Jersey Competition Regulatory Authority ('JCRA')

Decision M 005/05

Ferryspeed (C.I.) Limited /

Channel Express (C.I.) Limited

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I. EXECUTIVE SUMMARY

1. On 30 November 2005, the JCRA received an application for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the 'Law') concerning a proposed acquisition by Ferryspeed (C.I.) Limited ('Ferryspeed') of the whole of the assets of Channel Express (C.I.) Limited ('Channel Express') (the 'Application'). Ferryspeed and Channel Express (the 'Parties') entered into a business purchase agreement in relation to the proposed acquisition on 17 November 2005, conditioned on the approval of the JCRA.

2. The JCRA published a notice of its receipt of the Application on its website and in the Jersey Gazette, on 1 December and 2 December 2005 respectively, inviting comments on the proposed acquisition by 15 December 2005. In addition to public consultation, the JCRA consulted with several of the Parties' competitors and customers concerning the proposed acquisition, as well as with other potentially interested parties.

3. As a result of this preliminary assessment, the JCRA determined that the proposed acquisition raised competition concerns that merited a full investigation, as set out in the JCRA's Guideline on Mergers & Acquisitions (the 'JCRA Merger Guideline').[1] This was communicated to the Parties in January 2006.

4. During the full investigation, the JCRA collected additional information necessary to assess the competitive effects of the proposed acquisition. As a result of the investigation, the JCRA concluded that the proposed acquisition, as originally notified by the Parties, would substantially lessen competition in the relevant market for the provision of seaborne temperature-controlled freight services between St Helier, Jersey and Portsmouth, United Kingdom. This conclusion provides grounds for the JCRA to refuse to grant approval of the proposed acquisition under Article 22(4) of the Law.

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[1] JCRA Guideline, *Mergers and Acquisitions* at 6.

5. In response to the concerns raised by the JCRA, Ferryspeed offered to restructure its acquisition of Channel Express. Specifically, it committed to not acquire the Channel Express warehouse located in Jersey as part of the acquisition, but to surrender this warehouse to Jersey Harbours.[2] Jersey Harbours has stated that it will accept this surrender and offer the warehouse to a third party freight operator. Ferryspeed made this restructuring offer toward the end of the six month extended review period. In order to properly consider this offer, the JCRA was required to extend the investigation beyond the normal six month timeframe in this case.

6. The JCRA concludes that the restructuring of the proposed acquisition substantially addresses the competition concerns identified herein. Specifically, in this Decision we identify lack of suitable warehouse space at St Helier's harbour as one of the key barriers to entry into the relevant market. Surrendering the Channel Express warehouse to Jersey Harbours, thereby allowing its occupation by a third party freight operator, lowers this barrier to entry and will provide to a new entrant the key asset necessary to compete in the relevant market.

7. Thus, in the interests of permitting Ferryspeed proceed with the acquisition of Channel Express while preserving competition in the relevant market, the JCRA approves the acquisition as restructured, subject to conditions imposed under Article 22 of the Law, which are set out below.

II. THE PARTIES

A. Ferryspeed

8. Ferryspeed is a Jersey-registered business and a wholly owned subsidiary of Empyraen Group Limited, also incorporated in Jersey, which is the ultimate holding company.

9. Ferryspeed's Internet website describes the company as 'a Channel Islands based freight company that specialise[s] in the storage and next day delivery of ambient

[2] The States of Jersey owns the Channel Express warehouse. The property is administered by Jersey Harbours, acting on behalf of the Minister for Economic Development.

and temperature-controlled freight to and from the Channel Islands.'[3] The website also states that Ferryspeed '[c]urrently [is] the largest independent shipping operator in the Channel Islands[.]'[4]

10. According to the Application and information contained on Ferryspeed's website, Ferryspeed's principal activities include:

- Warehousing in and distribution to the Channel Islands;
- U.K. chilled/frozen distribution;
- U.K. produce distribution;
- U.K. distribution/food service;
- U.K. cold storage; and
- Shipping furniture, fine arts, antiques and household removals through a service called Profreight.

11. Ferryspeed has dedicated depots in the United Kingdom located in Portsmouth and Fareham, and in the Channel Islands located in Guernsey and Jersey. It operates its freight distribution to the Channel Islands via its distribution warehouse in Hilsea, Portsmouth.

12. The Empyraen Group includes businesses in the transport, food and property sectors, [CONFIDENTIAL REDACTED].

B. Channel Express

13. Channel Express is a Guernsey registered company which has been trading for approximately 34 years. Its Internet website states that 'Channel Express offers a comprehensive freight forwarding service, which includes collections throughout

[3] www.ferryspeed.com (viewed on 22 Feb. 2006).
[4] www.ferryspeed.com/about_us.htm (viewed on 22 Feb. 2006).

the U.K., preparation of Customs and other necessary documentation and delivery right through to the Channel Islands destination.'[5]

14. Channel Express's principal activities include:

- Warehousing and distribution to the Channel Islands;
- U.K. chilled distribution;
- U.K. produce distribution;
- U.K. road haulage for onwards shipment of freight to Channel Islands; and
- Export of produce, flowers, mail and general freight from the Channel Islands.

15. Channel Express occupies a 7,600 square foot warehouse at Elizabeth Harbour in St Helier, Jersey. In the United Kingdom, Channel Express has its main depot at Portchester on the south coast of England, and a shared depot at Castle Donington in the East Midlands.

16. The company's previous focus was to fly flowers from Guernsey to the U.K. using cargo aircraft. In 1987 Channel Express started to use roll on, roll off ferry services from the Channel Islands to Portsmouth for the distribution of flowers and fresh produce under temperature-controlled conditions. With the demise of the Guernsey flower export business, Channel Express has diversified its activities to include transportation of mail, produce and general freight.

17. Channel Express is a wholly owned subsidiary of Dart Group Plc (incorporated in the United Kingdom), which is the ultimate holding company. The Dart Group's activities include the operation of cargo and passenger aircraft on charter contracts and low cost services throughout Europe; the distribution of fresh produce and temperature-controlled products to supermarkets and wholesale markets throughout the United Kingdom; and freight forwarding to the London

[5] www.fowler-welch.co.uk (viewed on 22 Feb. 2006).

Heathrow, Manchester, East Midlands and Newcastle airports from offices in the Far East.

III. THE REQUIREMENT FOR JCRA APPROVAL

18. The Parties applied for JCRA approval under Article 1(1)(a) of the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the 'Order'), on the basis that the proposed acquisition would create an undertaking with a share of more than 25% in the supply of transport and distribution services on certain sea routes to the Channel Islands, and the provision of associated storage services. On this basis, pursuant to the Order, the JCRA's approval is required under Article 20(1) of the Law before the proposed acquisition is executed.

IV. OVERVIEW OF SEA FREIGHT TO AND FROM JERSEY & GUERNSEY

19. The vast majority of goods transported to or from Jersey and Guernsey are conveyed via sea transport. Small, high priced goods or goods which require extremely rapid transit may be transported by air, but the amount of goods transported by air is very small compared to the amount of goods transported to the Channel Islands by sea.

20. The vast majority of goods imported into either Jersey or Guernsey are shipped via Portsmouth. Concerning Jersey, we understand that over 95% of all goods imported via ocean freight come from Portsmouth to St Helier. In addition, we understand that virtually all of the goods exported from Jersey are shipped via ocean freight from St Helier to Portsmouth. Both Ferryspeed and Channel Express operate only between the Channel Islands (Jersey and Guernsey) and Portsmouth.

21. At present, all such sea transport to Jersey, excepting *ad hoc* bulk transport, uses one or more of four ferry vessels that travel to St Helier on a regular scheduled basis. Two of the ferry vessels are the roll on/roll off ('ro/ro') type and two are of the load on/load off ('lo/lo') type.

22. Ro/ro involves the shipment of freight via lorries and trailers on ferries. As the name indicates, the lorries and trailers containing the freight are able to roll on the

ferry at the point of departure, and roll off the ferry at the point of arrival. In contrast, lo/lo involves the shipment of freight packed into containers, which are lifted on or off vessels by the use of special-purpose cranes located at a quay. Estimated total freight traffic between Portsmouth and St Helier is 65% ro/ro and 35% lo/lo.

23. Condor Limited ('Condor Ferries') owns both the ro/ro vessels, Huelin Renouf Shipping Limited ('Huelin') owns one lo/lo vessel and Channel Seaways Limited ('Channel Seaways') owns the other lo/lo vessel.

24. The two ro/ro vessels operated by Condor Ferries are called the *Commodore Clipper* and the *Commodore Goodwill*. The *Commodore Clipper* has an approximate freight capacity of 1,265 lane metres (plus space for approximately 500 passengers), while the *Commodore Goodwill* has a freight capacity of approximately 1,250 lane metres. Both provide daily year-round freight service between the Channel Islands and Portsmouth according to the following schedule.

TABLE 1

Vessel	**Depart Portsmouth for St Peter Port**	**Arrive St Peter Port**	**Depart St Peter Port for St Helier**	**Arrive St Helier**	**Depart St Helier for Portsmouth**
Commodore Clippper	06:30	16:00	17:30	19:30	21:00
Commodore Goodwill	19:30	03:00	04:00	06:00	08:15

25. Condor Ferries is a sister company of Condor Logistics (i.e., both share the same parent company). As detailed below, Condor Logistics is a competitor of both Ferryspeed and Channel Express in the provision of freight services to the Channel Islands.

26. Currently, neither Ferryspeed nor Channel Express operates their own freight vessels. Both ship their cargo to the Channel Islands using the ro/ro vessels operated by Condor Ferries. From 1984-1989, we understand that senior

Ferryspeed personnel were involved in the operation of a ro/ro vessel between the Channel Islands and Portsmouth in cooperation with third parties.

27. Huelin offers lo/lo ferry service from Portsmouth to the Channel Islands three times a week on its vessel, the *Huelin Dispatch*, which has a capacity of 125 containers.

28. The other lo/lo ferry service provider, Channel Seaways, currently does not provide service between the Channel Islands and Portsmouth. It operates a vessel that sails once a week between the Channel Islands (Jersey and Guernsey), the U.K. (Poole), and the Netherlands (Rotterdam). The capacity of this vessel is 24 containers.

V. ANALYSIS OF PROPOSED TRANSACTION

29. Part 4 of the Law requires that the JCRA analyse whether the proposed acquisition would substantially lessen competition in Jersey or any part of Jersey. An analysis of whether a proposed acquisition would substantially lessen competition involves the following steps: (1) defining the affected relevant market(s); (2) assessing concentration levels in the relevant market(s); (3) assessing the ability of the combined undertaking to substantially lessen competition as a result of the proposed acquisition, either unilaterally or in co-ordination with competitors; (4) assessing whether other market forces, such as the entry of new competitors, eliminate the risk of a substantial lessening of competition; and (5) assessing any pro-competitive effects or efficiencies that may result from the proposed acquisition.[6]

VI. RELEVANT MARKET DEFINITIONS

30. Defining the markets relevant to a proposed acquisition is the first step in the assessment of whether it may have the effect of substantially lessening competition. As set forth in the JCRA's Guideline on Market Definition (the 'JCRA Market Definition Guideline'), a relevant market normally has two

[6] *See* JCRA Guideline, *Mergers and Acquisitions* at 8.

dimensions: a product market and a geographic market.[7] The focus of market definition is to identify 'those goods or services that are close substitutes in the eyes of buyers, and upon those suppliers who could produce, or who could easily switch to producing, those goods or services.'[8] In defining relevant markets, the JCRA may take note of precedents under European competition law.[9]

A. Relevant Product Market

31. 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.'[10] Defining a relevant product market usually has two components: demand-side substitution and supply-side substitution.

- Demand-side substitution exists if, in response to a small yet significant and non-transitory price increase in a good or service supplied by the merging parties, a significant number of customers would switch to other products.[11]

- Supply-side substitution exists when, in response to a small yet significant and non-transitory price increase in a good or service supplied by the merging parties, other suppliers could easily start providing the good or service in the short-term, using largely unchanged production facilities and with little or no additional investment.[12]

A relevant product market encompasses the smallest group of goods or services, and the smallest number of suppliers, which satisfy these tests.

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[7] *See* JCRA Guideline, *Market Definition* at 6.
[8] *Ibid.* at 5.
[9] *See ibid.* at 12. Article 60 of the Law requires that, so far as possible, matters arising under competition law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.
[10] *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at 2 (09.12.97).
[11] *See ibid.* at 3 ('The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer.').
[12] *See* JCRA Guideline, *Market Definition* at 8.

32. As stated above, the proposed acquisition deals generally with the transportation of goods to and from the Channel Islands, including Jersey.

33. As a preliminary matter, the Parties state that the relevant product market does not include the transport of freight by air as the costs associated with air transport far exceed the costs of sea transport (by at least three times) and the available transport capacity by air is far smaller than that available for sea transport. The JCRA agrees with this view, as the costs associated with air transport appear to not make it a realistic substitute to sea transport currently for a vast majority of goods shipped to or from the Channel Islands, including Jersey.[13]

34. The Parties further state that *ad hoc* bulk shipments are excluded from the relevant product market on the basis that they are organised by individual operators relatively rarely for the transport of large quantities of single items such as heavy goods or oil. The JCRA agrees with the view, based on the substantial costs associated with organizing such transportation and the relative rarity of sufficiently large cargoes to justify it, as well as on European precedent.[14]

35. As stated above, the provision of scheduled seaborne freight service to the Channel Islands currently is done using two kind of ships: ro/ro and lo/lo. A key question in the JCRA's analysis of the proposed acquisition is whether freight delivered on ro/ro ferries is in the same relevant product market as freight delivered on lo/lo ferries.

36. In addition, certain types of freight delivered to the Channel Islands require delivery under temperature-controlled conditions. Other types of freight do not require delivery under temperature-controlled conditions, but can be delivered under normal or 'ambient' conditions. Another key question of the JCRA's analysis of the proposed acquisition, therefore, is whether the delivery of seaborne

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[13] *See supra* ¶ 19; *see also* Competition Commission, *Stena AB and The Peninsular and Oriental Steam Navigation Co.* ¶ 4.7 (Feb. 2004) (concluding that air and sea freight were not viable economic alternatives).

[14] *See, e.g., NYK/Lauritzen Cool/Laucool JV*, Case No Comp/M.3798 ¶¶ 19-20 (19.08.05).

temperature-controlled freight is in the same relevant product market as the delivery of seaborne ambient freight.

37. The Application appears to make a functional distinction between ro/ro and lo/lo, stating that '[d]ue to the cargo which they carry, Ferryspeed and Channel require ro/ro services and are obliged to transport through Condor Ferries only[,]' and that 'Ferryspeed, due to the cargo it carries, has no choice but to use the ro/ro operation.'[15]

38. Despite this apparent functional distinction, the Application states that based on the conclusion reached by the U.K.'s Competition Commission in *Stena AB and the Peninsular and Oriental Steam Navigation Company ('Stena')*,[16] the JCRA should consider all freight delivered via ro/ro and lo/lo transport to be in the same relevant product market.

39. In *Stena*, the Competition Commission included lo/lo in the same relevant product market as ro/ro.[17] However, in reaching this decision the Commission stated that it had 'received little information on the extent of competition between lo/lo and ro/ro,' as this distinction did not appear overly important to the analysis of the proposed merger before it.[18] The Commission observed that lo/lo services may be a potential substitute to ro/ro 'for less time-sensitive freight.'[19] It did 'not, however, expect lo/lo to provide a major competitive constraint on ro/ro.'[20]

40. *Stena* thus indicates that to the extent that lo/lo provides a competitive constraint to ro/ro, it does so for freight that is not time sensitive. The JCRA's examination of the proposed acquisition supports this distinction. Specifically, customers of freight services told us that shipping time sensitive products by lo/lo is not an option for them. The principal reasons given are the greater frequency of ro/ro compared to lo/lo (i.e., twice a day service on ro/ro compared to three times a

[15] Application at 4 and 5.
[16] Competition Commission, *Stena AB and The Peninsular and Oriental Steam Navigation Co.* (Feb. 2004).
[17] *Ibid.* ¶ 4.8.
[18] *Ibid*.
[19] *Ibid.*
[20] *Ibid.*

week on lo/lo), the inability of lo/lo operators severing the Channel Islands to provide the necessary cool-chain processes required for the delivery of temperature-controlled goods, and the speed and timing of the ro/ro service (which is essential to customers/manufacturers shipping temperature-control goods as well as those using a just-in-time ordering system). The last factor is important to many customers because of the need to reduce costs by minimising their requirements for warehousing space in Jersey.

41. The lo/lo operators also expressed the view that lo/lo is a distinct product market from ro/ro. As detailed above, lo/lo vessels operate infrequently to Jersey compared to ro/ro vessels, and prices for lo/lo transport are less than for ro/ro transport. Despite the lower prices for lo/lo compared to ro/ro, evidence of customers switching from ro/ro to lo/lo appears to be limited, and non-existent for goods that require transport under temperature-controlled conditions.

42. Thus, the JCRA concludes that, from a demand-side perspective, lo/lo does not provide a viable option to ro/ro for all types of freight. Ro/ro may compete against lo/lo for the transportation of bulky goods that are not time-sensitive. For other kinds of goods, however, the delivery of which may be time-sensitive, lo/lo does not appear to be a viable demand-side substitute for ro/ro.

43. Identifying a precise dividing line between lo/lo and ro/ro is not required to define a relevant product market for the proposed acquisition. The Application states that '[b]oth Ferryspeed and Channel specialise in temperature controlled services.'[21]

44. Goods requiring transportation under temperature-controlled conditions include foodstuffs such as fruits, vegetables, potatoes, meat, fish, and plants. Strict E.U., U.K. and Jersey regulations apply to the transportation and storage of such

[21] Application at 5.

items,[22] including relevant U.K. and Jersey regulations which require that chilled products must be kept at temperatures less than or equal to 8°C.[23]

45. Customers have informed us that the transport of goods under temperature-controlled conditions is inherently time-sensitive. Currently, all such goods are delivered into or from Jersey using ro/ro transport. Therefore, even if lo/lo transport may substitute for ro/ro transport for some goods, such substitution does not occur for goods requiring transportation under temperature-controlled conditions. This conclusion is supported by observations from customers such as the following:

- A supermarket operator in the Channel Islands told us that lo/lo is not an option for chilled goods such as fruits and vegetables;

- A company that imports and exports seafood in Jersey told us that the speed of movement and refrigeration capacity provided by ro/ro makes lo/lo not a viable option; and

- An importer of fresh plants and flowers told us that while lo/lo may be an option for some ambient goods, it was not an option for goods requiring shipment under temperature-controlled conditions, because of the greater frequency and faster delivery times associated with ro/ro service.

46. European competition law is consistent with these views, recognizing that '[f]rom a demand side perspective, certain goods such as fruit, meat and dairy products must be shipped under refrigerated conditions.'[24]

47. The Parties contend, however, that supply-side substitution from providers of ambient freight services (whether ro/ro or lo/lo) provide a competitive constraint

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[22] *Ibid.* at 18.
[23] The Food Safety (Temperature Control) Regulations 1995; Food Hygiene (General Provisions) (Jersey) Order 1967.
[24] *Maersk/PONL*, Case No Comp/M.3829 ¶ 8 (29.07.05); *accord TUI/CP Ships*, Case No Comp/M.3863 ¶ 7 (12.10.05).

to the ability of providers of temperature-controlled freight services to increase prices.

48. As stated in the JCRA's Guideline on Market Definition, supply-side substitution can occur only if 'suppliers can shift production easily and in the short-run, using largely unchanged production facilities and with little or no additional investment, when given the incentive to do so[.]'[25] This Guideline suggest a one-year time-frame as a period for when suppliers should start supplying a particular good or service to be considered as supply-side substitutes. When, however, 'supply side substitutability would imply the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition.'[26]

49. As explained in detail below in our discussion of market entry, the barriers to entry into the provision of seaborne temperature-controlled freight services appear high. Specifically, while the barriers to entry would not appear to prevent absolutely the entry of new competitors, they would appear to effectively prevent entry on a scale required to compete with incumbent providers of seaborne temperature-controlled freight service on the basis of price.[27] Thus, because of the significant barriers to entry, new entrants would be unlikely to put price pressure on incumbent providers and provide an effective competitive constraint on their behaviour.

50. Significantly, there have not been any recent entrants of new competitors providing seaborne temperature-controlled freight services to customers in Jersey.

51. Because the barriers to entry would appear to prevent effective entry into the provision of seaborne temperature-controlled freight services in the medium to long-term, such entry also would not be likely in the short-term, which is required for supply-side substitution. Thus, the JCRA concludes that effective supply-side

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[25] JCRA Guideline, *Market Definition* at 8.
[26] *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at 4 (09.12.97).
[27] *See infra* ¶¶ 100-134.

substitution is unlikely in the provision of seaborne temperature-controlled freight services.

52. In summary, therefore, the JCRA concludes that based on customer demand for temperature-controlled freight services, and the inability of suppliers of either lo/lo or ro/ro ambient freight services to start supplying temperature-controlled freight services to customers in Jersey in the short-term, the provision of seaborne temperature-controlled freight services is a distinct relevant product market.

B. Relevant Geographic Market

53. The European Commission states that '[t]he relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.'[28]

54. Ro/ro ferries currently serve Jersey from St Malo, France, and from the U.K. via Weymouth, Poole, and Portsmouth. Jersey also has a sea link with Rotterdam in the Netherlands via Channel Seaways. However, as this route is served by a lo/lo ship only, it is not included in the relevant market.

55. As stated above, virtually all goods imported into Jersey, or exported from Jersey, are conveyed via sea freight from Portsmouth to St Helier. In addition, 100% of the shipments of both Ferryspeed and Channel Express to or from Jersey use this route.

56. This trade pattern indicates that virtually all temperature-controlled goods exported from Jersey are destined for the U.K. Moreover, a vast majority of temperature-controlled goods imported into Jersey come from the U.K. On this basis, the JCRA concludes that the sea link with St Malo, France provides no

[28] *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 at 2 (09.12.97).

viable substitute for customers needing to transport temperature-controlled goods into or from Jersey.

57. Concerning the U.K., the vast majority of temperature-controlled freight shipped between Jersey and the U.K. (in either direction) currently goes through Portsmouth. Current services into both Weymouth and Poole are limited to fast ferries which are better designed to cater for passengers, cars and light vans, and neither Ferryspeed nor Channel Express offer services on these routes.

58. Thus, a supply-side perspective indicates the existence of a relevant geographic market limited to the Portsmouth-St Helier, St Helier-Portsmouth route. Even if the relevant geographic market is expanded to include Weymouth and Poole, this would not materially change the JCRA's analysis of the proposed acquisition. While facilities in Weymouth and Poole may be sufficiently homogeneous to those existing in Portsmouth to suggest that temperature-controlled freight shipped through the latter port could be sent through either of the former ports, currently a vast majority of the temperature-controlled freight shipped to or from Jersey to the U.K. goes through Portsmouth. Only Condor Logistics may ship a de minimis amount of temperature-controlled goods through either Weymouth or Poole, the effect of which would be only to increase marginally Condor Logistics' share in the relevant market. A small increase in Condor Logistics' market share would not materially affect the JCRA's analysis.

59. From a demand-side perspective, shipping from Portsmouth to Jersey or Guernsey may not be viewed in isolation, as economies of scale and efficiencies may make it more economical and therefore more sensible for particularly manufacturing exporters of goods to ship to both islands using one freight company.

60. However, there exist a significant number of customers for freight services in Jersey that depend on providers of seaborne temperature-controlled freight services to transport goods between Jersey and the U.K. An example would be an agricultural exporter with operations in Jersey and not Guernsey, or a business in Jersey and not Guernsey that sources supplies from the U.K.

61. The JCRA therefore concludes that the relevant geographic market is limited to the Portsmouth-St Helier, St Helier-Portsmouth route. While the demands of some customers may suggest a wider Channel Islands (Jersey & Guernsey) to Portsmouth market, for many Jersey-based customers the market would appear to be narrower. This approach is consistent with the internationally accepted approach, as stated in the JCRA's Market Definition Guideline, that 'the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose a small yet significant and non-transitory increase in price[.]'[29]

C. Relevant Market Conclusions

62. The relevant market in which to consider whether the proposed acquisition results in a substantial lessening of competition is thus the provision of seaborne temperature-controlled freight services between Portsmouth and St Helier.

VII. MARKET CONCENTRATION

63. After defining the relevant market, the JCRA estimates the respective market shares of the competitors in the market, both before and after the proposed acquisition. The shares of the competitors in the market are used to assess the overall level of market concentration.

64. The increase in concentration caused by a reduction in the number of competitors in a market is an indicator of the extent to which competition in the market may be lessened by a proposed acquisition. Specifically, the greater the aggregation of market shares caused by a proposed acquisition, 'the greater the likelihood that [it] would lead to a substantial lessening of competition.'[30]

65. While a high market share and concentration level resulting from a proposed acquisition may be indicative of a substantial lessening of competition, it is not conclusive. A final determination of a substantial lessening of competition may

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[29] JCRA Guideline, *Market Definition* at 5 (emphasis supplied).
[30] JCRA Guideline, *Mergers and Acquisitions* at 9.

only be achieved after a detailed assessment of the conditions that exist in the relevant market in question.

66. The following table summarises the market shares in 2005 for the provision of seaborne temperature-controlled freight services between Portsmouth and St Helier, as well as the expected change in these shares resulting from the acquisition.

TABLE 2[31]		
Operator	**Pre-Merger**	**Post-Merger**
Ferryspeed	[60 – 70%]	[70 – 80%]
Condor Logistics	[10 – 20%]	[10 – 20%]
Channel Express	[5 – 10%]	. . .
Bowman Haulage	[0 – 5%]	[0 – 5%]

67. In addition to market shares, another commonly used indicator of market concentration is the Herfindahl-Hirschman Index (‘HHI’). The HHI is calculated by summing the squares of the percentage market shares held by the competitors in the market. ‘[T]he change in HHI (known as the ‘delta’) is a useful proxy for the change in concentration directly brought about by the merger.’[32]

68. According to the European Commission, a proposed acquisition is unlikely to raise competition concerns if the post-merger HHI is above 2,000, but the delta is below 150.[33] Based on the market shares provided above, the HHI analysis for the relevant market is a post-merger HHI of over 6,000 with an increase (delta) of over 1,300. The proposed acquisition, therefore, well surpasses this safe-harbour threshold.

[31] Based on calendar year 2005 lane metres shipped on Condor’s ro/ro vessels between Jersey and Portsmouth (both directions), for temperature-controlled goods. During the investigation the JCRA estimated market shares for each operator, which were within the ranges shown above. Precise data are confidential.
[32] *See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 16 (05.02.04).
[33] *See ibid.* ¶ 20.

69. Both the market share data and HHI analysis indicate that the relevant market is highly concentrated, and would become more so as a result of the proposed acquisition. This may be indicative of a substantial lessening of competition as a result of the proposed acquisition.

70. We understand that since 2005, Channel Express has lost business in Jersey in the provision of seaborne temperature-controlled freight services. Such customer losses may have resulted in a diminution of Channel Express's share in the relevant market since 2005. To the extent such a reduction in Channel Express's market share has occurred, however, it is not particularly relevant to our analysis, as the 2005 market share numbers show that Channel Express is one of the few operators that currently provides seaborne temperature-controlled freight services between Jersey and Portsmouth.

VIII. SUBSTANTIAL LESSENING OF COMPETITION THROUGH THE STRENGTHENING OF A DOMINANT POSITION

71. A merger may substantially reduce competition through the creation or strengthening of a dominant position. A key indicator of this is a dominant firm having an appreciably larger market share than its next competitor post-merger.

72. As the market share and HHI analysis presented above indicates, the acquisition of Channel Express would strengthen Ferryspeed's pre-existing dominant position in the relevant market. Specifically, as shown in Table 2, Ferryspeed's post-acquisition market share would be approximately [70 – 80%],[34] which would be approximately four times the market share of the next largest competitor.

73. The European Commission's Merger Guidelines state that '[t]he larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power.'[35] Ferryspeed's market share in the provision of seaborne temperature-controlled freight services leads to a

[34] Figure within range shown, precise figure is confidential.
[35] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 27 (05.02.04).

presumption that it holds a dominant position in the provision of such services,[36] and that this position would be strengthened through the acquisition of Channel Express. In Europe, several mergers or acquisitions leading to levels of market concentration similar to (or less than) that of the currently proposed acquisition have been prohibited.[37]

74. Moreover, the position of other actual and potential competitors on these routes is such that it would be unlikely for Ferryspeed's dominance to be challenged.

- First, as detailed below, barriers to entry into the relevant market are high, meaning that new entry into the market would be unlikely to deter or counteract an exercise of dominance by Ferryspeed.[38]

- Second, many customers told us that for the delivery of goods under temperature-controlled conditions, Channel Express and Ferryspeed previously have been the two most viable options to provide this service. While Condor Logistics also provides seaborne temperature-controlled freight services in Jersey, [CONFIDENTIAL REDACTED]. As detailed below, the ability of Bowman Haulage to significantly expand in the relevant market is constrained by its comparatively small scale and high costs.[39] Thus, the loss of Channel Express may remove, for many customers, the 'next-best' option for the seaborne delivery of goods under temperature-controlled conditions.

- Third and finally, many of Ferryspeed's customers appear to exhibit a high degree of loyalty to the company. This may be based, in part, on the requirements that both European and U.K. regulations place on the transportation and storage of chilled foodstuffs. Thus, in addition to the

[36] *See* JCRA Guideline, *Abuse of a Dominant Position* at 6 ('The European Court of Justice has stated that dominance can be presumed, in the absence of evidence to the contrary, if an undertaking has a market share persistently above 50 per cent.') (citing relevant authority).
[37] *See, e.g., Aeropatiale-Alenia/de Havilland*, Case IV/M053 (02.10.91); *RTL/Veronica/Endemol*, Case IV/M553 (20.09.05); *Gencor/Lonrho*, Case No IV/M.619 (24.04.96); *Kesko/Tuko*, Case IV/M784 (20.11.96).
[38] *See infra* ¶¶ 101-134.
[39] *See infra* ¶ 132.

barriers to entry discussed below, customer loyalty may be an additional factor that would prevent or deter customers from switching suppliers of freight services.

75. The JCRA therefore concludes that the proposed acquisition would risk a substantial lessening of competition through the strengthening of a dominant provision in the provision of seaborne temperature-controlled freight services.

IX. SUBSTANTIAL LESSENING OF COMPETITION THROUGH COORDINATED EFFECTS

76. A proposed merger or acquisition may substantially lessen competition because ‘it increases the likelihood that firms are able to coordinate their behaviour . . . and raise prices, even without entering into an agreement or resorting to a concerted practice within the meaning of [the Law].’[40] Coordination may involve the ability of competitors to increase prices, limit output or production, or divide markets or customers.

77. The ability to coordinate does not have to be in the form of an agreement or concerted practice that might otherwise infringe the Law’s prohibition on anti-competitive agreements. The JCRA Merger Guideline states that coordination covers both explicit agreements and tacit forms of behaviour. ‘Tacit co-ordination involves the use of devices such as price signalling, conscious parallel pricing and price leadership. Businesses that would otherwise compete may attempt to co-ordinate their behaviour, in order to exercise market power, by restricting their joint output and raising prices.’[41]

78. While an increase in market concentration is itself not conclusive on the question coordinated effects, ‘[t]he reduction in the number of firms in a market may, in itself, be a factor that facilitates coordination.’[42]

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[40] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 39 (05.02.04)
[41] JCRA Guideline, *Mergers and Acquisitions* at 10.
[42] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 42 (05.02.04)

79. The JCRA analysed whether the proposed acquisition may substantially lessen competition through facilitating the ability of the firms to coordinate their behaviour.

A. Market Conditions Conducive to Coordinated Effects

80. As an initial matter, the relevant market has characteristics that have been found to be conducive to coordinated effects. These characteristics include:

- *Stable Demand* – Inbound freight to Jersey is relatively stable throughout the year, and year over year, although it has shown a recent tendency to decrease.[43] While demand for outbound freight from Jersey is considerably more seasonal than inbound freight, it also is characterised by a relatively stable overall volume.[44]

- *Homogeneous Product* – The provision of seaborne temperature-controlled freight service is largely the same among the different competitors: literally, having the transport and warehousing capacity to move an item from 'Point A' to 'Point B'. The Application states that price is the pre-eminent factor motivating a customer's selection of a freight operator.[45]

- *Low Technical Innovation* – The relevant market is not characterised by rapidly changing technologies. It would appear the competition largely occurs within the market, not for the market.

- *Barriers to New Entry* – As detailed below, entry barriers into the relevant market are high.

81. In addition, the JCRA's investigation revealed evidence of past examples of coordination among the operators of freight services to Jersey. 'Evidence of past

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[43] *See* Oxera, *Viability of ferry services to and from the island of Jersey* at 13 (July 2004).
[44] *See ibid.*; *see also Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 45 (05.02.04) ('Generally, the less complex and the more stable the economic environment, the easier it is for the firms to reach a common understanding on the terms of coordination.').
[45] *See* Application at 18 ('There is an emphasis on price above the other factors[.]').

coordination is important if the relevant market characteristics have not changed appreciably or are not likely to do so in the near future.'[46] Such evidence of past coordination among competitors includes the following.

- [CONFIDENTIAL REDACTED]
- [CONFIDENTIAL REDACTED][47]

82. If presented in a Jersey context now that the Law is in full force, information such as that highlighted above could raise compliance issues [CONFIDENTIAL REDACTED].

83. The only point raised from this evidence for the current analysis, however, is that many of the conditions in the relevant market appear conducive to coordinated effects, and that evidence further suggests past examples of coordination among the competitors through either overt or tacit agreements to divide or allocate customers. By reducing the number of competitors in the market, the proposed acquisition therefore would appear to enhance or strengthen the ability of the competitors to substantially lessen competition through either express or tacit coordination.

84. While these factors may be indicative of the ability of competitors in the relevant market to coordinate their behaviour, the 2002 decision of the Court of First Instance in *Airtours plc v. Commission* sets the following three required elements for coordinated effects in merger review. The first required element is market transparency.[48] The second is the ability of competitors subject to the agreement to retaliate and discipline competitors that deviate from the agreement.[49] The third is that the foreseeable reaction of current and future competitors and customers

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[46] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 43 (05.02.04).
[47] [CONFIDENTIAL REDACTED].
[48] *See Airtours plc v. Commission*, T-342/99 ¶ 62 (06.06.02) (requiring 'sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving').
[49] *See ibid.* ('there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy').

would not jeopardise the results of the common policy.[50] The JCRA's investigation of the proposed acquisition indicates that all three required *Airtours* factors are present in the relevant market.

B. Market Transparency

85. The relevant market appears transparent with respect to prices, costs, and other factors. While we understand that prices are subject to individual negotiation between the operators and their customers, and the operators may not publish price lists, the evidence indicates that price transparency exists via the customers. The Application states that 'there is a high level of transparency in the prices offered by Ferryspeed and its competitors to customers seeking such services in the relevant market.'[51] We also were told that customers often will pass on information on price quotes they receive from one operator to another operator, in an attempt to bargain over price. Furthermore, the [CONFIDENTIAL REDACTED] also indicates that, at least in the past, there may have been examples of direct discussions between competitors on the prices they charge to customers.[52]

86. Transparency in costs among competitors also can be a relevant consideration in a coordinated effects analysis.[53] For ro/ro operators such a Channel Express and Ferryspeed, by far the largest component of their variable costs are the ferry fees. For example, ferry charges represented approximately 35% of Ferryspeed's total cost of sales during both 2003 and 2004.[54] These charges come from one common source: Condor Ferries, the sole provider of ro/ro ferry services in the relevant market. As detailed below, Condor Ferries has scaled pricing for access to its ro/ro ferries, with prices decreasing based on increased amounts of volume shipped.[55] While Condor Ferries does not publish this price scale, our analysis

[50] *See ibid.* This factor also is known as 'sustainability.'
[51] Application at 18.
[52] *See supra* ¶ 81.
[53] *See Air Liquide/Messer Targets*, Case No Comp/M.3314 ¶ 94, 104 (15.03.04).
[54] *See Report of the Directors and Financial Statements for the year ended 31 December 2004 for Ferryspeed (CI) Limited* at 11 (06.10.05).
[55] *See infra* ¶ 113.

indicates that the different freight operators in the relevant market are aware of the scale and have a good idea of the ferry charges Condor Ferries charges to the different operators.

87. In addition to ferry charges, other costs appear to be common among providers of seaborne temperature-controlled freight services. These include the cost of petrol, harbour dues, and rents paid for warehouse space.

88. Transparency in costs can facilitate the ability of competitors in the relevant market to reach either explicit or implicit terms of coordination of the prices they charge to customers.

89. Finally, [CONFIDENTIAL REDACTED][56]

90. Thus, many important competitive factors in the relevant market appear to be transparent. Moreover, as detailed below, this level of transparency would appear to increase as a result of the proposed acquisition, further enhancing the ability of the remaining competitors to coordinate their behaviour.

C. Disciplinary and Retaliatory Mechanisms

91. As stated above, all competitors providing service in the relevant market depend on Condor Ferries to deliver their lorries or trailers from Portsmouth to Jersey. Condor Ferries is thus in the position of a gate-keeper to this market.

92. One of the competitors in the relevant market, Condor Logistics, is a sister company of Condor Ferries.

93. In response to taking action in the relevant market that may be detrimental to Condor Logistics, [CONFIDENTIAL REDACTED] Condor Ferries has the ability to use its gatekeeper status to discipline other providers of freight services. Such disciplinary action could take the form of (i) an outright denial of access to the ro/ro ferries (especially the all-important nightly sailing from Portsmouth), or,

[56] [CONFIDENTIAL REDACTED].

more likely, either (ii) a reduction of space available on these ferries, or (iii) the imposition of increased fees for access. [CONFIDENTIAL REDACTED][57]

94. Nothing suggests that Condor Ferries would be prevented from exercising this potential ability to either retaliate against freight providers that operate against the interests of Condor Logistics, or that its ability to do so would not serve as a deterrent to deviations in the relevant market.[58] Similar to increasing the level of market transparency, the proposed acquisition may enhance Condor's ability to retaliate by reducing the number of remaining significant competitors in the relevant market from three to two.

95. This ability for Condor Ferries to retaliate suggests that other providers of freight services have strong disincentives to take action detrimental to Condor Logistics. In addition, Condor Logistics may have reduced incentives to compete against Ferryspeed after the proposed acquisition. We understand that the additional volume of freight (both ambient and temperature-controlled) transported by Ferryspeed as a result of acquiring Channel Express likely may make Ferryspeed the single largest freight customer for Condor Ferries. That is, Ferryspeed may take up more of the freight capacity on Condor's ro/ro ferry than that taken by Condor Logistics. In this environment, Ferryspeed will both be the major customer to the Condor Group (via its dependence on Condor Ferries) as well as the major competitor (against Condor Logistics in the provision of freight services). As detailed above, although the costs of introducing a new ro/ro vessel on the Jersey to Portsmouth route are high, Ferryspeed has, previously, operated such a vessel in cooperation with third parties.[59] Thus, Condor Logistics may have disincentives to compete aggressively in the relevant market and thereby avoid jeopardising Condor Ferry's relationship with its single largest customer.

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[57] [CONFIDENTIAL REDACTED].

[58] *See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 55 (05.02.04) ('[R]etaliation could take many forms, including cancellation of . . . forms of cooperation[.]'); *see also Shell/DEA* Case No Comp/M.2389 ¶ 124 (20.12.01) (potential ability to retaliate based on denying a competitor access to terminal facilities).

[59] *See supra* ¶ 26.

D. Sustainability

96. Finally, any terms of coordination reached among the competitors in the market would appear to be sustainable, in that it would not be jeopardised by the foreseeable reaction of current and future competitors and customers.

97. As detailed below, barriers to entry into the relevant market are high. This greatly impedes the ability of new competitors to enter the relevant market and disrupt any form of overt or tacit coordination between the current competitors. Moreover, any new entrants would themselves depend on the infrastructure provided by Condor Ferries, the sister company of Condor Logistics, for access to the market, thereby providing a strong disincentive for new entrants to disrupt market conditions to Condor Logistics' disadvantage.[60] As further detailed below, new competitors are also limited in their ability to acquire suitable warehouse space in St Helier.[61]

E. Conclusions with Respect to Coordinated Effects

98. As detailed above, the relevant market appears to have characteristics that facilitate either express or tacit coordination, and examples of apparent past coordination between competitors in the market exist. Furthermore, the three factors required to show coordinated effects in merger review appear to be satisfied.

99. The relevant market thus appears subject to either express or tacit coordination. The proposed acquisition may substantially lessen competition by either making coordination among the remaining competitors more likely, or enhancing the effectiveness of their current ability and incentive to coordinate.

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[60] *See Air Liquide/Messer Targets*, Case No Comp/M.3314 ¶ 98 (15.03.04) (control of infrastructure necessary to compete in the relevant market provides the 'ability and incentive to retaliate selectively against smaller competitors').

[61] *See infra* ¶¶ 114-129.

X. POTENTIAL ENTRY AND THE EXERCISE OF BUYER POWER

100. If the merger risks a substantial lessening of competition, the JCRA will analyse whether other market forces, such as the threat of new entry or the presence of countervailing buying power, eliminate or substantially diminish the competitive effects arising from the merger.

101. For entry to be sufficient to alleviate the risk of a substantial lessening of competition, it must be likely in commercial terms and at a scale that is likely to cause the merged entity to react in a significant manner. It also must be feasible within a sufficiently short timeframe to prevent the exercise of market power.[62]

102. The JCRA concludes that entry would not be sufficient, likely or timely to counteract or deter the substantial lessening of competition resulting from the proposed acquisition.

103. The provision of seaborne freight services in general on the Portsmouth-St Helier, St Helier-Portsmouth route currently requires the following components: (1) access to lorry or trailer transport in the United Kingdom, (2) access to warehouse space in Portsmouth, (3) access to space on a ferry operating between Portsmouth and St Helier, (4) access to warehouse space in St Helier, and (5) access to lorry or trailer transport in Jersey. Assets would not necessarily have to be purchased, as both ground transport and storage facilities could be leased.

104. Additionally, the provision of seaborne temperature-controlled freight services would require that factors (1), (2), (4), and (5) listed above be temperature controlled (at least partially) and comply with regulatory and customer requirements.

105. While all five factors represent barriers to entry into the relevant market, our analysis concludes that factor (3) (access to ferry space) and factor (4) (access to suitable warehouse space in St Helier) are particularly significant. While these factors may not necessarily prevent entry absolutely, they would effectively

[62] *See* JCRA Guideline, *Mergers and Acquisitions* at 11.

prevent it on a scale necessary to constrain the behaviour of the incumbent firms in the relevant market. These barriers, plus the additional costs associated with the provision of seaborne temperature-controlled freight services, are detailed below.

A. Access to Ferry Space from Portsmouth to St Helier

106. Currently, all seaborne temperature-controlled freight traffic is transported between St Helier and Portsmouth using the two daily ro/ro ferries operated by Condor Ferries.

107. The Parties argued that, despite this fact, goods that require temperature-controlled transport could be transported on Huelin's lo/lo ferry, the *Huelin Dispatch*. The Parties argue that prior to the introduction of ro/ro service in the late 1980s, all freight transported to the Channel Islands (ambient or temperature controlled) was transported on lo/lo ferries.

108. While recognizing that, nearly twenty years ago, goods requiring temperature-controlled transport may have been transported on lo/lo ferries, the JCRA concludes that, today, ro/ro offers a far superior service for the transportation of such goods, to the extent that lo/lo no longer offers a viable substitute to ro/ro for the transportation of goods requiring temperature-controlled conditions. The inability of Huelin to provide an effective substitute to the ro/ro ferries operated by Condor Ferries is supported by the following factors:

- As stated above, customers that require temperature-controlled freight services have told us that the lo/lo service offered by Huelin is not a substitute for the ro/ro service offered by Condor Ferries. This view is supported by the lack of customers requiring temperature-controlled freight services switching from Ferryspeed to Huelin.

- While we understand that the *Huelin Dispatch* has the capacity to provide some temperature-controlled transport, we understand that this capacity is not used for temperature controlled transport, [CONFIDENTIAL REDACTED].

- Huelin currently lacks temperature-controlled warehouse space in Jersey. This effectively means that it could not, currently, provide temperature-controlled transport services to customers in Jersey. As detailed below, the conversion of its warehouse from ambient to temperature controlled would require additional investments, which could be substantial.[63]

109. Thus, based on factors such as these, the JCRA concludes that potential access to the *Huelin Dispatch* currently is not a viable option for customers requiring temperature-controlled transport.

110. Nor is the conversion of a lo/lo vessel into a ro/ro vessel, or the introduction of a new ro/ro vessel operating between Portsmouth and Jersey, a likely option, at least in the short to medium terms, due to the associated costs.[64] Therefore, the JCRA concludes that the only viable option to transport temperature-controlled goods in between St Helier and Portsmouth is via the ro/ro ferries currently operated by Condor Ferries.

111. Dependence on Condor Ferries for the provision of temperature-controlled freight services to St Helier presents at least two barriers that appear particularly high: access to suitable boat space and the costs associated with transport.

112. As for access, capacity on both the *Commodore Clipper* and the *Commodore Goodwill* is approximately 1,250 linear metres, which is the equivalent of approximately 90 trailers. As stated in the Application, space on these ferries is limited, and the nightly southbound sailing of the *Commodore Goodwill* is often either full or oversubscribed -- '[s]pace on Condor Ferries' ro/ro vessels is necessarily limited and regularly oversubscribed on the prime evening Southbound service.'[65] [CONFIDENTIAL REDACTED].[66] We understand

[63] *See infra* ¶¶ 126-129.
[64] *See* Application at 20 ('The costs of placing another vessel in the relevant market are high and prohibitive since it is unlikely that there is sufficient business in the relevant market to justify such a substantial addition of capacity.').
[65] Application at 6; *see also* Letter from Stan Markland to Paul Hamilton at 7 (23.01.06) ('[T]he night boat from the UK is usually full with loaded trailers[.]')
[66] [CONFIDENTIAL REDACTED] .

further that, post-merger, Ferryspeed's ambient and temperature-controlled traffic combined would account for roughly 47% of the space used on Condor Ferries' ro/ro ferries, meaning that the two largest competitors in the relevant market post-merger would account for, on average, over 90% of the capacity available on Condor's ro/ro ferries. Thus, a new entrant may encounter difficulty literally 'getting on the boat.'

113. Even if access to one of the two ro/ro ferries can be achieved, such access likely would come at a high cost compared to the two major incumbent firms post-merger (i.e., Ferryspeed and Condor Logistics). We have been told that Condor Ferries calculates a lane metre-based rate for access to its ro/ro ferry that decreases based on increasing numbers of units transported.[67] This rate can range from approximately £[. . .] (for customers of Condor Ferries carrying a small amount of cargo) to around £[. . .] (for large freight operators such as Ferryspeed).[68] For firms that ship goods throughout the year on Condor Ferries, we understand that these rates are negotiated annually at the start of each year. As detailed above, these rates also represent by far the largest variable cost incurred by freight operators.[69] Thus, even if access to a ro/ro ferry can be had, access to such space for a new entrant would be at a price that is approximately [140% - 160%] greater than the incumbent firms.[70] Such extra costs would either have to be absorbed by the entrant, or passed on to its customers. Either way, and as detailed by the examples discussed below, this extra cost would be a significant factor preventing an entrant from placing competitive pressure on the incumbent firms.

B. Access to Warehouse Space at St Helier

114. Another barrier to entry is access to suitable warehouse space in St Helier.

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[67] *See* Application at 5 ('For example, since Channel carries a relatively lesser amount of cargo with Condor Ferries, its unit rates are high and higher than those charged to Ferryspeed.').
[68] Figures confidential
[69] *See supra* ¶ 86.
[70] Figure within range shown, precise figure is confidential.

115. Currently, the three major providers of temperature-controlled ro/ro service to Jersey occupy warehouse space near St Helier's ro/ro terminal at Elizabeth Harbour. Condor Logistics occupies 27,500 square feet of warehouse space at Elizabeth Harbour, Channel Express occupies 7,600 square feet of warehouse space at Elizabeth Harbour, and Ferryspeed occupies 22,500 square feet split between Elizabeth Harbour (approximately 4,500 sq. feet) and the New North Quay (approximately. 18,000 sq feet). The fourth temperature-controlled freight operator, Bowman Haulage, currently occupies a 2,000 square foot warehouse located away from the harbour on Rue des Pres in St Helier.[71]

116. During our analysis of the proposed acquisition, Ferryspeed argued that warehouse space at the harbour is not vital for the provision of freight services. While warehouse space currently may be constrained at the harbour, other space may be or become available at La Collette or elsewhere in St Helier.

117. Based on our analysis, access to warehouse space at the harbour, while preferred, may not be absolutely required to provide service in the relevant market. The fact that Bowman Haulage currently operates in the relevant market without harbour warehouse space supports this conclusion.

118. However, while access to warehouse space at the harbour may not be absolutely necessary for new entry, our analysis concludes that access to warehouse space away from the harbour comes at increased costs, which include the following:

- While the warehouses at the harbour were designed specifically for freight transport, this may not be the case for warehouses located elsewhere in Jersey. For example, access to warehouses off of the harbour may only be possible with 8 metre trailers, and not 13.6 metre trailers that can be accommodated at the harbour. This reduces the scale at which a freight provider can operate. According to Condor Logistics, an 8 metre refrigerated trailer has 43.6 cubic metres of capacity, while a 13.6 metre

[71] Square footage numbers are approximate.

refrigerated trailer has 82.3 cubic metres of capacity.[72] Furthermore, while 13.6 metre trailers are used commonly in the U.K., we understand that 8 metre trailers must be acquired specifically for Jersey.

- If an operator can use only 8 metre trailers, this implies that this operator must either use 8 metre trailers when taking and bringing goods to and from the U.K. or, when using larger trailers, repack the goods into 8 metre trailers upon arrival in Jersey. Both options involve increased costs.[73] Thus, independently of which option is chosen, a warehouse away from the harbour could pose additional costs.

- Even if a new entrant decided to seek warehouse space away from the harbour, the facilities it acquires still would need to receive planning permission and comply with health and safety regulations concerning the storage of goods and the operation of the facility.

- Access to warehouses distant from the harbour also increases costs with respect to the increased distance required to be travelled. These costs include time lost in traffic in and around St Helier, and increased petrol usage. These costs increase with the distance required to be travelled from Elizabeth Harbour. While, depending on the location, a warehouse away from the harbour may be closer to a freight operator's end customers (thereby, arguably negating increased transport costs) this would not be the case with potential warehouse space located at La Collette, which is further from Jersey's main population centres than Elizabeth Harbour. La Collette is the primary location where Ferryspeed has indicated that additional warehouse capacity may exist in Jersey.

119. Given that rents for warehouse space at the ro/ro harbour tend to be higher than rents for warehouse space elsewhere around the harbour, it is difficult to

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[72] www.condorlogistics.co.uk (viewed on 12 April 2006).
[73] For example, the first option could involve increased costs such as higher labour costs; the second option could involve additional costs for repacking.

determine precisely whether the increased costs associated with using relatively distant warehouse space outweigh the increased rents required to be at the harbour. The JCRA concludes, however, that having access to distant warehouse space, at a minimum, likely reduces the scale that a provider of temperature-controlled freight services can operate. This decreased scale, combined with increased costs for ferry access, severely limits the ability of entrants to place competitive pressure on incumbent firms.

120. Ferryspeed argues, however, that any capacity constraints for warehouse space at the harbour will be alleviated by the planned expansion of ro/ro warehouse capacity at Elizabeth Harbour, know as Phase III. Phase III is a planned new ro/ro warehouse of approximately 38,000 – 45,000 square feet. It could be used for either ambient or temperature-controlled storage.

121. Phase III is currently planned for 38,000 square feet. We understand that the entire warehouse currently is allocated to Ferryspeed and Channel Express, which jointly bid for the space prior to the announcement of the merger.

122. We understand that Jersey Harbours would like to increase Phase III to 45,000 square feet to accommodate another operator. We understand further, however, that this expansion is yet to be agreed, and it has opposition.

123. A condition for the occupation of new warehouse space in Phase III is the release of the current warehouse space of Channel Express and Ferryspeed. Thus, this promises to release over 30,000 square feet of existing warehouse space at the harbour.

124. We conclude, however, that the possibility of Phase III coming on-line does not lower the barriers arising from the lack of warehouse space at the harbour, at least in the short-term. Phase III does not yet have planning approval, and one application for planning approval already has been rejected. After approval, the project still would require financing prior to the start of construction. Because of

such factors, we understand that, in the best case, Phase III may come on-line in 2 years, although in the worst case scenario, it may never be constructed.

125. While we understand there may be room to build another warehouse on the New North Quay, the planning process for such a new warehouse has not commenced. Once started, a new warehouse would face the same regulatory requirements and potential hurdles that Phase III has encountered. Thus, the addition of a new warehouse at the New North Quay is not timely for the purpose of entry analysis and the proposed acquisition.

C. Additional Costs Associated with Providing Temperature-Controlled Freight Services

126. The barriers to entry discussed above are applicable to any provision of ro/ro seaborne freight service in between Portsmouth and St. Helier – either ambient or temperature-controlled. However, entry into the provision of seaborne temperature-controlled freight services comes at additional cost to the provision of ambient freight services. These additional costs would need to be borne by entrants into the relevant market.

127. As detailed above, the provision of seaborne temperature-controlled freight services requires access to temperature-controlled warehouses in both Portsmouth and St Helier, and temperature-controlled lorries or trailers.

128. Evidence we collected on the extra costs associated with the provision of seaborne temperature-controlled freight services, and temperature-controlled warehouse space in particular, varied widely. Ferryspeed argued that the costs associated with establishing temporary, mobile refrigeration facilities in an existing warehouse are insignificant; however, other parties told us that such facilities may not comply with at least some customer requirements for the storage of refrigerated goods. Other parties stated that the costs of converting an existing ambient warehouse into temperature-controlled are significant. Estimates for the total costs necessary to provide temperature-controlled freight service varied from £150,000 to £500,000.

129. It is not necessary for the purpose of this Decision to reach a precise estimate on the additional costs required to enter the relevant product market for the provision of seaborne temperature-controlled freight services, above that required to enter seaborne freight-services generally. The only point here is to observe that such additional costs exist, and these additional costs are an additional entry barrier (in addition to access to ferry space and warehouse space) to the relevant market.

D. Examples of the Barriers to Entry in Practice

130. It is significant to note that there has been no recent new entry into the relevant market. Furthermore, prior to the proposed acquisition of Channel Express, there have been no recent examples of firms exiting the relevant market. This is significant because '[h]istoric examples of entry and exit in the industry may provide useful information about the size of entry barriers.'[74]

131. The experiences of two freight operators in Jersey – Bowman Haulage and Paul Davis Freight ('PDF') – provide potentially useful insight into the size of the entry barriers discussed above.

132. As noted above, Bowman Haulage currently competes in provision of temperature-controlled freight services, accounting for roughly [0 – 5%] of the relevant market in both 2004 and 2005.[75] It has operated in this market for the past several years. It transports around [. . .] 8 metre trailers a week into Jersey from Portsmouth. To transport this amount of freight, Condor Ferries charges Bowman Haulage a per lane metre rate of around £[. . .].[76] [CONFIDENTIAL REDACTED]. While it currently occupies a 2,000 square foot warehouse on Rue des Pres, this facility is small compared to the warehouse space located at the harbour (which ranges from 7,000 to over 27,000 square feet). Its Rue des Pres warehouse also cannot accommodate 13.6 metre trailers, meaning that Bowman Haulage currently operates only 8 metre vehicles.

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[74] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 70 (05.02.04)
[75] Figure within range shown, precise figure is confidential.
[76] Figures confidential

133. PDF is a recent entrant into the provision of ambient freight services between Jersey and Portsmouth. In fact, it is 'the first new freight company to enter the marketplace in the Island in a number of years.'[77] It currently has access to an 8,000 square foot warehouse located in the ground floor of a building owned by Property Services, which was previously used by the States of Jersey Central Purchasing Department. This warehouse is located at La Collette across from the lo/lo facility at Victoria Quay. PDF has informed us that it cannot use 13.6 metre trailers at this facility. Because of the smaller amount of freight transported on Condor Ferries, [CONFIDENTIAL REDACTED].[78]

134. The experiences of both Bowman Haulage and PDF support the conclusion that, while the barriers to entry into the relevant market may not prevent new entry absolutely, they effectively prevent entry on a scale required for new entrants to place competitive pressure on the incumbent firms in the relevant market.[79] Although such scale effects may be overcome in a rapidly expanding market, or by new entrants being willing to cross-subsidize losses in the short-term to gain sufficient scale, we conclude that neither of these factors is relevant in a Jersey context. Data cited above shows that demand for freight services to and from Jersey is stable, and may even be decreasing.[80] Moreover, Jersey's small size makes short-run cross-subsidization of losses an unlikely rational business strategy.

E. Potential for Countervailing Buying Power

135. In addition to entry, another market effect that potentially can reduce or eliminate a substantial lessening of competition is the exercise of buying power by the downstream customers of the merging parties. As stated in the JCRA Merger Guideline, a purchaser might be able credibly to exert such countervailing power if it were large in relation to suppliers, well informed about alternative sources of

[77] *Jersey Evening Post* at 21 (30.01.06).
[78] [CONFIDENTIAL REDACTED].
[79] *See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 72 (05.02.04) ('Scale economies . . . may make entry unprofitable unless the entrant can obtain a sufficiently large market share.').
[80] *See supra* ¶ 80.

supply, readily able to switch from one supplier to another, and able to foster new supply (including own-supply).[81]

136. As part of our analysis, the JCRA examined whether Channel Island Traders ('CIT') is in a position to exercise purchasing power.[82] CIT currently is a customer of Ferryspeed, [CONFIDENTIAL REDACTED]

137. [CONFIDENTIAL REDACTED].[83]

138. [CONFIDENTIAL REDACTED].

139. Furthermore, our investigation indicated [CONFIDENTIAL REDACTED].

140. Finally, even if CIT has the ability, before or after the proposed acquisition, to pull its business from Ferryspeed and provide it, in some form or another, to Condor Logistics, this would not appear to be an effective counterweight to the substantial lessening of competition that would result from the proposed acquisition.

141. Specifically, the merger of Ferryspeed and Channel Express would effectively create a duopoly for the provision of seaborne temperature-controlled freight services for large customers such as CIT. Bowman Haulage currently does not have the capacity in the provision of seaborne temperature-controlled freight services to serve customers such as CIT, and as discussed above it is unlikely to acquire the additional capacity necessary to service such customers in the medium to long terms. In contrast, Channel Express has shown the ability to provide seaborne temperature-controlled freight services to large customers in Jersey, as recently as 2005 providing such services to Safeway (prior to losing this account in the middle of 2005 to Ferryspeed).

142. In this situation, the most that CIT could do is remove its business from one competitor (Ferryspeed) to the other (Condor Logistics). In summary, therefore,

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[81] *See* JCRA Guideline, *Mergers and Acquisitions* at 12.
[82] [CONFIDENTIAL REDACTED].
[83] [CONFIDENTIAL REDACTED].

even if CIT had the potential to exercise some measure of buying power, '[b]uyer power can only be exercised effectively if the buyer has an adequate choice of alternative suppliers.'[84]

143. The apparent duopoly that large customers would face post-merger increases the likelihood of the anticompetitive effects discussed previously. Specifically, in '[a] duopoly situation would make it much easier for the main suppliers to adapt to each other's behaviour[.]'[85] Such risks have been the driving force behind several decisions by the European Commission to either not approve a proposed merger or acquisition likely resulting in a duopoly, or approving them only subject to conditions intended to remedy the substantially lessening of competition.[86]

144. Thus, like entry, the JCRA concludes that the potential exercise of buyer power would be insufficient to alleviate or avoid the risk of a substantial lessening of competition in the relevant market as a result of the proposed acquisition.

XI. EFFICIENCIES ANALYSIS

145. Even if a proposed acquisition would appear to substantially lessen competition without an effective response from new entrants or powerful buyers, approval may still be possible if 'efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have.'[87] To be considered in a merger analysis, any claimed efficiencies must be achievable in a short period of time, result as a direct consequence of the merger, increase rivalry among remaining firms, and benefits must be passed on to consumers.

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[84] *SCA/Metsa Tissue*, Case No Comp/M.2097 ¶ 155 (31.10.01) (failing to find effective buying power in light of a post-merger duopoly).

[85] *Gencor/Lonrho*, Case No IV/M.619 ¶ 181 (24.04.96).

[86] *See, e.g., Air Liquide/Messer Targets*, Case No Comp/M.3314 (15.03.04); *SCA/Metsa Tissue*, Case No Comp/M.2097 (31.01.01); *France Telecom/Orange*, Case No Comp/M.2016 (11.08.00); *Rexam (PLM)/American National Can*, Case No Comp/M.1939 (19.07.00); *Gencor/Lonrho*, Case No IV/M.619 (24.04.96).

[87] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 76 (05.02.04).

146. Ferryspeed states that the financial benefits of the proposed acquisition amount to £[. . .][88] [CONFIDENTIAL REDACTED]. Ferryspeed's estimated main savings are summarized below.

TABLE 3[89]	
Category	**Estimated Projected Savings**
Depot costs	£[. . .]
Shipping charges	£[. . .]
Reductions in fleet	£[. . .]
Warehouse staff costs	£[. . .]
Administration costs	£[. . .]
Accountancy costs	£[. . .]

147. Ferryspeed also states that the gain of Channel Express's operating base in the Midlands will enhance its ability to compete with Condor Logistics. This claimed efficiency, however, does not appear to be merger specific, i.e., achievable only with through proposed acquisition. We understand that warehouse space is available in the Midlands, and Ferryspeed does not have to acquire Channel Express to establish a facility in that area.

148. [CONFIDENTIAL REDACTED].

149. [CONFIDENTIAL REDACTED].

150. Thus, the actual efficiencies resulting from the proposed acquisition likely are somewhat significantly less than £[. . .].[90] In light of the risk of a significant lessening of competition discussed in detail above, defining a precise efficiency estimate is not required. 'The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realised, and to be passed on, to a sufficient degree, to the

[88] Figure confidential
[89] Figures confidential
[90] Figure confidential

consumer.'[91] With a very high aggregation of market share in a relevant market, European precedent states that it is highly unlikely 'that efficiency gains would be sufficient to counteract its potential anti-competitive effects.'[92]

151. While recognizing that efficiencies may be generated from the proposed acquisition, the JCRA concludes that these efficiencies, standing on their own, would be insufficient to counteract the substantial lessening of competition outlined above.

XII. CONCLUSIONS CONCERNING A SUBSTANTIAL LESSENING OF COMPETITION

152. Thus, the JCRA is satisfied that the proposed acquisition would substantially lessen competition in the provision of services in Jersey. This conclusion is based on the risk of a substantial lessening of competition occurring through the exercise of either unilateral or coordinated market power in the market for the provision of seaborne temperature-controlled freight services between St Helier and Portsmouth. This conclusion provides grounds for the JCRA to refuse approval of the proposed acquisition under Article 22(4) of the Law.

XIII. REMEDIES ADDRESSING A SUBSTANTIAL LESSENING OF COMPETITION

153. In response to this conclusion, Ferryspeed offered to restructure its acquisition of Channel Express. The intended purposes of this restructuring was to alleviate the JCRA's competition concerns arising from the proposed acquisition, and thereby permit the acquisition to proceed in a manner which likely would not lead to a substantial lessening of competition in Jersey.

154. Specifically, Ferryspeed offered to not acquire the Channel Express warehouse located at Elizabeth Harbour in Jersey, but to surrender this warehouse to Jersey Harbours after a transitional period intended to permit the vacating of this facility.

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[91] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, O.J. C 31/5 ¶ 84 (05.02.04).
[92] *Ibid.*

In addition, Ferryspeed offered to facilitate the occupation of this warehouse by a third-party freight operator.

155. Jersey Harbours, in turn, has informed the JCRA that it will accept the surrender of this warehouse and offer it under a new lease to a third-party freight operator, for a period extending until the new Phase III warehouse becomes operational.

156. DFDS Transport ('DFDS') was recommended by Ferryspeed to the JCRA as a potential occupant of the Channel Express warehouse. Based on DFDS's status as a major provider of temperature-controlled freight services in other jurisdictions, including in the United Kingdom, the occupation of this warehouse by DFDS promises to introduce a major new competitor into the relevant market in Jersey.[93] DFDS has provided the JCRA with written confirmation that it has corporate approval to occupy the Channel Express warehouse in Jersey.

157. As a result of this proposal, Jersey Harbours is examining the possibility of DFDS occupying the Channel Express warehouse on a first-refusal basis, at least until Phase III becomes operational.

158. DFDS has supplied freight distribution services between Portsmouth and Jersey on a subcontract basis with Ferryspeed.[94] We understand this arrangement between DFDS and Ferryspeed has lasted for over a decade. Any remedy involving DFDS therefore also would require the termination of this pre-existing arrangement.

159. In the event that Jersey Harbours and DFDS fail to reach a final agreement concerning the lease of the Channel Express warehouse, Jersey Harbours has agreed to put the Channel Express warehouse out to tender on terms acceptable to the JCRA, which would be intended to ensure that another third-party freight

[93] DFDS's website describes the company as a major provider of temperature-controlled transport services throughout Europe, and 'one of the largest suppliers of logistics services to the food industry.' www.dfdstransport.co.uk (viewed on 18 May 2005).
[94] On the other hand, both Ferryspeed and DFDS told us that no arrangement exists between the companies with respect to Guernsey.

operator with the capability to compete in the relevant market occupies the warehouse until the new Phase III warehouse becomes operational.

160. The JCRA concludes that the proposed restructuring of the acquisition materially reduces the risk of a substantial lessening of competition:

- The proposed remedy would remove Ferryspeed's potential to further strengthen its dominant position in the provision of seaborne temperature-controlled freight services through the acquisition of the Channel Express warehouse. This warehouse already contains temperature-controlled storage capacity, and absent its divestiture Ferryspeed could have used this capacity to further expand in this market.

- The acquisition of this warehouse by DFDS, or another third-party freight operator, eliminates one of the two key barriers to entry into the relevant market – specifically, access to temperature-controlled warehouse space at the harbour in St Helier.[95] The remedy thus would help 'ensure that there can be viable new competition by removing existing entry barriers for potential competitors.'[96] The JCRA is satisfied that occupying this warehouse should give a new entrant both the means and incentive to expand its business in Jersey, and thereby reduce the costs associated with the second key barrier to entry, access to ferry space. The introduction of another competitor in the provision of seaborne temperature-controlled freight services between St Helier and Portsmouth would reduce the risk of a unilateral or coordinated exercise of market power in this relevant market after the proposed acquisition.

161. Article 22(3) of the Law provides for the JCRA's conditional approval of proposed acquisitions. As stated in the JCRA Merger Guideline, '[t]he attachment of conditions would be appropriate where the JCRA is satisfied that, without conditions, the merger would substantially lessen competition, but, if one

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[95] *See supra* ¶¶ 114-129.
[96] *AuA/LH*, Case No Comp/37.730 ¶ 107 (05.07.02).

or more conditions were fulfilled, the merger would not do so.'[97] The JCRA therefore grants its conditional approval of the acquisition as restructured. Compliance by Ferryspeed and Channel Express with the conditions stated herein is mandatory, with non-compliance potentially subject to the powers set forth in Article 38 of the Law.

XIV. DECISION ATTACHING CONDITIONS

162. Under Article 22 of the Law, the JCRA approves Ferryspeed's proposed acquisition of Channel Express. This approval applies specifically to the Agreement for the sale and purchase of part of the business of Channel Express (CI) Limited dated 17 November 2005, as subsequently amended by both (i) the Side Letter dated 3 July 2006, and (ii) the Memorandum of Agreement ('MoA') dated 3 July 2006 concerning the Channel Express warehouse located at Elizabeth Harbour in Jersey (the 'Warehouse'). In the event of any conflict between either the Side Letter or the MoA and this Decision, the terms and obligations of this Decision shall prevail.

163. Channel Express shall surrender the Warehouse to Jersey Harbours and Ferryspeed shall vacate the same no later than three months following the date of this Decision, or at such earlier time as Jersey Harbours may require.

164. Prior to vacating the Warehouse, Ferryspeed may use it only to continue to provide pre-existing services to existing Channel Express customers and not for new customers or services.

165. Prior to vacating the Warehouse, Ferryspeed and its directors, officers, employees, and agents, shall take such actions as are necessary to preserve and maintain the integrity and viability of the Warehouse and to prevent its destruction, wasting, deterioration or impairment, except for ordinary wear and tear, in accordance with good business practice.

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[97] JCRA Guideline, *Mergers and Acquisitions* at 13.

166. If the Warehouse is occupied by DFDS, Ferryspeed and DFDS shall terminate the pre-existing arrangement between DFDS and Ferryspeed concerning the provision of freight services to and from Jersey, no later than the date on which DFDS occupies the Warehouse.

167. After Ferryspeed vacates the Warehouse, Ferryspeed shall make no effort to re-acquire or re-occupy the same for a period of 24 months after the date of this Decision.

168. Ferryspeed and/or Channel Express shall provide such information and documents as the JCRA may require, subject to any legally recognizable privilege and upon written request with reasonable notice, for the purpose of determining, monitoring or securing compliance with this Decision and the conditions attached thereto.

169. JCRA may, where appropriate, in response to a written request from Ferryspeed or Channel Express showing good cause, modify or substitute one or more of the conditions set forth herein.

170. These conditions are binding on Ferryspeed and Channel Express under Article 22(3)(a).

3 July 2006 **By Order of the JCRA Board**