

ORDER OF THE PRESIDENT OF THE COURT OF  
FIRST INSTANCE 12 May 1995 \*

In Cases T-79/95 R and T-80/95 R,

**Société Nationale des Chemins de Fer Français**, a company incorporated under French law whose registered office is in Paris, represented by Barbara Rapp-Jung and Nathalie Flandin, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Victor Elvinger, 31 Rue d'Eich,

and

**British Railways Board**, a statutory corporation incorporated under the law of England and Wales whose registered office is in London, represented by Thomas Sharpe QC of the Bar of England and Wales, instructed by Alexandre Nourry, Solicitor, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

applicants,

v

**Commission of the European Communities**, represented in Case T-79/95 R by Francisco González Díaz, of the Legal Service, and Géraud de Bergues, national civil servant on secondment to the Commission, and in Case T-80/95 R by Carmel

\* Language of the case: English.

O'Reilly and Francisco González Díaz, of the Legal Service, and Géraud de Bergues, national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATIONS for the suspension of operation of Article 2A of Commission Decision 94/894/EC of 13 December 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/32.490 — Euro-tunnel) (OJ 1994 L 354, p. 66) in so far as it attaches certain conditions to the exemption provided for in Article 1 of the decision,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES

makes the following

**Order**

**Facts and procedure**

1 By application lodged at the Registry of the Court of First Instance on 7 March 1995, the Société Nationale des Chemins de Fer Français (hereinafter 'SNCF')

brought an action under the fourth paragraph of Article 173 of the Treaty establishing the European Community (hereinafter 'the EC Treaty') for the annulment of Commission Decision 94/894/EC of 13 December 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/32.490 — Eurotunnel) (OJ 1994 L 354, p. 66) or in the alternative for the annulment of that decision in so far as certain conditions are attached to it (Article 2A).

2 By separate document lodged at the Registry of the Court of First Instance on 20 March 1995, the SNCF also made an application for the suspension of operation of Article 2A of the contested decision.

3 By application lodged at the Registry of the Court of First Instance on 8 March 1995, British Railways Board (hereinafter 'BR') brought an action under the same provision of the EC Treaty also for the annulment of the abovementioned decision or in the alternative for the annulment of Article 2A thereof.

4 By separate document lodged at the Registry of the Court of First Instance on the same date BR also made an application for the suspension of operation of Article 2A of that decision.

5 The Commission submitted written observations on the application for interim measures in Case T-80/95 R on 20 March 1995. It lodged its written observations on the application for interim measures in Case T-79/95 R on 30 March 1995. By decision of the President of the Court of First Instance of 31 March 1995, BR was granted leave to lodge additional evidence in response to the Commission's observations.

6 The Court heard oral argument on 3 April 1995. At the hearing, SNCF and the Commission were also granted leave to lodge a number of documents. The judge hearing the application for interim measures granted all the parties a period expiring on 6 April 1995 for submitting their written observations on the new evidence

adduced by the other side. The applicants and the defendant also stated at the hearing that they had no objection to one order disposing of the two applications for interim measures, which contain identical requests.

7 Before considering the merits of the applications for interim measures, it is appropriate to summarize the essential facts at the root of the dispute before the Court as they appear from the pleadings and documents lodged by the parties and the oral explanations given at the hearing of 3 April 1995.

8 On 29 July 1987, BR and SNCF of the first part and the English company The Channel Tunnel Group Ltd and the French company France Manche SA (hereinafter jointly referred to as 'Eurotunnel') of the second part entered into an agreement concerning the use of the fixed link under the English Channel between the Département of Pas-de-Calais in France and the County of Kent in England (hereinafter 'the usage contract'). The usage contract was entered into against the background and for the duration of the concession of the right to carry out the development, financing, construction and operation of the fixed link (or tunnel) obtained by Eurotunnel pursuant to an agreement signed on 14 March 1986 with the Secretary of State for Transport of the United Kingdom of Great Britain and Northern Ireland and the French Minister for Town Planning, Housing and Transport. The concession period, initially set at 55 years, was extended to 65 years in 1994.

9 The usage contract essentially governs the relationship between Eurotunnel on the one hand and BR and SNCF on the other hand, defining their reciprocal rights and obligations concerning the use of the tunnel. It lays down the arrangements and conditions for transit by the international passenger and freight trains operated by BR and SNCF and the operation by Eurotunnel of a special shuttle service transporting various types of motor vehicle and any passengers. Clause 6.2 of the usage contract provides that BR and SNCF are at all times during the term of the agreement to be entitled to 50% of the capacity of the fixed link per hour in each direction. The remaining capacity of the tunnel, measured in standard paths per hour,

remains available to Eurotunnel, manager of the infrastructure. In consideration of the use of the fixed link, BR and SNCF are to pay to Eurotunnel charges comprising a fixed element, payable during the first twelve years of operation, and a partially variable, decreasing element calculated by reference to actual traffic. Pursuant to Clause 10 of the usage contract, BR and SNCF are also to reimburse to Eurotunnel a portion of the costs of operating the fixed link, set out in Schedule V. The railway undertakings undertook in addition to make substantial investment with a view to organizing their respective railway infrastructures to the extent necessary for using the tunnel and to have available special rolling stock suitable for such use.

10 Eurotunnel, in agreement with BR and SNCF, notified the usage contract to the Commission on 2 November 1987 with a view to obtaining a declaration of the non-applicability of Article 2 of Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302). At the end of the procedure laid down in Article 12(2) and (3) of that regulation, the Commission granted the usage contract an exemption for a period of three years expiring on 15 November 1991.

11 Following requests by Eurotunnel for the renewal of the exemption and after publication in the Official Journal of 30 July 1994 (OJ 1994 C 210, p. 15) of a notice under Article 19(3) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and Article 26(3) of Regulation No 1017/68, the Commission adopted the contested decision on 13 December 1994. It declared Article 85(1) of the Treaty, Article 2 of Regulation No 1017/68 and Article 53(1) of the EEA Agreement inapplicable to the usage contract for a period of 30 years beginning on 16 November 1991. Conditions and obligations were attached to that exemption. It is the conditions, set out in Article 2A of the contested decision, which the present applications seek to suspend.

12 The conditions in dispute read as follows:

- (a) In accordance with Clause 6.2 of the usage contract, BR and SNCF must not withhold their agreement to the sale by the managers of the infrastructure to other railway undertakings of the hourly paths necessary to operate international passenger and freight services.
  
- (b) However, BR and SNCF must have available the hourly paths necessary to provide an appropriate level of services during the period up to 31 December 2006, that is up to 75% of the hourly capacity of the Tunnel in each direction which is reserved for international passenger and freight trains, in order to operate their own services and those of their subsidiaries.
  
- (c) Over the same period the other railway undertakings and groupings of undertakings shall have available at least 25% of the hourly capacity of the Tunnel in each direction in order to run international passenger and freight trains.
  
- (d) The conditions set out in (b) and (c) shall not prevent BR and SNCF, during that period, from using more than 75% of the hourly capacity if the other railway undertakings do not use the 25% of capacity remaining.
  
- (e) The conditions set out in (b) and (c) shall similarly not prevent railway undertakings other than BR and SNCF from using, during that period, more than 25% of the hourly capacity if BR and SNCF do not use the 75% of capacity which is reserved to them.

- (f) Such adjustments shall in no way restrict the right of BR to use up to 75% of the hourly paths reserved for international trains during that period if the need arises, nor the right of the other railway undertakings to use up to 25% of that capacity.
- (g) The proportion of paths reserved to BR and SNCF will be re-examined by the Commission before 31 December 2006.'

## Law

- 13 Pursuant to the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.
- 14 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that an application for the interim measures referred to in Articles 185 and 186 of the Treaty must state the circumstances giving rise to the urgency and the pleas of fact and law establishing a prima facie case for the measures applied for. Such measures must be provisional in the sense that they do not prejudice the decision on the substance of the case (see, most recently, the order of the President of the Court of First Instance in Cases T-231/94 R, T-232/94 R and T-234/94 R *Transacciones Marítimas and Others v Commission* [1994] ECR II-887, paragraph 20).

*Arguments of the parties*

15 As regards the pleas establishing a *prima facie* case for suspension of the conditions in dispute, the applicants submit, first, that the Commission based itself on an erroneous legal assessment of the object and effects of the usage contract. The imposition of the conditions in question is therefore not justified under the applicable competition rules. Consequently the contested decision is unlawful in that it was adopted in breach of Article 85(1) of the Treaty, Article 2 of Regulation No 1017/68 and Article 53(1) of the EEA Agreement. The applicants consider that a proper construction of the usage contract, taking into account its pro-competitive effects, justifies a declaration of the inapplicability of Article 85(1) of the Treaty or, at the very least, an unconditional application of Article 85(3). BR notes that the Commission exempted the usage contract without imposing any conditions for a period of three years expiring on 15 November 1991 and maintains that the decision does not reveal any material change of circumstances since the grant of that exemption.

16 The applicants consider that, contrary to the Commission's understanding, neither the object nor the effect of the usage contract is to divide up the market between, on the one hand, the shuttle services operated by Eurotunnel and, on the other hand, the railway passenger and freight services operated by BR and SNCF. Eurotunnel is not prevented from using the part of the tunnel's capacity remaining at its disposal to operate international passenger and freight train services. Nor does the usage contract prevent BR and SNCF from providing shuttle services since none of the parties has accepted contractual restrictions as to the type of use which they are to make of that part of the tunnel's capacity which is assigned to them. The SNCF observes that the Commission appears to acknowledge those facts in paragraphs 75 to 79 of the decision without however drawing from them the conclusions which, in the applicant's view, are inescapable. Furthermore, the applicants stress that access by third parties to the use of part of the capacity of the fixed link is not precluded by the contract. That capacity may be made available to other railway undertakings by Eurotunnel in accordance with Article 10 of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's



railways (OJ 1991 L 237, p. 25). Were Eurotunnel to exhaust its entire available capacity of 50%, it could obtain part of the capacity allocated to BR and SNCF by invoking Clause 6.2 of the usage contract. That clause provides that BR and SNCF cannot unreasonably refuse to surrender part of their entitlement. In so far as the conditions imposed aim to ensure that third-party railway undertakings have the right to use part of the tunnel's capacity, they are superfluous.

- 17 The applicants submit, secondly, that in this case the Commission exceeded its power under Article 8 of Regulation No 17 and Article 13 of Regulation No 1017/68 to attach conditions to an exemption. According to SNCF, the conditions in dispute upset the contractual equilibrium of the usage contract consisting in the acceptance by BR and SNCF of financial commitments and investments essential for starting the project in consideration of having at their disposal 50% of the tunnel's capacity. By imposing on BR and SNCF exclusively the obligation to surrender some of their rights under the usage contract, the Commission is enabling Eurotunnel to receive twice over the consideration for the part of the tunnel's hourly capacity reserved to third parties: the first time by virtue of the fixed charges and investments for which SNCF and BR assume responsibility and the second time by the payment of dues by third parties. BR argues furthermore first that the imposition of the conditions in dispute amounts to extending to the applicants Eurotunnel's obligations under Directive 91/440 as the manager of the infrastructure and secondly that the Commission exercised its power in a manner incompatible with that directive and in particular with the competence conferred by that directive on the Member States. It follows, according to BR, that the conditions imposed are both discriminatory and unlawful.

- 18 Thirdly, SNCF and BR consider that the contested decision infringes the principles of proportionality, the protection of legitimate expectations and legal certainty. SNCF emphasizes that the effect of the conditions in dispute is to deprive the applicants retroactively of one quarter of their rights under the usage contract while their contribution to the development of the new transport services at issue remains

in its entirety. BR notes first that the conditions are disproportionate to the alleged restrictions on competition found by the Commission and secondly that the practical arrangements for applying the obligations which they impose on the applicants are vague and unclear.

19 Finally, the applicants go on to put forward, in support of their applications in the main proceedings, pleas alleging breach by the Commission of the obligation to state reasons, the right to be heard and the principle of good administration.

20 With regard to urgency, the applicants argue essentially that, taking account of the services which they provide at present and of those which they envisage providing in the near future, by summer 1996 they will be in a position to use, during certain hours of the day and night, all the hourly paths allocated to them by the usage contract and, consequently, to exceed the limit of 37.5% of capacity per hour in each direction imposed on them by the conditions in dispute. At the hearing on 3 April 1995, the applicants adduced several arguments on the basis of traffic forecasts for the three next summers, covering both the services operated by Eurotunnel and those operated by BR and SNCF. Those arguments seek to counter the Commission's assertions that the limit at issue is justified because the applicants predicted that in the next twelve years they would use only 75% of the tunnel's capacity available to them.

21 In the applicants' view, it is essential to distinguish between hourly and daily capacity, given that the commercial value of the hourly paths differs according to the hour of the day or night. The forecasts of SNCF and BR, which the Commission used as a basis for laying down the conditions in dispute, concern daily capacity, as may be seen from the SNCF's letter to the Commission and its annexes, and from the observations submitted by BR before the contested decision was adopted. The limit imposed by the Commission on the applicants, however, concerns the

tunnel's capacity per hour in each direction. The applicants consider that the evidence which they have adduced shows that, even though the total or daily capacity currently exceeds their needs and those of Eurotunnel, in the short term BR and SNCF will use, during several hours of the day and the night, either their total available capacity or, in any event, more than 75% of that capacity to provide their own transport services and honour their contractual commitments to third parties. A shortage of hourly paths is foreseeable in particular during certain hours of the night owing to reductions in capacity due to maintenance work on the tunnel. The applicants argue that they have no guarantee that the maintenance period, currently seven hours, will be reduced in the near future to the four hours provided for in the usage contract. The applicants reject the Commission's suggestions that they could reorganize their services so as to remain below the fixed usage threshold, emphasizing that their timetables are the outcome of complex planning, prepared years in advance which takes account of the specific needs of customers, in particular the demand for international freight transport, and which must moreover be compatible with using all the networks connected to the tunnel. BR and SNCF also note that, according to the traffic forecasts provided, most of the hourly paths retained by Eurotunnel will remain unused whereas they will be obliged to sacrifice part of their capacity, necessary to ensure a proper level of service, to third parties.

22 The applicants submit that in consequence of the conditions in dispute they will suffer damage which is serious and by nature virtually irreparable. First, they are bound to continue paying the fixed and minimum charges and assuming responsibility for investment in infrastructure and rolling stock, obligations which had been negotiated as consideration for the right to use 50% of the tunnel's capacity, whereas they now have available only 37.5% of that capacity and are thereby prevented from obtaining a return on their investments. Secondly, the performance of certain commitments already entered into with third parties is called in question, which also has considerable financial consequences for the applicants, quite apart from the legal uncertainty which would affect the conclusion of new contracts.

Finally, the situation on the market created by the application of the conditions in dispute would be irreversible. According to the applicants, if the conditions were annulled by the Court third-party railway undertakings would be able to rely on rights acquired and investments realized before judgment was given on the merits in order to avoid returning to the applicants the part of the tunnel's capacity which they obtained in the mean time.

23 The applicants submit, finally, that the balance of convenience in this case justifies the grant of the suspension requested since the conditions in dispute are not necessary to protect the interests of other railway undertakings. Any interested third parties — who have not in any event been shown by the Commission to exist — may obtain tunnel usage rights directly from the infrastructure manager, namely Eurotunnel, by means of the mechanism provided for in Article 10 of Directive 91/440. Moreover, given that there are at present no third parties wishing to acquire usage rights, the applicants consider that the Community public interest in the immediate application of the conditions in dispute has not been demonstrated. Furthermore, the implementation of the obligations, also attached to the contested decision, means that the Commission is now able sufficiently to monitor the situation and to intervene if the exercise by the applicants of their rights under the usage contract is incompatible with the Community competition rules.

24 The Commission, for its part, considers that the conditions required by law for the grant of the interim measures requested are not satisfied in this case.

25 With regard to the requirement for a *prima facie* case, it notes that the construction of the usage contract urged by the applicants seems to contradict that contained in the formal notification of the contract to the Commission on 10 November 1987, where the parties stated that 'the contract is intended to establish an equitable and feasible division of the new infrastructure, i. e. the fixed link, between, on the one

hand the markets in the transport of passengers and freight by train and, on the other, the market in the transport of accompanied motor vehicles through a special system of shuttles'. In any event, the Commission considers that the construction given by the applicants to Clause 6.2 of the contract conflicts with their arguments that the conditions in dispute upset the contractual equilibrium, since they state that that clause already provides for the surrender of part of their entitlement to other railway undertakings. In the Commission's view, the applicants are therefore not justified in claiming that the economic and financial viability of the project is called in question by the possible use by third parties of part of the capacity currently available to them.

26 The Commission also notes that since the grant of the first exemption concerning the usage contract there has been a fundamental change, namely the adoption of Directive 91/440. According to the Commission, that directive created an entirely new legal and practical framework for the operation of the railways, which is a first step towards attaining freedom to provide services in that sector by guaranteeing access to the railway infrastructures to certain categories of providers of services. The imposition of the conditions in dispute is justified by the concern to protect the interests of third parties and to give full effect to Directive 91/440, in the light of the fact that the usage contract was negotiated and entered into in the pre-existing framework, which is characterized by the railway undertakings' monopoly over their respective networks.

27 With regard to the allegation that it exceeded its powers, the Commission emphasizes first that in setting the conditions in dispute it took full account of the applicants' needs for the next twelve years on the basis of the forecasts which they themselves provided. It considers, next, that the question raised by the applicants as to the double consideration allegedly received by Eurotunnel is a matter for the contractual relations between the parties and should have been foreseen once BR and SNCF accepted the possibility of handing back some of their rights under the usage contract. Furthermore, the representatives of Eurotunnel indicated to the Commission that they envisaged implementing a system of equalization in the event that

other undertakings were to use part of the capacity in question. Finally, at the hearing on 3 April 1995 the Commission argued that it could not have imposed the conditions in dispute on Eurotunnel because the restriction on competition, as considered in the light of Article 85(3) of the Treaty, consists in putting 50% of the tunnel's capacity at the exclusive disposal of the applicants for a period of 65 years. In its view, the fact that the infrastructure manager reserves to itself part of the capacity which it has not surrendered does not constitute a restriction on competition, which does not however mean that it is released from its obligations under Directive 91/440 or exempted from the application of Article 86 of the Treaty.

28 In response to the questions put to it at the hearing, the Commission furthermore explained that imposing on BR and SNCF a limit concerning the tunnel's hourly capacity and not its daily capacity was justified first by a logical link with the terms of the usage contract, which refer to 50% of the capacity of the fixed link per hour in each direction, and secondly by the concern to guarantee that third-party railway undertakings will have access not just to the hourly paths which are commercially least attractive. The Commission also confirmed to the Court that to date it is not aware of any third-party undertaking wishing to acquire part of the capacity at issue.

29 With regard to the existence of the circumstances giving rise to urgency, the Commission considers that the applicants have not adduced evidence that they cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences.

30 First, it disputes the conclusion drawn by the applicants from the new traffic forecasts presented, to the effect that there is a risk of a shortage of hourly paths for

the next three years. The Commission observes that certain of those estimates have not been confirmed by Eurotunnel and that in general the applicants have used combinations of trains travelling at different speeds and liable to consume the most standard paths. It considers that the progress which may be anticipated towards a rational and optimal organization of the usage of the fixed link and the introduction of more modern locomotives already ordered by BR and SNCF will culminate in a smaller consumption of standard paths and thus avoid the risk that the tunnel will be saturated during certain hours of the day or night. Furthermore, the Commission maintains its position that the applicants have the option of re-scheduling certain of their goods trains, considering that the punctuality of that type of train is not an essential prerequisite for continued commercial relations with the freight-owners, as is demonstrated by the frequent delays and by the timetable changes made by BR and SNCF since the tunnel started operating.

31 Secondly, the Commission notes that the conditions in dispute may be flexibly applied in that the capacity thresholds laid down are not rigid and may be adjusted according to the operators' needs. According to the explanations given at the hearing, that flexibility applies first to the relations between Eurotunnel and the applicants and secondly to the fact that BR and SNCF may exceed the 75% limit so long as there are no other undertakings in a position to use the remaining 25% of the capacity reserved for passenger and freight trains. The Commission considers that maximum use of the tunnel's total capacity is the principal economic attraction for the infrastructure manager, which can organize the allocation of available paths in the most rational way, as is clear from paragraph 116 of the contested decision. It also considers that use of the tunnel by third parties will not prejudice the applicants' financial interests since such use could enable the charges due to Eurotunnel to be reduced in accordance with Schedule VII to the usage contract.

32 Finally, the defendant submits that the applicants' other arguments seeking to show serious and irreparable damage are not convincing. That is so as regards the alleged continuance of their financial commitments to Eurotunnel although they no longer

have more than a reduced share of the negotiated capacity, or of the possible risk of breach of freight transport contracts. The Commission considers that the damage pleaded is at best future, uncertain and speculative and cannot threaten the existence of railway undertakings of the size of BR and SNCF.

- 33 With regard to the balance of convenience, the Commission submits that the conditions in dispute are essential to enable third-party railway undertakings to enter the market in question and that the public interest attaching to the preservation of effective competition and to the principle of the freedom to provide services in the railway sector must prevail over the risk of damage invoked by the applicants. It emphasizes that suspension of the conditions would not only delay by several years the use of the tunnel by third parties but also give the applicants time to strengthen their establishment in the market at issue. Given the scale of the investments necessary for use of the tunnel, uncertainty as to the legal situation and the position acquired in the interim by BR and SNCF would make entry to the market by third parties even more difficult.

*Findings of the President of the Court of First Instance*

- 34 It must be borne in mind, first, in considering whether the applicants have established that they have a prima facie case, that in these proceedings for interim measures they are confining themselves to seeking suspension of the operation of Article 2A of the contested decision. That provision lists a number of conditions attached to the grant by the Commission of an exemption for the usage contract between the applicants and Eurotunnel. Essentially, SNCF and BR consider that those conditions are unlawful and harmful to their interests because they are



obliged to surrender to third-party railway undertakings one quarter of their rights under that contract to use the tunnel.

35 The question whether the Commission, in the performance of its duties under the applicable competition rules, was justified in imposing that alleged restriction on the applicants' contractual rights is a delicate question which must be given thorough consideration in the context of the main proceedings. In those circumstances, it is not necessary for the judge hearing the application for interim measures to examine any further the lawfulness of the conditions in dispute; he must turn to an assessment of whether there are urgent circumstances justifying the grant of the interim measures sought by the applicants.

36 According to settled case-law (see the order in *Transacciones Marítimas and Others v Commission*, cited above, paragraph 41), the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for those measures. It is for the party seeking suspension of the operation of a contested decision to prove that it cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences.

37 In support of their arguments as to the existence of circumstances giving rise to urgency, the applicants interpret the conditions in dispute in a manner which is particularly unfavourable to them and which, the Commission argues, is not relevant. The Commission has drawn the attention of the Court to the flexibility of the conditions imposed, referring in particular to paragraph 116 of the decision and to the objective, reaffirmed in the wording of Article 2A, of enabling BR and SNCF to provide an appropriate level of services. Furthermore, according to the

documents before the Court and disregarding the applicants' forecasts of traffic at certain particularly busy times of the day and night, a significant proportion of the available paths is still not, nor will in the short term be, used by BR and SNCF. The applicants consider, however, that the application of the limit of 75% of the tunnel's capacity per hour in each direction currently reserved to international trains is even now incompatible with the services which it envisages running as from the summer of 1996.

38 Admittedly, the flexibility referred to in the preceding paragraph of the conditions in dispute, which enable BR and SNCF to use 'more than 75% of the hourly capacity if the other railway undertakings do not use the 25% of capacity remaining', does not appear to be such as to rule out all serious disadvantage to the applicants in so far as it gives rise to uncertainty as to the extent and the duration of the usage rights granted to them. The judge hearing the application for interim measures cannot ignore the arguments of BR and SNCF concerning the complex long-term planning necessary to operate train services through the tunnel or the fact that freight transport contracts with third parties normally have a term of between three and five years or the fact that imposing a limit on the use of the hourly capacity limits the applicants' flexibility in complying with it more than would imposing a limit on the use of the total or daily capacity.

39 The Commission and the applicants have, however, acknowledged that they are not aware of any railway undertakings interested in obtaining the right to use part of the tunnel's capacity. The Commission has stated that its aim in imposing the conditions in dispute in the contested decision was to preserve potential competition and to introduce freedom to provide services in the sector.

40 In circumstances such as those in this case, only the existence, at least foreseeable or probable, of third parties interested in using the tunnel's capacity would be capable of substantiating the risk of serious and irreparable damage which, according to the applicants, would follow from the immediate application of the conditions attached to the decision of exemption. The applicants have however been unable to

adduce any evidence capably of substantiating the risk that a surrender to third parties of part or all of the hourly capacity reserved to such parties by Article 2A of the decision will occur in the short term and cause them serious and irreparable damage.

- 41 That finding is borne out by the fact that the applicants themselves have furthermore submitted that the conditions in dispute are not necessary since in the absence of third parties interested in using the tunnel's capacity there is no potential competition to be preserved.
- 42 In the light of all the foregoing, the balance of convenience, which the judge hearing the application for interim measures must assess, shows that the risk of damage pleaded by the applicants is at this stage too uncertain and speculative to be able to prevail over the interests pursued by the Commission by means of the imposition of the conditions in dispute, namely the preservation of effective competition and the principle of the freedom to provide services in the rail transport sector. The applications for suspension of the operation of those conditions must accordingly be dismissed.
- 43 In any event, under Article 108 of the Rules of Procedure an order for interim measures may at any time on application by a party be varied or cancelled on account of a change in circumstances. It is for the applicants, should the need arise, to apply to the Court in the event that the imminent grant to other railway undertakings of hourly paths now used by them is liable to cause them serious and irreparable damage. It will still be necessary for them to be able to demonstrate before the judge hearing the application for interim measures that the surrenders of capacity at issue would immediately make it impossible for them to fulfil their obligations relating to the operation of the tunnel, in particular to provide an appropriate level of services, or that they could no longer, if their applications in the main proceedings were to succeed, recover from the third parties the capacity surrendered to them in the mean time.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

- 1. The applications for interim measures are dismissed.**
- 2. The costs are reserved.**

Luxembourg, 12 May 1995.

H. Jung

Registrar

J. L. Cruz Vilaça

President