the distributed costs, except the leasehold paid to the City) is actually very close to the 15% figure used by Scandlines. This means that allocating approximately one third of the distributed costs to the ferry-operations leads to a result which is close to the assumption taken by Scandlines in its own calculations.

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

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

47. It should be noted that contrary to what Deloitte & Touche stated²⁵ and unlike what Scandlines argued in its submission of 4 July 2000, the depreciation costs are directly allocated to the ferry-operations). The Commission has notably identified the list of the assets wholly or partly used by the ferry-operations in the port on the land-side (see Section 5 below and attached table) and calculated the yearly depreciation costs.
48. In Appendix 3 to the Article 6 letter, the Commission attached the list of the assets owned by HHAB considered to be used by the ferry-operations. This list specifies, for each asset, its description, its original acquisition value, its acquisition date, its depreciation period, the coefficient of its use by the ferry-operations, and its depreciation value for each year from 1994 to 2001.
49. Scandlines notices that some items have been included in this table which do not relate to ferry operators: building no 900780 Coast Guard (MSEK 7,1) and building

²³ Document 526, File A11, p 1

²⁴ Document 430, File A8, Section 5.

²⁵ Appendix 1.10 to the Reply to the Article 6 letter, p 3, under "IMR Reports".

no 900790 Towage building (MSEK 3,05 + 0,7), which are located in the City harbour outside the ferry port. These items have therefore been removed and do not appear in the amended list attached as Appendix 3.2. As regards the port facilities, items related to asset n°900100 (berth 403B) which is located in the Ocean Harbour have also been removed (Scandlines considers that the ferry-operations do not use any part of the Ocean Harbour).

50. The coefficients of use of some assets by the ferry-operations are amended:

- The Sound terminal is considered to be 9% used for the ferry-operations. Out of the gross area of premises at the Sound terminal (about 1.326 m²), the traffic control occupies 130m². In 2001, some 50.000 vessels called at the port of Helsingborg, out of which the ferries accounted for 45.000 calls, i.e. 90%. Then 90% of (130/1326) of the Sound Terminal should be allocated to the ferry-operations.
- Building 203 (Old custom house) is considered to be 30% used by Sundbusserne;
- The other assets which are not exclusively used for the ferry-operators (for instance, HHAB's Office) are considered to be 33% used by the ferry-operations (the same key of repartition as the one used for the allocation of the distributed costs between the ferry-operators and the other users of the port in Section 4 above).

6. Comparison between the approximate cost allocation made by the Commission in the Article 6 letter and the cost allocation made by Scandlines in its submission of 4 July 2000.

Scandlines' comments

51. In its Reply to the Article 6 letter²⁶, Scandlines questions why the Commission did not adopt the cost allocation submitted by Scandlines in its submission of 4 July 2000²⁷. A comparison between the approximate cost allocation made by the Commission in the Article 6 letter and the cost allocation made by Scandlines in its submission of 4 July 2000 was made by Professor Basil Yamey in Appendix 2 of Scandlines' Reply²⁸. Professor Yamey identified the following differences:

- (i) The revenues used in the submission are, for 1997 onwards, reduced by the [CONFIDENTIAL] % prudential provision made by HHAB as compared to the Article 6 letter where the Revenues reflect the port charges as invoiced by HHAB (see **Section 2** above).
- (ii) In Scandlines' submission, the "profits" are taken after the interest received and paid by HHAB (financial result). 27% of HHAB's financial result was allocated to the ferry-operations. This percentage corresponds to the ratio between the

²⁶ Reply to the Article 6 letter, point 26, p 8.

²⁷ Document 525-528, File A11.

²⁸ Annex 2 to Scandlines' Reply to the Article 6 letter, Section 3, points 3.3 and 3.5.

acquisition value - 1994 book values - of the assets used by the ferry-operations (MSEK 113,214) and the acquisition value of all the assets owned by HHAB (MSEK 427,5715)²⁹.

- (iii) The allocations of costs between the ferry-operations and the other activities in the port differ in Scandlines' submission and in the Commission' Article 6 letter (see Section 4 above).

Assessment of Scandlines' comments by the Commission

52. In addition to the differences listed above by Professor Yamey, the following differences should also be noted:

- (iv) Unlike in the Article 6 letter, it seems that Scandlines has included in its submission the revenues and the costs of DFDS, which should not be included amongst the ferry-operators.³⁰ See Section 1 above.
- (v) In Scandlines' submission, the same value (MSEK 8,1) is applied each year as regards the depreciation costs of the assets used in the ferry-operations. In the Commission's Article 6 letter, the depreciation costs are calculated each year on the basis of the list of the assets used by the ferry-operations (see Section 5 above and the list attached as Appendix 3.2).
- (vi) In its submission,³¹ Scandlines has calculated for each year the Return On Capital Employed ratio:

ROCE = Income Before Taxes / Operating assets.

	1994	1995	1996	1997	1998	1999
Operating assets	472,468	455,610	478,309	450,082	436,167	411,655

MSEK

53. In the Article 6 letter, the Commission has calculated the Return On Equity ratio:

ROE = Net Income (After Taxes) / Equity.

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

MSEK

Moreover, Scandlines has allocated HHAB's operating assets between ferry-operations and the other operations on the basis of 27% for the former and 73% for the latter. This key of repartition 27% / 73% is the same key as the one used for the allocation of the financial result between the ferry-operations and the other operations in the port (see above).

54. As regards the last point, Scandlines finds it more appropriate, for the purpose of calculation of the ROCE and the ROE ratios referred to above, to work with profits

²⁹ Document 525, File A11, p2; Document 526, File A11, p3.

³⁰ Document 526, File A11, footnote 1.

³¹ Documents 525 and 528, File A11.

before taxes³². Taxes in Sweden are highly dependent on internal decisions taken by the companies, which makes more difficult to compare the profitability of different companies on the basis of ROE or ROCE ratios calculated on the basis of Incomes After Taxes. For the purposes of the present decision, the Commission will base the amended approximate cost allocation on the return on equity calculated as the ratio: “Income Before Taxes / Equity”.

55. It does not seem that Scandlines contests the use by the Commission of the equity specified in the table above in the calculation of the ROE ratio. These figures are taken from HHAB’s audited financial reports (consolidated accounts).³³
56. The table attached as *Appendix 3.3. [WHICH IS CONFIDENTIAL]* sets out a comparison between the approximate cost allocation made by the Commission in its Article 6 letter and the cost allocation made by Scandlines in its submission of 4 July 2000 (based on the assumption that the operating costs allocated to ferry-operations account for 15% of HHAB’s total operating costs).
57. In this comparison, the differences identified above in sub-paragraphs (i), (ii), (iv) and (vi) are removed in order to allow a comparison, in line with Professor Yamey’s opinion.³⁴ The only remaining difference concerns the allocation of costs (including the depreciation costs) between the ferry-operators and the other users of the port. Despite this difference, the two cost allocations provide very similar results. This is mainly because the operating costs (including the direct operating costs, plus the overhead costs and the maintenance costs of the fixed assets) allocated by the Commission to the ferry-operations amount to about 15% of HHAB’s total operating costs (excluding the leasehold to the City), which is the assumption taken by Scandlines in its own cost allocation.
58. Despite the difference of treatment of specific elements in the calculations made by Scandlines and the Commission, it would appear that there is no real dispute between the Commission and Scandlines as regards the results of these calculations.
59. This is also confirmed by Deloitte & Touche³⁵ which also performed a comparison between the approximate cost allocation made by the Commission and the cost allocation made by Scandlines in its submission of 4 July 2000 and found that “there is considerable common understanding of the basis of the calculations”.

7. Cost of Capital

³² Annex 1.10 to Scandlines’ Reply to the Article 6 letter, Statement by Deloitte & Touche.

³³ See comments by Deloitte & Touche in this regard in Annex 1.10 to Scandlines’ Reply to the Article 6 letter.

³⁴ Annex 2 to Scandlines’ Reply to the Article 6 letter, point 3.6.

³⁵ Appendix 1.10 to Scandlines’ Reply to the Article 6 letter

60. HHAB explained³⁶ that its pricing policy as regards the port charges should take into account, amongst other costs, the cost of capital. HHAB did not give a precise definition of the cost of capital but referred to the “cost of capital invested (interest)”.
61. In the Article 6 letter³⁷, the Commission explained that the cost of capital should include, on one hand, the financial costs that remunerate the creditors (i.e. the banks in general) and, on the other hand, the dividends served to the shareholders (i.e. the “equity” holders) whenever the company is profitable. The latter component can vary each year depending on the operational performances of the company and consequently reflects the risk associated with equity investments as opposed to providing financing through debts.
62. The Commission calculated in Appendix 3 to the Article 6 letter, the cost of capital as the sum of HHAB’s Financial Costs plus the Income After Taxes achieved by the company:
 - The Financial Costs include the interest charges paid on the net outstanding debts. In this case, they consist essentially in the interest charged for the long term loan granted by the City of Helsingborg³⁸. As a consequence, this component of the cost of capital should be represented by the net financial costs of this loan which equals the financial result (the other financial income and costs being insignificant).
 - The Income After Taxes has been calculated by applying to the Income Before Taxes a corporate tax ratio of 28% which is the nominal value for the corporation tax in Sweden.
63. The cost of capital has not been broken-down between the ferry-operations and the other activities of HHAB.

Scandlines’ comments

64. In its Reply to the Article 6 letter³⁹, Scandlines notes that the cost of capital, as specified above, does not correspond to the concept of cost of capital used in business, finance and economics. According to Scandlines, “in the language of finance and economics, cost of capital refers, in broad terms, to the minimum return the capital market would expect a company (or project) to generate if the market is to invest in that company, due allowance being made for any specific risk associated with the company’s activities”.

³⁶ Document 214, File A2, point 6.2., p 10

³⁷ Article 6 letter, Section II.B.3.c) points 142-145

³⁸ It must be recalled that in 1993, the City of Helsingborg transferred part of its assets to HHAB at a market value of 427,57 MSEK. 130 MSEK were registered as a contribution in kind for an issue of new shares of HHAB and the rest (297,57 MSEK) was registered as a loan from the City [Document 259, File A4, point 3, p. 7.]

³⁹ Annex 2 to the Reply to the Article 6 letter, Section 7, p 13-14

65. Scandlines also notes that “if the cost of capital were to be treated as one of the costs actually incurred by HHAB, the company would never show a profit (or loss)”. “The Appendix does not treat the “cost of capital” as one of the “costs incurred” by HHAB.

Assessment of Scandlines’ comments by the Commission

66. First, it should be recalled that the term and the concept of “cost of capital” were introduced by HHAB in a context where it wanted to justify the level of its price. In such a context, the price should allow the company to cover the cost of capital that is intended, on one hand, to remunerate the bond holders (i.e. the banks in general) and, on the other hand, to serve dividends to the shareholders (i.e. the “equity” holders). Hence the two components of the cost of capital:

- The former corresponds to the financial costs which notably include the interest charges paid on the net outstanding debts. These costs are costs accounted for, which appear as such in the audited annual financial reports.
 - The latter corresponds to the profit which would allow the company to remunerate its shareholders at an appropriate level. It is not a cost accounted for as such in the audited annual financial reports. It can however be viewed *a priori* as a charge for the company, when it wants to fix its price, because if the equity holders are not served the expected remuneration, they may decide to invest elsewhere. In reality and *a posteriori*, the remuneration of the equity capital will vary according to the net income after tax generated by the company and available for distribution to the shareholders under the form of dividends (once the legal and free reserves and the undistributed profits are deducted).
67. The term “cost of capital” referred to in the language of finance and economics is closely related to the second component above (expected remuneration of the equity capital). It should not be considered as cost accounted for per se in the audited annual financial reports, as explained above.
68. In the case at hand, in absence of any reliable indication on what the capital market would expect as a remuneration for investments in HHAB, the Commission has considered in the Article 6 letter that the Income After Taxes generated by the company⁴⁰ would represent an approximate value of this component of the capital cost. It was assessed as if the whole Income After Taxes were distributed to the equity holders. As a consequence, as Scandlines noted, if this component of the cost of capital were to be treated as one of the costs actually incurred by HHAB, the company would never show a profit (or loss).
69. In the Article 6 letter, the Commission has made an estimation of the cost of the capital provided to the company through loans and equity, mainly in order to compare it to the value provided by HHAB in its cost allocation⁴¹. As this cost allocation is not

⁴⁰ The Income After Taxes has been calculated by applying to the Income Before Taxes a corporate tax ratio of 28% which is the nominal value for the corporation tax in Sweden.

⁴¹ In this respect, it appears that, when calculated on the basis of the financial result and the profits after tax achieved by the company (instead of half the replacement value of the assets of the port), the cost/remuneration of the capital would amount on average to 48,3 MSEK per year between 1994 and

used further in the determination whether the port charges are excessive and as it is not a cost accounted for per se in the audited annual financial reports, the “cost of capital” will not appear any longer in the amended approximate cost allocation made by the Commission. Only the financial result, the net income and the ROE will be specified.

2000, for the whole company, instead of 177 MSEK as argued by HHAB (i.e. 10% of half of the replacement value of HHAB’s assets).

APPENDIX 4.1

Approximate allocation of HHAB's costs [CONFIDENTIAL]

APPENDIX 6.1

COMPARISON OF OFFICIAL TARIFFS IN FERRY PORTS

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

[CONFIDENTIAL]

3. The comparison consists in comparing the ship fees and the goods fees invoiced by HHAB to Scandlines in the port of Helsingborg to what it would pay according to the official tariff in other ports.
4. The comparison only concerns the official tariffs in these ports, i.e. the tariffs which are normally published on a yearly basis, applicable to passenger vessels (ro-ro and other passenger ferries – hereinafter “ferries”) providing regular international services (i.e. excluding passenger vessels on domestic routes, cruise vessels and high-speed passenger crafts in as far as separate tariffs apply to these).
5. Most of the ship-owners that call a certain port regularly, such as ferry operators, have individual agreements with the port in question (like Scandlines and Sundbusserne with HHAB) whereby they pay less than the price indicated in the official tariff on which the comparison is based (rebates based on the number of passengers, vehicles and cargo transported by the ferries and/or number of calls) or on a different basis (for instance, on a lump sum). The official tariff does not therefore represent what Scandlines would actually be charged in these ports for the same number of calls and traffic as in Helsingborg. It should, however, be noted that the official tariffs in the ports of *[CONFIDENTIAL]* specify the applicable reductions, and therefore these reductions have been taken into account in the comparative table, where possible^[1].
6. In the absence of specific rules at international or Community level on the charging in ports, the level and method of charging is generally decided by the ports themselves (unless regulated at national or local level – this is, however, unusual). As a result, there are considerable differences between the charging systems in ports.
7. Despite these discrepancies, the official tariffs commonly comprise a ship fee per port, which depends on the characteristics of the vessel and fees which depend on what and

¹ *[CONFIDENTIAL]*

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

8. The ship fees/port dues are commonly based on the capacity of the ship and calculated on the Gross Tonnage (“GT”) of the vessel. The ports can, however, charge these fees on another basis, e.g. the net tonnage of the vessel (the port of [CONFIDENTIAL]), or the geometric volume of the vessel, per cubic metre (the port of [CONFIDENTIAL]). The ship fee is normally charged per call, in other words each time the vessel calls the port (including entry and departure)^[2]. However, the Danish ferry ports covered in this comparison charge the ferries per month and per vessel rather than per call.
9. The ferries also commonly pay a passenger fee per arriving/disembarking and departing/embarking passenger and a vehicle fee per vehicle unit (in this comparison we have only considered cars, busses and lorries), the amount of which varies depending on the type of vehicle^[3].
10. As regards the cargo transported onboard the lorries, the practice differs between the ports. Most ports in the comparison charge both a vehicle fee and a cargo fee for the cargo carried by the lorry (depending on the load). Some other ports only charge either a vehicle fee per lorry, irrespective of the load actually carried (e.g. [CONFIDENTIAL⁴]) or a cargo fee based on the weight (e.g. [CONFIDENTIAL]⁵).
11. Tables attached as Appendices 6.2. and 6.3. [WHICH ARE CONFIDENTIAL] below provide a comparison of port tariffs between Helsingborg and the other ports for 1997 and 2000 respectively.
12. Each table contains two main parts: (i) the specifications of the charging systems of the ports in local currency and (ii) the specifications of the charging systems of the ports in Euros (to allow a comparison). The exchange rate is specified between the two parts of the table, for each year and each port (country)⁶.
13. An additional sub-table at the bottom specifies the parameters used in the calculations (yearly number of calls, gross tonnage, net tonnage and specifications for calculation of the volume of a typical Scandlines/Sundbusserne’s vessel).
14. As concerns Helsingborg, the ship fees and the goods fees correspond to the disputed port charges invoiced to Scandlines and Sundbusserne since [CONFIDENTIAL] (which differ from the official tariffs for [CONFIDENTIAL]). For the other ports, they reflect the official tariff without application of rebates.

² [CONFIDENTIAL]

³ [CONFIDENTIAL]

⁴ [CONFIDENTIAL]

⁵ [CONFIDENTIAL]

⁶ Source : Eurostat’s official local currency/€conversion rates.

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

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