JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

15 September 1998 *

In Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94,

European Night Services Ltd (ENS), a company incorporated under English law, established in London,

Eurostar (UK) Ltd, formerly **European Passenger Services Ltd (EPS)**, a company incorporated under English law, established in London,

represented by Thomas Sharpe QC, of the Bar of England and Wales, and Alexandre Nourry, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger, Hoss & Prussen, 15 Côte d'Eich,

applicants, respectively, in Cases T-374/94 and T-375/94,

Union Internationale des Chemins de Fer (UIC), an association constituted under French law, established in Paris,

* Languages of the cases: English and French.

NV Nederlandse Spoorwegen (NS), a company incorporated under Netherlands law, established in Utrecht, the Netherlands,

represented by Erik H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Luc Frieden, 62 Avenue Guillaume,

applicants in Case T-384/94,

and

Société Nationale des Chemins de Fer Français (SNCF), a company incorporated under French law, established in Paris, represented by Chantal Momège, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicant in Case T-388/94 and
intervener in Cases T-374/94 and T-384/94,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Lindsey Nicoll, acting as Agent, and by Paul Lasok QC, of the Bar of England and Wales, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

Commission of the European Communities, represented initially by Francisco Enrique González Díaz, of its Legal Service, then by Giuliano Marenco, Principal Legal Adviser, acting as Agents, assisted by Ami Barav, of the Bar of England and Wales and of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 94/663/EC of 21 September 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.600 — Night Services) (OJ 1994 L 259, p. 20),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A. Kalogeropoulos, President, C. W. Bellamy and J. Pirrung, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 22 October 1997,

gives the following

Judgment

Legal background

1 Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25) seeks to facilitate the adaptation of the Community's railways to the needs of the single market and to increase their efficiency. First, it ensures the management independence of the railway undertakings in order to enable them to behave in a commercial manner. Article 5(3) provides in that regard that such undertakings are to be 'free to:

— establish with one or more other railway undertakings an international grouping;

...

— control the supply and marketing of services and fix the pricing thereof ...;

...

— expand their market share, develop new technologies and new services and adopt any innovative management techniques;

— establish new activities in fields associated with railway business'.

2 Second, it provides for separating the management of railway infrastructure from the provision of railway transport services, separation of accounts being compulsory and organisational separation optional (Article 1 and Section III of the directive).

3 Finally, the directive constitutes a first step towards progressive liberalisation of the market for transport by rail in that, for the first time, it gives railway undertakings engaged in international combined transport and associations of railway undertakings a right of access to infrastructure within the Community, subject to certain conditions, as from 1 January 1993.

4 Article 10 of the directive provides:

'1. International groupings shall be granted access and transit rights in the Member States of establishment of their constituent railway undertakings, as well as transit rights in other Member States, for international services between the Member States where the undertakings constituting the said groupings are established.

2. Railway undertakings within the scope of Article 2 shall be granted access on equitable conditions to the infrastructure in the other Member States for the purpose of operating international combined transport goods services.

...'

5 Article 3 defines a railway undertaking as 'any private or public undertaking whose main business is to provide rail transport services for goods and/or passengers with a requirement that the undertaking should ensure traction' and an international grouping of railway undertakings as 'any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States'.

6 On 19 June 1995, with a view to the implementation of Directive 91/440, the Council adopted Directive 95/18/EC on the licensing of railway undertakings (OJ 1995 L 143, p. 70) and Directive 95/19/EC on the allocation of railway infrastructure capacity and the charging of infrastructure fees (OJ 1995 L 143, p. 75).

Facts

7 On 29 January 1993 the Commission received an application seeking a declaration that 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) did not apply to a number of agreements concerning the carriage of passengers by rail through the Channel Tunnel or, failing that, exemption of the agreements under Article 5 of the regulation.

8 That application ('the notification') was lodged by European Night Services Ltd ('ENS') on behalf of British Rail ('BR'), Deutsche Bundesbahn ('DB'), NV Nederlandse Spoorwegen ('NS') and Société Nationale des Chemins de Fer Français ('SNCF'). It had previously been approved by Société Nationale des Chemins de Fer Belges ('SNCB'), which at that time had an option to participate in ENS,

although that option lapsed in July 1993. SNCB is still a party to one of the operating agreements concluded with ENS.

9 The first agreement notified concerned the formation, by the four railway undertakings mentioned above — BR, SNCF, DB and NS — either directly or through subsidiaries owned by them, of ENS, a company established in the United Kingdom whose business was to consist of providing and operating overnight passenger rail services between points in the United Kingdom and the Continent through the Channel Tunnel, on the following four routes: London-Amsterdam, London-Frankfurt/Dortmund, Glasgow/Swansea-Paris and Glasgow/Plymouth-Brussels.

10 By letter of 15 October 1997, however, ENS informed the Court that the rail services to and from Brussels had been abandoned in December 1994, that the London-Frankfurt/Dortmund route had been replaced by London-Cologne in August 1996 and that the only routes now envisaged were London-Amsterdam/Cologne.

11 On 9 May 1994, European Passenger Services Ltd ('EPS'), which was a subsidiary of BR when the ENS agreements were notified, was transferred by BR to the public authorities in the United Kingdom and now ranks as a railway undertaking within the meaning of Article 3 of Directive 91/440, in the same way as SNCF, DB and NS (all hereinafter referred to, including EPS, as 'the railway undertakings concerned' or 'the parent undertakings'). At the same time, BR's holding in ENS was transferred to EPS. By letter of 25 September 1997, ENS and EPS informed the Court that EPS's name had been changed to Eurostar (UK) Ltd ('EUKL') and requested that any reference to EPS be deemed to refer to EUKL and vice versa. They further announced that the holding of the United Kingdom public authorities in EPS had been transferred to London & Continental Railways on 31 May 1996. In the United Kingdom, virtually all of the railway track and associated infrastructure, previously owned by BR, is now owned by Railtrack, the railway infrastructure manager.

12 The second group of agreements notified comprised the operating agreements concluded by ENS with the railway undertakings concerned and with SNCB, under which each of them agreed to provide ENS with certain services, including traction over its network (locomotive, train crew and path), cleaning services on board, servicing of equipment and passenger-handling services. EPS and SNCF further agreed to provide traction through the Channel Tunnel.

13 In order to operate the night passenger services, the railway undertakings concerned have procured, through ENS, specialised rolling stock suitable for running on the different rail systems and through the Channel Tunnel, financed through long-term leasing arrangements over 20 years, extended to 25 years in January 1996, at a total cost of UKL 136.7 million, increased to UKL 158 million in January 1996, including the contract price, estimated spares costs, variations, deliveries, commissioning and testing and project team costs.

14 In the notification, ENS and the railway undertakings concerned stated that, on the market for the service in question, in competition with air, coach, ferry and car transport, ENS could achieve an overall market share of some 2.4% of the business segment and 5% of the leisure segment. Even if that market were defined more narrowly, taking account only of the routes concerned, ENS's overall market shares would remain insignificant. None of the railway undertakings concerned could operate alone a comparable service on the routes served by ENS, nor was there any indication that any other group had expressed an interest in, or could derive any profit from, the same activity. The notifying parties further gave the assurance that the ENS agreements did not create any barriers to entry additional to those already in place for any other undertakings wishing to provide similar services, which could constitute 'international groupings' within the meaning of Article 3 of Directive 91/440; such groupings would thus gain access to railway infrastructures — train-paths on the relevant lines — and would have no difficulty in finding qualified staff and suitable rolling stock.

15 Pursuant to Article 12(2) of Regulation No 1017/68, a notice concerning the notification of the ENS agreements was published in the *Official Journal of the European Communities* on 29 May 1993 (Notice 93/C 149/07, OJ 1993 C 149, p. 10). In it, the Commission informed the notifying undertakings that it took the preliminary view that the agreements notified could infringe Article 85(1) of the EC Treaty but that it had not at that stage taken a decision as to the applicability of Article 5 of Regulation No 1017/68. It invited all interested third parties to submit their observations within 30 days of the publication of the notice.

16 By letter of 23 July 1993, the Commission informed the notifying undertakings that there were serious doubts within the meaning of Article 12(3) of Regulation No 1017/68 as to the applicability of Article 5 thereof to the agreements notified.

17 On 4 June 1994, the Commission published a further notice in the *Official Journal of the European Communities* pursuant to Article 26(3) of Regulation No 1017/68 (OJ 1994 C 153, p. 15), in which it announced that the agreements notified could qualify for exemption pursuant to Article 85(3) of the Treaty and Article 53(3) of the Agreement on the European Economic Area ('the EEA Agreement'), provided — essentially — that new entrants would be able to purchase from the notifying parties the same rail services as those parties had undertaken to sell to ENS. At the same time, the Commission invited all interested third parties to submit their observations within 30 days of the publication of the notice. However, no third party responded to that invitation.

The contested decision

18 On 21 September 1994 the Commission adopted Decision 94/663/EC relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.600 — Night Services) (OJ 1994 L 259, p. 20, hereinafter 'the

decision' or 'the contested decision'). It is based on Regulation No 1017/68, in particular on Article 5 thereof, under which the prohibition of restrictive practices laid down in Article 2, in terms almost identical to those of Article 85(1) of the Treaty, may be declared inapplicable with retroactive effect to certain agreements between undertakings.

19 The decision distinguishes two relevant service markets: the market for the transport of business travellers, for whom scheduled air travel, high-speed rail travel and the rail services to be operated by ENS are interchangeable modes of transport (point 26), and the market for the transport of leisure travellers, for whom substitute services may include economy-class air travel, train, coach and possibly private motor car (point 27).

20 Contrary to what the notifying parties had maintained, the Commission states that the geographic market does not include the whole of the United Kingdom, France, Germany and the Benelux countries, but is confined to the four routes actually to be served by ENS, namely London-Amsterdam, London-Frankfurt/Dortmund, Paris-Glasgow/Swansea and Brussels-Glasgow/Plymouth (point 29).

21 The decision goes on, referring to the 1993 Commission notice of 16 February 1993 concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty (OJ 1993 C 43, p. 2; hereinafter 'the 1993 communication'), to find that ENS is a cooperative joint venture (points 30 to 37). It states that ENS's parent undertakings are not withdrawing permanently from the relevant market, since their technical and financial resources could easily enable them to set up an international grouping within the meaning of Article 3 of Directive 91/440 and to provide overnight passenger transport services. Furthermore, they continue to operate primarily on a market upstream from ENS's market, namely the market in necessary rail services which the railway undertakings sell to transport operators

such as ENS. The ENS joint venture thus forms an agreement caught by Article 85 of the EC Treaty, as do the operating agreements between it and each of its parent undertakings and SNCB.

22 The decision then notes the restrictions of competition arising out of the ENS agreements (points 38 to 53).

23 First, those agreements have eliminated or appreciably restricted, as between ENS's parent undertakings, the scope for competition provided by Article 10 of Directive 91/440 (points 38 to 45). Both existing and new railway undertakings, including subsidiaries of existing ones, are entitled to the rights of access conferred by that provision, and Member States may enact domestic legislation which is more generous in the access it allows to infrastructure. Thus, for example, DB or NS would be entitled to form an international grouping with a railway undertaking in the United Kingdom to operate international transport services through the Channel Tunnel. Similarly, any of ENS's parent undertakings could itself take on the role of 'transport operator', or set up a subsidiary specialising as a 'transport operator', and provide international transport services by buying the necessary rail services from the railway undertakings concerned.

24 Second, given the commercial strength of the parent undertakings, the formation of ENS might impede access to the market by transport operators in a position to compete with it (points 46 to 48). ENS's parent undertakings continue to hold a dominant position in the supply of rail services in their Member States of origin, especially as regards special locomotives for the Channel Tunnel. In view of ENS's direct access to those services and of its special relationship with its parent undertakings, other operators could be placed at a disadvantage in competition for necessary rail services. Account also has to be taken of the fact that BR and SNCF

control a significant proportion of available paths for international trains through the Channel Tunnel, by virtue of the usage contract concluded with Eurotunnel.

25 Finally, those restrictions of competition are enhanced by the fact that ENS forms part of a network of joint ventures between the parent undertakings. BR/EPS, SNCF, DB and NS take part to varying degrees in a network of joint ventures for the operation of goods and passenger transport services, in particular through the Channel Tunnel. BR and SNCF are parties to the formation of Allied Continental Intermodal Services Ltd ('ACI'), which is to provide combined transport of goods, and BR and SNCB are parties to the formation of 'Autocare Europe', which is to provide rail transport for motor vehicles (points 49 to 52).

26 However, according to the decision, the agreements in issue, although they do not fall within the exception for technical agreements under Article 3 of Regulation No 1017/68, since they do not have as their sole object and sole effect to apply technical improvements or to achieve technical cooperation within the meaning of that article (points 55 to 58), do meet the conditions laid down by Article 5 of that regulation and Article 53(1) of the EEA Agreement (points 59 to 70). The formation of ENS is likely to favour economic progress by, *inter alia*, providing competition between modes of transport, and users will benefit directly from the new services offered. The restrictions found to exist are, moreover, indispensable in view of the fact that the services involved are completely new, entailing substantial financial risks which could be borne by a single undertaking only with great difficulty. Subject, therefore, to the imposition of a condition to ensure the presence on the market of rail transport operators competing with ENS, the formation of ENS does not eliminate all competition on the relevant market.

27 The decision therefore declares Article 85(1) of the Treaty and Article 53(1) of the EEA Agreement inapplicable to the ENS agreements for a period of eight years, ending on 31 December 2002 (Article 1 of the decision) and subjects that exemption to the condition ('the condition imposed') that 'the railway undertakings

party to the ENS agreements shall supply to any international grouping of railway undertakings or any transport operator wishing to operate night passenger trains through the Channel Tunnel the same necessary rail services as they have agreed to supply to ENS. These services consist of the provision of the locomotive, train crew and path on each national network and in the Channel Tunnel. The railway undertakings must supply these services on their networks on the same technical and financial terms as they allow to ENS' (Article 2 of the decision).

Procedure

28 By applications lodged at the Registry of the Court of First Instance on 22 November 1994, ENS and EPS brought actions, registered as Cases T-374/94 and Case T-375/94 respectively.

29 By application lodged at the Court Registry on 5 December 1994, Union Internationale des Chemins de Fer ('UIC') and NS brought an action, registered as Case T-384/94.

30 By application lodged at the Court Registry on 13 December 1994, SNCF brought an action, registered as Case T-388/94.

31 By separate document lodged at the Court Registry on 6 February 1995, the Commission raised an objection of inadmissibility in Case T-388/94, under Article 114 of the Rules of Procedure of the Court of First Instance. The applicant lodged observations on that objection on 20 March 1995.

32 On 28 June 1995, the Court of First Instance (First Chamber, Extended Composition) made an order joining consideration of the objection of inadmissibility raised by the Commission to that of the merits. On the same day, it requested SNCF to answer a number of questions in writing and to produce certain documents.

33 By orders of the President of the First Chamber (Extended Composition) of 9 August 1995, the applications of the International Union of Combined Rail-Road Transport for leave to intervene in support of the forms of order sought by the Commission in Cases T-374/94, T-375/94 and T-384/94, lodged at the Court Registry on 3 April 1995, were dismissed.

34 By order of the President of the First Chamber (Extended Composition) of 9 August 1995, the applications of SNCF for leave to intervene in support of the forms of order sought by the applicants in Cases T-374/94 and T-384/94, lodged at the Court Registry on 9 May 1995, were granted.

35 By orders of the President of the First Chamber (Extended Composition) of 14 July and 10 August 1995, the United Kingdom was granted leave to intervene in support of the forms of order sought by the applicants in Cases T-374/94, T-375/94, T-384/94 and T-388/94.

36 By decision of the Court of First Instance of 2 October 1995, the Judge-Rapporteur was transferred to the Second Chamber (Extended Composition), to which the cases were accordingly assigned.

37 By decision of the Court of First Instance of 8 November 1996, the case was referred to a Chamber of three judges.

38 By order of the President of the Second Chamber of 6 August 1997, Cases T-374/94, T-375/94, T-384/94 and T-388/94 were joined for the purposes of the oral procedure and the judgment.

39 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry. It requested the parties, however, to answer a number of written questions, which they did within the period prescribed.

40 The parties presented oral argument and answered the questions put by the Court at the hearing on 22 October 1997.

Forms of order sought

41 In Cases T-374/94 and T-375/94, ENS and EPS claims that the Court should:

— annul the decision;

— require the Commission

(a) to issue a declaration as to the inapplicability of Article 2 of Regulation No 1017/68 and Article 85(1) of the Treaty, or

(b) to grant an exemption without the condition imposed and for a duration commensurate with the period of the commitment of the railways for the financing of the rolling stock, or

(c) alternatively, to grant the exemption subject to any condition necessary and proportionate to the alleged restrictions on competition and for a period commensurate with the period of commitment of the railways for the financing of the rolling stock; and

— order the Commission to pay the costs.

42 SNCF, intervening in support of the forms of order sought by the applicant in Case T-374/94, claims that the Court should:

— annul the decision; and

— require the Commission either

(a) to issue a declaration as to the inapplicability of Article 2 of Regulation No 1017/68 and Article 85(1) of the Treaty, or

(b) to grant an exemption without the condition imposed and for a duration commensurate with the period of the commitment of the railways for the financing of the rolling stock.

43 In Cases T-374/94 and T-375/94, the Commission contends that the Court should:

— dismiss the applications;

— dismiss the arguments raised by SNCF; and

— order the applicants and the intervener to pay the costs.

44 In Case T-384/94, UIC and NS claim that the Court should:

— declare the contested decision void in its entirety;

— in the alternative, declare void Article 2 of the decision, as well as Article 1 thereof in so far as the duration of the exemption is limited to a period of less than 20 years;

— take any further or alternative measures which the Court may deem appropriate; and

— order the Commission to pay the costs.

45 SNCF, intervening in support of the forms of order sought by the applicants, claims that the Court should:

— declare the contested decision void in its entirety;

— in the alternative, declare void Article 2 of the decision, as well as Article 1 thereof in so far as the duration of the exemption is limited to a period of less than 20 years;

— take any further or alternative measures which the Court may deem appropriate; and

— order the Commission to pay the costs.

46 The Commission contends that the Court should:

— declare inadmissible and, in any event, unfounded, the application by UIC;

— dismiss the application by NS;

— dismiss the arguments raised by the intervener; and

— order the applicants and the intervener to pay the costs.

47 In Case T-388/94, SNCF claims that the Court should:

— annul the contested decision;

— in the alternative, annul Article 2 of the decision in that the condition imposed is unjustified, as well as Article 1 thereof in so far as the Commission granted an exemption for a period of less than 20 years;

— take any measures which the Court may deem appropriate; and

— order the Commission to pay the costs.

48 In its observations on the objection of inadmissibility raised by the Commission, SNCF claims that the Court should:

— find the application admissible; and

— order the Commission to pay the costs.

49 The Commission contends that the Court should:

— dismiss the application as inadmissible and, in any event, as unfounded; and

— order the applicant to pay the costs.

50 The United Kingdom, intervening in support of the forms of order sought by the applicants in Cases T-374/94, T-375/94, T-384/94 and T-388/94, claims that the Court should:

— annul the contested decision; and

— order the Commission to pay the costs.

Admissibility

1. *Admissibility of the applications in Cases T-374/94 and T-375/94*

Arguments of the parties

51 The Commission considers that the applications are inadmissible to the extent that the applicants, ENS and EPS, seek an order of the Court requiring the Commission (a) to issue a declaration as to the inapplicability of Article 2 of Regulation No 1017/68 and Article 85(1) of the Treaty, (b) to grant an exemption without the condition imposed by the Commission and for a duration commensurate with the period of the commitment of the railway undertakings for the financing of the rolling stock, or (c) alternatively, to grant the exemption subject to any condition necessary and proportionate to the alleged restrictions on competition and for a period commensurate with the period of the commitment of the railway undertakings for the financing of the rolling stock, since it has consistently been held that the Community judicature has no power to issue directions to the institutions or to substitute itself for them when reviewing legality under Article 173 of the Treaty (Case T-74/92 *Ladbroke Racing* v *Commission* [1995] ECR II-115, paragraph 75).

52 The applicants, ENS and EPS, note in reply that the Commission does not contest either the admissibility of their applications in so far as they seek annulment of the decision or the possibility for the Court of annulling it in part, namely as regards the condition imposed by Article 2.

Findings of the Court

53 It is settled case-law that the Community judicature is not entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them; rather, it is for the administration concerned to adopt

the necessary measures to implement a judgment given in proceedings for annulment. Accordingly, the forms of order sought by the applicants, as set out under (a), (b) and (c) in paragraph 41 above, must be rejected as inadmissible (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200). The applications in Cases T-374/94 and T-375/94 are thus admissible only in so far as they seek the annulment of the contested decision in its entirety (see paragraph 41 above).

2. *Admissibility of the application in Case T-384/94*

Arguments of the parties

54 The applicants, UIC and NS, state that UIC is an international association of railway undertakings, including all the larger railway undertakings established in the Member States of the European Community, with the object of promoting cooperation between members and carrying out activities to develop the railways as a mode of transport in Europe, by consolidating its interoperability with the aim of strengthening its competitiveness. Under Article 2 of its Statutes, UIC is to develop standards, regulations and guidelines and to intervene in relation to outside bodies to represent and defend its members' common interests. In addition, the railway undertakings established within the Community are represented in a special group called the 'Community of European Railways' ('CER').

55 The applicants submit that the decision, although not addressed to UIC, is none the less of direct and individual concern to it within the meaning of Article 173 of the Treaty because it directly affects both UIC's own interests and those of its members established within the Community, which it represents through CER.

56 With regard to the interests of the members of UIC established within the Community, the applicants state that the contested decision constitutes a disincentive to further innovative initiatives for cooperation between railway undertakings for the provision of international passenger transport services, and submit that its application should be held admissible on the same footing as those of its members established within the Community, whether addressees of the decision or not.

57 As regards UIC's own interest in bringing proceedings, the applicants submit that UIC is directly and individually concerned by the decision because it impairs the full realisation of one of the most important objectives in its Statutes — reinforcement of the competitiveness of the international railway system. They add that, even though UIC did not take part in the administrative procedure prior to adoption of the decision (Case T-442/93 *AAC* v *Commission* [1995] ECR II-1329), CER, one of its subgroups, did take part in preparatory meetings concerning the adoption of Directive 91/440.

58 The Commission submits that the contested decision is not of direct and individual concern to UIC and that the Court cannot decline to rule on UIC's *locus standi*. The case-law to the effect that, where a single action is brought by a number of applicants, it is enough for one of them to have *locus standi* for the action to be found admissible in its entirety, gives rise to difficulties as regards costs and any subsequent right of appeal of the party concerned.

59 It adds that it is clear from the case-law that an association, in its capacity as the representative of a category of business operators, is not individually concerned by a measure affecting the general interests of that category (Joined Cases 16/62 and 17/62 *Confédération Nationale des Producteurs de Fruits et Légumes* v *Council* [1962] ECR 471, Case 72/74 *Union Syndicale and Others* v *Council* [1975] ECR 401 and Case 60/79 *Producteurs de Vins de Table et Vins de Pays* v *Commission* [1979] ECR 2429).

60 It further submits that, since UIC did not take part in the administrative procedure prior to the adoption of the contested decision or submit any observations after publication in the *Official Journal of the European Communities* of the Commission's notices of 29 May 1993 and 4 June 1994, it has no interest or standing to bring the present action (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045 and Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147). Finally, the part played by CER in the context of the adoption of Directive 91/440 cannot distinguish UIC individually in relation to the contested decision.

Findings of the Court

61 The *locus standi* of NS, as an addressee of the contested decision, is not in dispute. Thus, since one and the same application is involved, there is no need to consider the *locus standi* of UIC (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 51).

3. *Admissibility of the application in Case T-388/94*

Arguments of the parties

62 The Commission states that the contested decision was notified to the applicant by letter dated 22 September 1994, which was received at its head office on 29 September, as attested by the postal acknowledgment of receipt bearing the stamp of SNCF showing that date. According to the judgment in Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749, at paragraph 11, notification of a measure to a company's registered office meets the requirement of legal certainty and brings

that measure to the company's notice, irrespective of whether the person who is competent to deal with the matter according to the internal rules of the company addressed is actually in a position to take cognisance of it.

63 Since, in accordance with Article 102(1) of the Rules of Procedure of the Court of First Instance, the period of time allowed for commencing annulment proceedings is to run from the day following its notification if it has been notified and since in the present case the total period allowed comes to two months, plus an extension of six days on account of distance (Article 102(2) of the Rules of Procedure of the Court of First Instance and Article 1 of Annex II to the Rules of Procedure of the Court of Justice), the final date on which SNCF could commence proceedings against the contested decision was 6 December 1994. Thus, having been lodged on 13 December 1994, the application is out of time and therefore inadmissible (Case 108/79 *Belfiore* v *Commission* [1980] ECR 1769, Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 14, and *Cockerill-Sambre*, cited above, paragraph 10).

64 The Commission disputes the applicant's argument that, since the employee to whom the decision was delivered was not authorised to receive mail, the relevant acknowledgment of receipt for calculating the time allowed for commencing proceedings is not that of 29 September 1994 but a second acknowledgment of receipt, the form for which was in the same envelope as the decision and was signed on 7 October 1994 by a person competent to do so. The Commission stresses, first, that, according to the judgment in Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, at paragraph 20, the second form for acknowledgment of receipt contained in the same envelope as the decision can in no event constitute a second notification separate from that effected by postal delivery, since the proper method of giving notice is always by a registered letter with postal acknowledgment of receipt, which makes it possible to determine with certainty the date from which time begins to run. The purpose of sending the second acknowledgment of receipt form is simply that the Commission is thereby able to be certain of a date by which the undertaking concerned has taken cognisance of the decision in cases where the postal authorities fail to return the postal acknowledgment of receipt to the Commission. The precaution of sending a second acknowledgment of receipt form is thus intended not to guard against the possibility that the postal services might make the mistake of delivering the mail to a person employed by the addressee but not authorised to receive registered mail, but rather against the possibility that

they might not return the postal acknowledgment of receipt to the Commission. Under French law, moreover, the fact that an acknowledgment of receipt is signed by a servant of a corporate body to which an item of mail is addressed does not render notice served by registered mail with acknowledgment of receipt invalid where that servant is not duly authorised to receive registered mail.

65 With regard to SNCF's arguments of *force majeure* and unforeseeable circumstances, the Commission submits that, according to the case-law of the Court of Justice, a company's internal problems of communication do not constitute unforeseeable circumstances or *force majeure* (*Cockerill-Sambre*, cited above, paragraph 12), in particular where the malfunctioning is attributable to faults on the part of its employees (Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 33).

66 Finally, with regard to SNCF's argument of excusable error, the Commission submits that the concept of excusable error can apply only to exceptional circumstances where, in particular, the conduct of the institution concerned was such as to give rise to understandable confusion in the mind of a person acting in good faith and exercising all the diligence to be expected of an experienced operator (Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 40). In the present case, however, the error was ascribable to a person other than the Commission.

67 SNCF claims that the notification was irregular or, in the alternative, that even if it was regularly effected, the circumstances surrounding the receipt of the decision amounted to *force majeure*, unforeseeable circumstances or excusable error.

68 In its argument that the notification was irregular, it states that in French law, under Article L 9 of the Code des Postes et Télécommunications (Post and Telecommunications Code), a registered letter must be delivered personally to its addressee or to the addressee's 'authorised agent or manager'. The postal acknowl-

edgment of receipt attesting to its receipt of the decision is thus not valid. In the first place, it was not signed by one of the persons to whom SNCF had specifically delegated authority to sign such acknowledgments. Secondly, the postal employee accepted signature of the acknowledgment of receipt by a person not authorised to do so. Finally, the acknowledgment of receipt was returned to the Commission by the French postal services in breach of their duty to verify that the signature on it corresponded to that of the person authorised to sign it.

69 SNCF submits that according to the case-law, the signature of a postal acknowledgment of receipt form by an authorised employee in the mail service of the undertaking concerned is a decisive factor in determining whether notification has been properly effected to that undertaking (Case T-12/90 *Bayer*, cited above, paragraphs 4 and 20; Opinion of Advocate General Darmon in *Cockerill-Sambre*, cited above), as the Commission itself accepted in the *Ferriera Valsabbia* case, cited above.

70 Consequently, in SNCF's submission, the relevant acknowledgment of receipt in the present case is that contained on the Commission's own form, included with the decision in order to enable it to be certain of a date by which the undertaking has taken cognisance of the decision in the event of a failure on the part of the postal authorities (Case T-12/90 *Bayer*, cited above). The kinds of failure to which the case-law refers involve not only instances where the postal services fail to return the acknowledgment of receipt to the Commission but also those where their failure takes the form of indicating a date on the acknowledgment of receipt form themselves without obtaining the signature of a duly authorised representative of the undertaking concerned; if the postal services commit an error when performing their duty of delivering registered mail, therefore, the information stated on the form should be disregarded (Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 et T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729, paragraphs 54 to 60). The date of receipt, and consequently that of notification, should accordingly be 7 October 1994, as indicated on the second acknowledgment of receipt.

71 In the alternative, SNCF submits that, even if its application was in fact lodged out of time, the delay was due to unforeseeable circumstances or *force majeure*, in that the signature of the acknowledgment of receipt form by an unauthorised person was quite contrary to its intention and it had taken all necessary care to ensure that registered mail was received in the proper manner. It stresses that the post office employee who delivered the notification on 29 September 1994 was specifically aware that the person who received it was not authorised to do so, and adds that the French courts treat delivery of mail to a person not authorised to receive it as a serious fault on the part of the postal services, such as to cause the administration to incur liability.

72 In SNCF's submission, even if the circumstances surrounding the notification of the contested decision do not constitute *force majeure*, they are at least such as to give rise to excusable error. It refers to its arguments concerning the fact that the postal services failed to comply with its specific instructions concerning delivery of registered mail and submits that, in view of the way in which those services generally perform their duties, their failure in this instance was an isolated and exceptional case. Excusable error is established when an exceptional failure on the part of the postal services has given rise to confusion within the undertaking in receipt of the notification; it is not confined solely to cases where such confusion was caused by the Commission (Case C-195/91 P *Bayer*, cited above, paragraph 26).

73 Furthermore, SNCF claims that the Commission's practice with regard to the notification of decisions is lax and that in this case SNCF's error was in part caused by that practice. Where much less important letters (containing information on the lodging of a complaint or inviting observations) are concerned, the Commission takes care to indicate the addressee by name, whereas here a final decision applying Article 85(1) of the Treaty, against which an action could be brought, was sent without any such indication.

74 Finally, SNCF draws attention to the deceptive and misleading nature of the Commission's practice in enclosing its own acknowledgment of receipt form with decisions when notifying them to undertakings, without informing addressees that a decision is considered to have been notified when the addressee has received the registered letter and signed the postal acknowledgment of receipt.

Findings of the Court

75 First of all, it is common ground that in accordance with the third paragraph of Article 173 of the Treaty, read in conjunction with Article 102(2) of the Rules of Procedure of the Court of First Instance and Article 1 of Annex II to the Rules of Procedure of the Court of Justice, to which Article 102(2) refers, the period for initiating proceedings in the present case was two months and six days.

76 It has, moreover, consistently been held that the strict application of Community rules on procedural time-limits serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice. It is also settled law that where a measure is notified to the registered office of an undertaking, the validity of that notification is in no way conditional on its having been actually brought to the notice of the person competent to deal with it according to that undertaking's internal rules, and that a decision is duly notified once it has been communicated to the addressee and the addressee is in a position to take cognisance of it (*Cockerill-Sambre*, cited above, paragraph 10, and *BASF and Others*, cited above, paragraphs 58 and 59).

77 It is therefore necessary to examine whether the contested decision was properly notified to SNCF in accordance with the rules applicable to mail deliveries in France, that is to say, whether it was delivered to an employee of SNCF duly authorised to receive such mail (*BASF and Others*, cited above, paragraph 60).

78 It is clear from the case-file and from SNCF's answers to the written questions put by the Court that the French postal services, although they had in their possession valid instructions from SNCF delegating to specified persons authority to receive mail addressed to its various departments and staff, did not deliver the contested decision to one of those persons but to another person who had no such authority. As the applicant has stressed, however, without being contradicted by the Commission, the rules applicable to the delivery of mail in France require postal employees to deliver registered mail only to the persons to whom it is addressed by name or, in their absence, to authorised agents or managers, that is to say, persons having valid authority for that purpose.

79 Consequently, the contested decision, having been delivered in breach of those rules to an employee of the applicant who was not authorised to take delivery of mail, was not properly notified to SNCF, and the period of time allowed for commencing proceedings thus began to run only from the receipt and signature of the second form for acknowledgment of receipt on 7 October 1994, and not from the date of signature of the first acknowledgment of receipt on 29 September 1994. The judgment in *Cockerill-Sambre*, cited by the Commission in support of its plea that the application was lodged out of time, is irrelevant here because that case did not turn on whether a Commission decision was properly notified to an agent of the undertaking concerned duly authorised to receive such mail but on whether, following proper notification at its registered office, that undertaking could justify a delay in commencing annulment proceedings by relying on its internal rules as to the persons competent actually to take cognisance of mail addressed to it (see paragraph 10 of the judgment in *Cockerill-Sambre*, cited above). Similarly, in Case C-195/91 P *Bayer*, cited above, it was not contested that notification of the contested decision had been properly effected by the postal services to an 'agent or manager' in Bayer's mail department. The judgment in that case, too, concerned only whether, even though the Commission's decision had been properly notified to Bayer's registered office, Bayer could none the less rely on deficiencies in the functioning of its internal services to justify having commenced annulment proceedings out of time (paragraphs 2 and 20 of the judgment). Here, however, as noted above, the point in issue is whether notification as such was properly effected; it thus concerns the functioning of the postal services (the external aspect of the notification) rather than SNCF's internal functioning (the internal aspect).

80 Proceedings were therefore commenced within the period of time allowed, and the application must thus be held to be admissible.

Substance

81 In the pleas in law and arguments which they put forward, the applicants submit that the contested decision should be annulled for, in substance, four reasons: (a) none of the constituent elements of the conduct prohibited by Article 85(1) of the Treaty is established in the present case, since the ENS agreements do not restrict competition, and the decision is therefore vitiated by inaccurate and incomplete assessment of the facts, manifest error in law and a failure to state reasons; (b) in its application of the rules on competition, the Commission exceeded the limits of the regulatory framework laid down by Directive 91/440; (c) the Commission imposed disproportionate conditions on its granting of the exemption; and (d) the duration of the exemption granted for the notified agreements (eight years) is too short. Finally, in Case T-384/94, SNCF submits in addition that the contested decision should be annulled because the Commission considered that the ENS agreements did not qualify for the exception for technical agreements under Article 3 of Regulation No 1017/68.

1. *The first plea: inaccurate and incomplete assessment of the facts, manifest error in law and/or breach of the obligation to provide an adequate statement of reasons for the contested decision in so far as the Commission concluded that the creation of ENS had as its object and effect the restriction of competition*

82 This plea falls in two parts: first, that the relevant market was wrongly defined and that the ENS agreements have no appreciable effect on trade between Member States and, second, that those agreements have no restrictive effect on competition.

First part: definition of the relevant market and absence of any appreciable effect of the ENS agreements on trade between Member States

Arguments of the parties

83 The applicants point out that in the decision the Commission defined the relevant markets as those for the transport of business travellers and of leisure travellers on each of the routes served by ENS. They state that, based on forecast levels of demand in 1995 (set out in Table 17, at p. 26 of their notification), ENS services were likely to account for no more than 4% of those markets (2.4% of the market for business travellers and 5% of the market for leisure travellers). Taking account of the Commission's notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community (OJ 1986 C 231, p. 2), those market shares are thus negligible. Even on an individual route basis, Table 17 in the notification demonstrates that the only market shares in excess of 4% likely to be enjoyed by ENS were 6% and 7% for leisure travellers on the London-Amsterdam and London-Frankfurt/Dortmund routes respectively. As regards the Commission's view that a 5% market share warrants considering the undertaking concerned to be of sufficient importance for its behaviour to be in principle capable of affecting trade between Member States, the applicants refer to Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533 and Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, which confirm that a market share of over 5% is insufficient by itself to allow the conclusion that there is an appreciable restriction of competition. The point was also made in the notification that ENS's market share was likely to remain static or even fall as the market grew faster than ENS's ability to increase the frequency of its services (paragraph II.4. c.6, p. 27 of the notification). The relevant market for both services (business and leisure travel), therefore, is very large and it is clear that ENS would have no power to control the price, quality and availability of services or to exclude or weaken competition.

84 The Commission's statement in its defence, that ENS's market share should be measured in relation to early morning and late evening flights rather than by reference to all the flights available round the clock on a given route, is, in the applicants' submission, a redefinition of the relevant market, made without any probative evidence in support.

85 The Commission submits that ENS's market share should not be calculated, as proposed by the parties in their notification, in relation to the general market for the transport of passengers between the United Kingdom, on the one hand, and France, Germany and the Benelux countries, on the other hand, a geographical market on which ENS was expected to have 2.4% of the business travel segment and 5% of the leisure travel segment, making an overall market share of around 4%. The relevant market is confined to the routes actually to be served by ENS, namely London-Amsterdam, London-Frankfurt, Paris-Glasgow/Swansea and Brussels-Glasgow/Plymouth (decision, point 29). On the basis of that definition, ENS would have a market share of at least 7% of the business segment and 8% of the leisure segment of the market, according to the figures supplied by the parties to the ENS agreement in their notification.

86 According to case-law, a 5% market share warrants considering an undertaking to be of sufficient importance for its behaviour to be in principle capable of affecting trade between Member States (Case 19/77 *Miller* v *Commission* [1978] ECR 131, Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, and Case 107/82 *AEG* v *Commission* [1983] ECR 3151). The same rule must apply to restrictions of competition liable to result from an agreement between undertakings. In that regard, the Commission submits that, contrary to the applicants' contention, it is not clear from the *Langnese-Iglo* and *Schöller* judgments, cited above, that a market share of over 5% is insufficient by itself to conclude that there is an appreciable restriction of competition.

87 Furthermore, in the Commission's submission, ENS's market share in the business travel segment of the relevant market is considerably larger. It is clear from the analysis in the notification that ENS's share in that segment should be measured in relation solely to early morning and late evening flights rather than by reference to all the flights available round the clock on a given route. In addition, the Commission emphasises that the market share forecast concerned only 1995, the first year during which ENS services were expected to start operation, and that, in view of the effective strength of the railway undertakings concerned on the relevant markets and their actual and potential customer base, it was likely that the market share would increase. The Commission therefore considers itself justified in taking the view that the ENS agreements eliminate or appreciably restrict the scope of competition.

88 The United Kingdom, in intervention, submits that the Commission's definition of the relevant markets was artificially narrow. First, the geographical market should include the whole of the United Kingdom, France, Belgium, the Netherlands, Luxembourg and Germany. Second, the fact that the relevant markets encompass different modes of transport is taken into account only in the part of the decision relating to the granting of an exemption under Article 85(3) of the Treaty. Finally, in the United Kingdom's submission, parties to an agreement having a market share of less than 10% do not, in general, exercise any market power, whatever their level of turnover, so that below that threshold there must be specific circumstances for the anti-competitive object or effect of the agreement to be sufficiently deleterious or appreciable.

89 The Commission replies that the United Kingdom's suggestion that only a market share of 10% can justify application of Article 85(1) of the Treaty is unfounded in the case-law.

Findings of the Court

90 First of all, it must be noted that, in order to assess the effects of the ENS agreements on competition and on trade between Member States, the Commission

defined two relevant service markets in the decision: the market for the transport of business travellers, for whom scheduled air travel and high-speed rail travel are interchangeable modes of transport (the 'intermodal' market for business travel), and the market for the transport of leisure travellers, for whom substitute services may include economy-class air travel, train, coach and possibly private motor car (the 'intermodal' market for leisure travel) (see points 26 and 27 of the decision).

91 The Commission went on to consider, referring to Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, that the relevant geographical market should be confined to the routes actually to be served by ENS (points 28 and 29 of the decision), namely:

— London-Amsterdam,

— London-Frankfurt/Dortmund,

— Paris-Glasgow/Swansea and

— Brussels-Glasgow/Plymouth.

92 As that definition of the geographical market has not been challenged by the applicants, it follows that the ENS agreements fell to be assessed solely on the basis of the four separate geographical markets listed above and solely in the context of an intermodal market comprising various modes of transport such as rail, air, coach and motor car. On that basis, therefore, it is necessary to examine whether the Commission correctly evaluated ENS's market shares in order to arrive at the conclusion that the ENS agreements would have an appreciable effect on trade

between Member States, bearing in mind that, according to the applicants' notification, those market shares would not exceed the critical threshold of 5% and would, in any event, be insignificant.

93 It is to be noted here that the contested decision makes no reference to the market shares of ENS or of any other operators competing with ENS and also present on the various intermodal markets taken by the Commission as the relevant markets for the purposes of applying Article 85(1) of the Treaty. Consequently, even if — contrary to the applicants' submission — the ENS agreements were to restrict competition, the Court is not in a position, in the absence of any such data concerning the analysis of the relevant market in the contested decision, to make any finding as to whether the supposed restrictions on competition have an appreciable effect on trade between Member States and are thus caught by Article 85(1) of the Treaty, having regard, in particular, to the intermodal competition which is, according to the decision itself, a feature of the two service markets in question.

94 It was not until the stage of the proceedings before the Court that the Commission first referred to the notification submitted by the parties in support of its contention that 'even on the basis of the conservative — and by nature therefore restrictive — forecasts of ENS which are based on a narrower definition of the market, the Night Services' share of the business segment of the market is 7%, and 8% in the case of the leisure segment of the market'. It was also during the written procedure that it first asserted that ENS's market share should be calculated, for the business segment, in relation to early morning and late evening flights rather than by reference to all the flights available round the clock on a given route and is thus in fact much larger.

95 It is settled law that whilst, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required under Article 190 of the Treaty to set out at least

the facts and considerations having decisive importance in the context of the decision in order to make clear to the Court and the persons concerned the circumstances in which it has applied the Treaty (Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 39, Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 150, and Joined Cases T-369/94 and T-85/95 *DIR International Film and Others* v *Commission* [1998] ECR II-357, paragraph 117). It is also clear from the case-law that, other than in exceptional circumstances, the statement of reasons must be contained in the decision itself, and it is not sufficient for it to be explained subsequently for the first time before the Court (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, Case T-230/94 *Farrugia* v *Commission* [1996] ECR II-195, paragraph 36, and Case T-16/91 RV *Rendo and Others* v *Commission* [1996] ECR II-1827, paragraph 45).

96 It follows from the abovementioned case-law that when a Commission decision applying Article 85(1) of the Treaty suffers from serious omissions, such as the absence of any reference to the market shares of the undertakings concerned, the Commission may not remedy that defect by adducing for the first time before the Court figures and other analytical data from which it may be concluded that the essential elements of a situation in which Article 85(1) applies are in fact present unless none of the parties had challenged the analytical data in question during the prior administrative procedure.

97 Here, according to the estimates put forward by the applicants in the notification, ENS's market shares were not expected to exceed 4%, and it was only on the basis of a narrower market definition that they might reach 7% for the business travel market and 8% for the leisure travel market (see point 2.1.2 of the summary of the notification), without even then having an appreciable effect on competition. It is thus clear that, as regards the effect of the ENS agreements on trade between Member States, the applicants and the Commission were starting from different premisses, the applicants considering that the agreements did not have an appre-

ciable effect on intra-Community trade. The Commission was thus required to provide an adequate statement of its reasons for finding that the ENS agreements had an appreciable effect on trade between Member States.

98 Furthermore, even on the assumption that the Commission may adduce figures and other analytical data for the first time before the Court in order to show that its decision was well founded, the conclusions which it draws from the notification (see paragraph 94 above) are incorrect. According to Table 17 on page 26 of the notification, ENS's market shares for the business travel segment were to be under 5% on all the routes concerned:

— London-Amsterdam : 3%

— London-Frankfurt/Dortmund : 3%

— Paris-Glasgow/Swansea : 4%

— Brussels-Glasgow/Plymouth : 1%

99 Again according to Table 17 in the notification, ENS's market share in the leisure travel segment was expected to exceed 5% on only two of the four routes to be served by it, without on any route exceeding the 8% threshold put forward by the Commission:

— London-Amsterdam : 7%

— London-Frankfurt/Dortmund : 6%

— Paris-Glasgow/Swansea : 4%

— Brussels-Glasgow/Plymouth : 4%

100 It is further stated in the notification that ENS's market shares in the leisure travel segment were likely to remain fixed or even, in view of its limited possibilities for increasing capacity, to fall as the market as a whole grew. Whilst it is true, as has been pointed out above, that the Commission was not required to discuss all the issues of fact and law raised during the course of the administrative procedure prior to the adoption of the contested decision, this latter consideration put forward by the notifying parties was an essential part of their argument that the ENS agreements had an insignificant effect on trade between Member States. It is thus not possible to conclude, as the Commission maintains, that according to the notification ENS's market share on the leisure travel segment was 8%, or even that it exceeded 5%.

101 It must be noted here that whilst at points 2.1.2 of the summary of the notification and II.4. c.5.2(d) of the notification itself the parties stated, *inter alia*, that ENS's market share might reach 7% in the business travel segment and 8% in the leisure travel segment, they nevertheless made it clear that those shares would only apply in the context of a narrower definition of the market, based on 'city to city flows' and excluding residual competition from cars and coaches. Moreover, those estimates put forward by the parties related to average shares of an overall geographical market and not to the four routes actually to be served by ENS and specifically regarded by the Commission as the different relevant geographical markets within which the ENS agreements fell to be assessed. Consequently, since the contested decision defined the relevant markets by reference not to 'city to city flows' but to flows involving more than one destination (for example, from Paris to Glasgow and Swansea), since it did not exclude residual competition from cars and coaches from its definition of the market and since it did not assess the effects of the ENS agreements on the basis of an overall geographical market but on that of the four routes actually to be served by ENS, the Commission was not entitled to rely on the abovementioned market shares of 7% and 8%.

102 In any event, even if, as noted above, ENS's share of the tourist travel market was in fact likely to exceed 5% on certain routes, attaining 7% on the London-Amsterdam route and 6% on the London-Frankfurt/Dortmund route (see paragraph 94 above), it must be borne in mind that, according to the case-law, an

agreement may fall outside the prohibition in Article 85(1) of the Treaty if it has only an insignificant effect on the market, taking into account the weak position which the parties concerned have on the product or service market in question (Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7). With regard to the quantitative effect on the market, the Commission has argued that, in accordance with its notice on agreements of minor importance, cited above, Article 85(1) applies to an agreement when the market share of the parties to the agreement amounts to 5%. However, the mere fact that that threshold may be reached and even exceeded does not make it possible to conclude with certainty that an agreement is caught by Article 85(1) of the Treaty. Point 3 of that notice itself states that 'the quantitative definition of "appreciable" given by the Commission is, however, no absolute yardstick' and that 'in individual cases ... agreements between undertakings which exceed these limits may ... have only a negligible effect on trade between Member States or on competition, and are therefore not caught by Article 85(1)' (see also *Langnese-Iglo*, cited above, paragraph 98). It is noteworthy, moreover, if only as an indication, that that analysis is corroborated by the Commission's 1997 notice on agreements of minor importance (OJ 1997 C 372, p. 13) replacing the notice of 3 September 1986, cited above, according to which even agreements which are not of minor importance can escape the prohibition on agreements on account of their exclusively favourable impact on competition.

103 That being so, where, as in the present case, horizontal agreements between undertakings reach or only very slightly exceed the 5% threshold regarded by the Commission itself as critical and such as to justify application of Article 85(1) of the Treaty, the Commission must provide an adequate statement of its reasons for considering such agreements to be caught by the prohibition in Article 85(1) of the Treaty. Its obligation to do so is all the more imperative here, where, as the applicants stated in their notification, ENS has to operate on markets largely dominated by other modes of transport, such as air transport, and where, on the assumption of an increase in demand on the relevant markets and having regard to the limited possibilities for ENS to increase its capacity, its market shares will either fall or

remain stable. In addition, such a statement of reasons is necessary in the present instance in view of the fact that, as the Court of Justice held at paragraph 86 of its judgment in *Musique Diffusion Française*, cited above, an agreement is capable of exercising an appreciable influence on the pattern of trade between Member States even where the market shares of the undertakings concerned do not exceed 3%, provided that those market shares exceed those of most of their competitors.

104 There is, however, no such statement of reasons in the present case.

105 It must be concluded from the foregoing that the contested decision does not contain a sufficient statement of reasons to enable the Court to make a ruling on the shares held by ENS on the various relevant markets and, consequently, on whether the ENS agreements have an appreciable effect on trade between Member States, and the decision must therefore be annulled on that ground.

Second part: assessment of the restrictive effects of the ENS agreements on competition

Arguments of the parties

106 The applicants maintain that the ENS agreements do not restrict competition among the parent undertakings themselves, between the parent undertakings and ENS or *vis-à-vis* third parties, and that there is no strengthening of the alleged restrictions of competition as a result of the presence of networks of joint ventures on the market for rail transport. They further maintain that the beneficial effects of the ENS agreements outweigh any alleged restrictions to which they might give rise. The decision, they claim, therefore contains an inadequate statement of reasons or, at the very least, manifest errors of assessment.

107 In the first place, as regards restrictions of competition among the parent undertakings and between them and ENS, the applicants submit that, in the light of the substantial difficulties facing the railway undertakings and ENS, it cannot be asserted that any appreciable competition could emerge in the relevant markets among the railway undertakings in respect of the new services to be offered by ENS. ENS and EPS refer to a letter of 27 April 1992 sent by Lazard Brothers to BR (Annex 7 to the notification) showing that none of the railway undertakings alone would have accepted those risks, a point with which the Commission agreed in its decision. Moreover, the procurement of rolling stock involves various fixed costs such that an undertaking could only make a profit by increasing output to a minimum efficient size such as that hoped for by ENS. Individually, none of the railway undertakings would have been in a position to increase the level of services to that minimum.

108 UIC and NS add that there can be no restrictions of potential competition among the parties to the ENS agreements since, under Directive 91/440, none of the railway undertakings is in a position to serve any one of the routes concerned on its own but is bound to participate in an international grouping. The London-Amsterdam route, for instance, could not have been served by SNCF and EPS without the participation of NS. Since EPS and NS are 'obligatory trading partners' in any international grouping serving that route, the additional participation of SNCF, which is not an actual or potential competitor of NS or EPS on the route concerned, could thus not constitute a restriction of competition. As to the fact that ENS serves a route one of whose destinations is Belgium without the Belgian railway undertaking SNCB being a party to the ENS agreements, the applicants stress that SNCB's supply of 'necessary services' to ENS is the result of a purely commercial decision and not of any obligation imposed by Community law.

109 Since the four routes served by ENS are to be considered as forming four different geographical markets (decision, point 29), it also follows that the four connections must be held not to compete with each other, so that combining their operation in one grouping does not constitute a restriction of competition.

110 The Commission's argument that the ENS agreements restrict competition between the parties to the agreements and new railway undertakings, including subsidiaries of existing ones, is unfounded. To the extent that it concerns new undertakings, it is irrelevant for the purpose of analysing possible restrictions of competition among the participating undertakings. The assertion that the parent undertakings could set up, in countries served by ENS other than their own countries of establishment, subsidiaries which could acquire the status of 'railway undertakings' within the meaning of Directive 91/440 and with which each of the railway undertakings concerned could organise night services by means of a grouping excluding any other participant in ENS, is hypothetical. None of the railway undertakings participating in ENS has subsidiaries of such a kind; nor, moreover, are they able to set up subsidiaries having the status of railway undertakings in Member States where other railway undertakings are established, at least until the two draft directives complementing the regulatory framework of Directive 91/440 have been implemented. Even if such a framework already existed, moreover, it would be totally unrealistic from a business point of view to assume, for instance, that DB would set up its own railway undertaking in the Netherlands in order to operate, together with EPS, a night train connection between the United Kingdom and Amsterdam without the involvement of NS. In any event, the Commission's findings are all the more challengeable in that cooperation in ENS is not exclusive, there being nothing in the ENS agreements to prevent participants from engaging in a grouping competing with ENS.

111 SNCF adds that, contrary to the Commission's contention, the individual railway undertakings do not have the possibility of setting up a subsidiary in another Member State with a view to forming a grouping with it, because there are statutory monopolies in the Member States and the Council has not adopted any legislation conferring such a right of establishment. Moreover, the fact that a number of railway undertakings participate in the ENS agreements is of no consequence, since they operate on different networks and are thus not in competition on each of the other geographical markets considered. Finally, SNCF stresses that the financial risks involved in setting up ENS cannot be borne by a single undertaking, as the Commission accepts at point 63 of its decision.

112 Similarly, the Commission's argument that each railway undertaking could perform the role of railway 'transport operator' outside its country of establishment by buying the necessary services from the railways concerned is based on an unrealistic description of the market and is incompatible with the regulatory framework of Directive 91/440. There is no justification for supposing, for example, that DB would be interested in setting up a special structure and negotiating rights of access with the United Kingdom infrastructure manager, SNCF and NS in order to set up a night train connection between London and Amsterdam. Such behaviour would, in any event, be commercially unfeasible, since none of the participants in ENS has the financial and commercial means to do so.

113 The Commission's reasoning is also based on a market model which is incompatible with the regulatory framework of Directive 91/440. By drawing an artificial distinction between railway undertakings and a hypothetical new category of market participants called 'transport operators', it creates access and transit rights which do not derive from the directive. The conclusion from its analysis, moreover, is that the formation of any international grouping automatically restricts competition simply because its participants could also have formed another grouping. Such reasoning is all the more unacceptable in that it makes it impossible for the participating railway undertakings to assess how the services of ENS should be structured once the exemption granted has expired, thus discouraging further initiatives for innovative international transport services by the railway undertakings in the Community.

114 In the second place, as regards the alleged restrictions on access by third parties (points 46 to 48 of the decision), the applicants maintain that the Commission's analysis is wrong in both fact and law. First, the possibility that third parties might be excluded should be assessed in relation to the relevant intermodal markets on which the joint venture will be operating and for which, according to points 26 and 27 of the decision, there are other, interchangeable, modes of transport. The analysis in question, however, is based on another market definition, that of the market in necessary rail services, which diverges from the definition explicitly adopted in the decision.

115 Second, the Commission's assessment is based on the false premiss that ENS should be treated as a 'transport operator' to which the parent undertakings provide rail services. However, ENS is not a transport operator but an international grouping of railway undertakings within the meaning of Directive 91/440, formed in order to enable the parent undertakings to provide international passenger rail services, in accordance with Article 10(1) of the directive. The fact that the parent undertakings opted for a grouping in the form of a company is irrelevant in that connection with regard to the legal status of ENS. Thus, contrary to the Commission's contention, since the parent undertakings themselves provide transport services to travellers via the grouping in question, there cannot be an upstream market for the provision of rail services to operators and a separate market on which ENS operates, as stated in the decision. In any event, the Commission's findings are based on the false assumption that any 'transport operator' of any kind (for example, a hotel chain) is entitled to claim the supply of locomotives.

116 Third, the Commission's argument is based on the erroneous assumption that EPS is a wholly-owned subsidiary of BR and/or the railway infrastructure manager Railtrack and holds a dominant position in the United Kingdom, whereas in fact EPS has been transferred by BR to the United Kingdom Government (see paragraph 11 above) and its position is far from dominant in any market. EPS reminded the Commission in a letter of 30 June 1994 (Annex 9 to its application) that it is not an infrastructure owner or manager and has access only to the reserved paths it needs over the UK network, forming a small minority of the paths on the routes in question. Similarly, EPS employs a small number of railway staff and owns a small fleet of locomotives. It does not, therefore, enjoy a dominant position as regards access to infrastructure in the United Kingdom.

117 Fourth, the Commission has not explained why the alleged commercial strength of the participating railway undertakings constitutes as such a barrier to market access for third parties. The argument based on the existence of actual or potential competitors and the competitive damage on the downstream markets brought about by the alleged special relationship between the railway undertakings and

ENS is speculative. Even if the railway undertakings were alone in possessing locomotives and even if each of them refused to supply locomotives to a new operator, the effect on the properly-defined relevant markets would be minimal. In any event, under Directive 91/440, the participating railway undertakings are obliged, as infrastructure managers, to provide certain services to third parties. Moreover, the acquisition of (in particular second-hand) locomotives by operational or financial leases or otherwise does not constitute a major investment for third parties, and there is no evidence for the Commission's claim that only the railway undertakings concerned possess them or that any new entrant would experience difficulty in finding them. It is, moreover, possible to adapt existing locomotives to operate through the Channel Tunnel, rather than ordering new or special locomotives. In any event, the mere fact that the setting-up of a joint venture necessitates certain major capital investments cannot be regarded as a barrier to market entry. As to the Commission's reference in its pleadings to the foreclosure effect arising out of the Channel Tunnel usage agreement, the applicants reply that it is an agreement which has been granted exemption by the Commission under Article 85(3) of the Treaty and stress that the paths to be used by ENS will be allocated to the quota reserved by the Eurotunnel Agreement for SNCF and BR and will not reduce the number of paths available for third parties.

118 In the third place, as regards the restrictive effect due to the presence of a network of joint ventures, the applicants point out that the other joint ventures concerned are located on product or service markets — the market for combined transport of goods and the market for the transport of vehicles by rail — different from those on which ENS will be active and that they do not engage in competing or even complementary activities. The decision contains no analysis to show how the alleged existence of a network of joint ventures for rail transport could have an appreciable effect on competition in the market for passenger transport and is, moreover, inconsistent with the principles set out by the Commission in its 1993 communication.

119 Finally, as regards the overall assessment of the ENS agreements, ENS and EPS state that the Court of Justice has consistently held (Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, Case 26/76 *Metro* v *Commission*, cited above, Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015, Case 161/84 *Pronuptia* [1986] ECR 353 and Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935) that the pro-competitive effects of an agreement must be weighed up against its anti-competitive effects. If the pro-competitive effects outweigh the anti-competitive effects and the latter are necessary in order to implement the agreement, then the agreement cannot be regarded as having as its object or effect the prevention, restriction or distortion of competition within the common market within the meaning of Article 85(1) of the Treaty.

120 The applicants submit that the agreements in issue have substantial pro-competitive effects on both the relevant service markets as defined in points 26 and 27 of the decision. In particular, the market for the transport of business travellers on the routes served by ENS is dominated by a small number of airline companies which, according to the International Passenger Survey conducted by the Office of Population Censuses and Surveys, held 74% of that market in 1991. ENS further showed, in its notification, that it was likely to have 7% of that market while the airline companies would hold 78% and that its formation would thus to some extent mitigate the domination of the market by air transport. The Commission has, moreover, accepted that the position was the same with respect to the leisure market. In fact, the pro-competitive effects of the agreements should outweigh any speculative anti-competitive effect.

121 The Commission considers that the fact that the participants in ENS have assumed significant commercial risks and incurred high expenses and costs does not mean that appreciable competition among the railway undertakings concerned on the relevant market is improbable. A railway undertaking established in one Member State is entitled to form an international grouping with another railway undertaking established in another Member State and obtain from Eurotunnel, the infrastructure manager, the paths necessary to pass through the Channel Tunnel and thus operate international transport services (decision, point 42). Moreover, any

railway undertaking party to the ENS agreement is entitled to take on the role of 'transport operator' itself and to set up a subsidiary which, by buying the necessary services from the railway undertakings concerned, may likewise provide international transport services (decision, points 43 and 44). Thus, by entrusting the operation and marketing of those services to their joint venture ENS, the applicants have appreciably limited the scope for competition on that market (decision, point 45). Finally, it is clear from the decision of the German railway undertaking DB to form a joint venture with the Swiss and Austrian railways with a view to providing night services between German, Swiss and Austrian cities that the possibilities for a railway undertaking party to the ENS agreements to set up a subsidiary in the United Kingdom and/or other Member States in order to offer night train services are neither illusory nor unrealistic.

122 As regards the argument that each of the applicants is an obligatory trading partner for operation of the routes served by ENS, the Commission replies that ENS is not a railway undertaking within the meaning of the directive but a 'transport operator' which obtains the necessary rail services from railway undertakings. Furthermore, the fact that the Brussels-Glasgow/Plymouth route was to be offered by ENS even though SNCB is not a party to the agreement demonstrates that the participation of all four railway undertakings established in the Member States concerned is not a *sine qua non* for the operation of the services involved.

123 In response to the applicants' argument that the railway undertakings concerned could not set up subsidiaries having the status of railway undertakings in the different Member States and thus form other international groupings in competition with ENS, the Commission contends that there is no legal obstacle to prevent railway undertakings from exercising their right of establishment in other Member States. The principle of freedom of establishment enunciated by Article 52 of the Treaty became fully effective at the end of the transitional period; the fact that when the contested decision was adopted the Council had not yet adopted the draft directive on the licensing of railway undertakings is thus irrelevant, the aim

of such a directive being only to facilitate the exercise of the right of establishment, and not to create that right (Case 2/74 *Reyners* v *Belgian State* [1974] ECR 631).

124 With regard to the applicants' argument that the regulatory framework set up by Directive 91/440 does not allow the railway undertakings to set up a subsidiary in the form of a transport operator, the Commission stresses that, whilst Directive 91/440 applies admittedly only to railway undertakings whose main business is to provide rail transport services for goods and/or passengers, with a requirement that the undertaking should ensure traction (Article 3), transport operators which do not themselves qualify as railway undertakings within the meaning of Article 3 of the directive and thus do not have a right of access to railway infrastructure may none the less offer services and/or railway transport of goods by obtaining traction services and access to railway infrastructure from railway undertakings. That is precisely how ACI and ENS operate, as regards combined transport and passenger transport respectively.

125 The Commission points out that it had already put forward that point of view in the letters it sent to the notifying parties on 29 October 1993 (defence, Annex 4) and 28 February 1994 and adds that, after the railway undertakings participating in ENS had been consulted, ENS's chairman sent a letter dated 13 April 1994 to the Commission (defence, Annex 6), confirming their agreement to provide overnight services to ENS's competitors on the same routes.

126 As regards the assertion that the ENS agreements contain no provision as to exclusivity and thus do not preclude the railway undertakings concerned from setting up different international groupings capable of competing with ENS, the Commission stresses that such a possibility is extremely unlikely since, during the administrative procedure, the railway undertakings concerned insisted on the need to combine their experience and financial resources in order to ensure the commercial success of ENS.

127 The Commission also denies the claim that it failed to make a proper assessment of the restrictive effects of the ENS agreement on third parties, and refers in that regard to points 46 and 48 of the contested decision. It considers that, whilst the formation of ENS creates no restrictions on entry by third parties to the other modes of transport which are interchangeable with the services offered by ENS, access by railway undertakings and transport operators to the rail transport segment of the relevant market could none the less be impeded because ENS is composed of powerful railway undertakings with control of both the utilisation of railway infrastructure and the provision of traction. In the Commission's view, it is not necessary that barriers to access affect each segment of a composite market of the kind in question here. The fact that a decision was taken exempting the Eurotunnel Agreement entered into by BR, SNCF and Eurotunnel under Article 85(3) of the Treaty, it adds, in no way renders irrelevant the assessment of the economic position of EPS and SNCF, which hold 75% of the path capacity reserved for international train services in the Channel Tunnel.

128 With regard to the restrictions of competition arising out of the supply of necessary rail services to ENS, the Commission recognises that, as regards train paths, international groupings are entitled under the directive to obtain access to infrastructure directly from the infrastructure managers. That does not apply, however, to transport operators as regards the provision of train paths or of traction and skilled crews. In view of the fact that traction may only be assured by railway undertakings, which possess both the special locomotives designed for traction in the Channel Tunnel and the skilled crew operating them, it is justifiable to take the view that economic operators seeking to obtain such services would be at a disadvantage if they did not get the same services on non-discriminatory terms from ENS's parent undertakings.

129 The network of joint ventures in which the parent undertakings take part, the Commission states, concerns the operation of goods and passenger transport services, namely: Intercontainer, in which all the notifying parties take part; ACI, set up by BR, SNCF and Intercontainer; and, finally, Autocare Europe. The contention that joint ventures relating to the combined transport of goods and the

provision of rail transport for motor vehicles have no bearing on night passenger services such as those operated by ENS is unfounded since, according to the 1993 communication, competition is most severely restricted where undertakings competing within the same oligopolistic economic sector set up a multitude of joint ventures for complementary or unrelated products or services.

130 Finally, the Commission challenges the argument that the case-law cited by the applicants establishes that it is bound to apply a 'rule of reason' and to balance the competitive benefits and harms of the agreement. Such an approach is required in the context of Article 85(3) of the Treaty but not in respect of the appraisal of restrictions of competition under Article 85(1).

131 The United Kingdom, in intervention, submits that in applying Article 85(1) of the Treaty to the ENS agreements the Commission failed to take account of the economic context and, in particular, of the state of competition that would exist in the absence of the agreements. The ENS agreements do not restrict competition because they are designed to facilitate, and are necessary for, the introduction of a service which is not currently operating and which none of the parties could reasonably be expected to introduce by itself.

132 Various passages in the decision vouch for the pro-competitive nature of the ENS agreements, the novelty of the service offered, the substantial financial risks involved, the financial and technical justification for collaboration — the pooling of know-how — and the need to wait several years before the investments made will yield profitable returns (points 59, 61, 63, 64 and 74 to 77 of the decision). It is thus significant that those findings appear in the decision solely in connection with the question of the exemption of the ENS agreements and not with the application of Article 85(1) of the Treaty.

133 Nor does the contested decision contain any sufficient explanation of how ENS's parent undertakings are or could be competitors on the market in question in any real sense. It contains no explanation of how real the prospect is of such competition, which shows either that the Commission did not carry out the required analysis of the economic context or that it has failed to comply with Article 190 of the Treaty.

134 In reply to the United Kingdom, the Commission submits that, whilst the analysis of an agreement must take account of its economic context, it does not follow that the rule of reason — a concept which the Court of Justice has hitherto declined to embrace — should be resorted to. That conclusion is not negated by its judgment in Case C-250/92 *Gottrup-Klim* v *Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, which concerns only the validity of ancillary restrictions in the specific context of cooperative organisations and may not, therefore, be regarded as the expression of a general principle. Consequently, it is necessary to balance the competitive benefits and harms of an agreement in relation to the granting of exemptions under Article 85(3) of the Treaty but not in respect of the appraisal of restrictions on competition — which were, contrary to the United Kingdom's contention, fully explained in the decision — in accordance with Article 85(1).

Findings of the Court

135 According to the contested decision, the ENS agreements have effects restricting existing and potential competition (a) among the parent undertakings, (b) between the parent undertakings and ENS and (c) *vis-à-vis* third parties; furthermore (d), those restrictions are aggravated by the presence of a network of joint ventures set up by the parent undertakings.

136 Before any examination of the parties' arguments as to whether the Commission's analysis as regards restrictions of competition was correct, it must be borne in mind that in assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the

economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (judgments in *Delimitis*, cited above, *Gottrup-Klim*, cited above, paragraph 31, Case C-399/93 *Oude Luttikhuis and Others* v *Verenigde Coöperatieve Melkindustrie* [1995] ECR I-4515, paragraph 10, and Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraph 140), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed procompetitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).

137 It must also be stressed that the examination of conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established (*Delimitis*, cited above, paragraph 21). Furthermore, according to the Commission notice of 1993 concerning the assessment of cooperative joint ventures pursuant to Article 85 of the Treaty: 'The assumption of potential competitive circumstances presupposes that each parent alone is in a position to fulfil the tasks assigned to the [joint venture] and that it does not forfeit its capabilities to do so by the creation of the [joint venture]. An economically realistic approach is necessary in the assessment of any particular case' (point 18).

138 It is in the light of those considerations, therefore, that it is necessary to examine whether the Commission's assessment of the restrictive effects of the ENS agreements was correct.

— Restrictions on competition among the parent undertakings

139 It is clear from the documents before the Court that, prior to the adoption of Directive 91/440, the railway undertakings in the Member States were neither actually nor potentially in competition with each other because most Member States provided for exclusive rights precluding, *de jure* or *de facto*, both the provision of international passenger services and access to the infrastructure (the national rail networks). Prior to the adoption of that directive, as the parties have stressed, the only basis on which such services were provided in the Community was that of the traditional cooperation agreements between the railway undertakings operating on the various networks concerned. However, following the adoption of Directive 91/440, conditions of competition on the market for rail transport changed and the railway undertakings operating on their national networks became to a certain extent potential competitors for international passenger services, provided that they formed 'international groupings' with other railway undertakings established in other Member States for the purpose of providing international transport services between those Member States (Articles 3 and 10 of the directive).

140 It would appear from the Commission's arguments that the possibility of providing international services via international groupings is open not only to existing railway undertakings but also to new railway undertakings, including subsidiaries of existing railway undertakings, and that it was on the basis of that premiss that the Commission considered that the ENS agreements restricted competition among the parent undertakings inasmuch as (a) each of the parties to those agreements could form an international grouping either with an undertaking established in the United Kingdom or with its own subsidiary there and thus compete with ENS, (b) each of those parties could set up a subsidiary specialising as a 'transport operator' and buy from those parties the same necessary rail services as they sold to ENS and (c) each railway undertaking could itself take on the role of transport operator and provide international night passenger services by buying the necessary rail services from the railway undertakings concerned.

141 With regard to the possibility for each of the parties to the ENS agreements to form an international grouping either with a railway undertaking in the United Kingdom or with its own subsidiary there and thus compete with ENS, it must first of all be borne in mind that since, in accordance with Article 10 of Directive 91/440, an international route may be served only by an international grouping formed by the railway undertakings established in each of the countries concerned, the only 'obligatory trading partners' for the constitution of such an international grouping on each route are necessarily the railway undertakings established in each Member State concerned. As the applicants have pointed out, with regard to the example of the London-Amsterdam route, the only obligatory trading partners at the material time were NS and EPS; the fact that SNCF and DB were also members of the grouping could thus have no effect on existing competition since, in the context created by Directive 91/440, neither of those two railway undertakings could compete with EPS and NS on that route. The situation is the same for each of the three other routes actually to be served by ENS (see paragraph 9 above). Consequently, the fact that the four routes in question are operated jointly by EPS, DB, SNCF and NS cannot have the effect of an appreciable restriction of existing competition among the parent undertakings.

142 As regards the view that potential competition is restricted by the fact that each of the parent undertakings could set up subsidiaries in the Member States of the other parent undertakings and form, either with its own subsidiaries or with other railway undertakings established in the other Member States concerned, international groupings in direct competition with ENS, the Court considers this to be a hypothesis unsupported by any evidence or any analysis of the structures of the relevant market from which it might be concluded that it represented a real, concrete possibility. There is no indication either in the contested decision or in the documents before the Court that there are any railway undertakings with subsidiaries in other Member States having themselves the status of railway undertakings, such as to demonstrate any actual exercise of the right to freedom of establishment on the market for rail transport in the Community.

143 It should be stressed here that, as a measure of organisation of the procedure, the Court requested the Commission to indicate whether any railway undertakings established in the Member States had subsidiaries in other Member States having

the status of railway undertakings within the meaning of Directive 91/440 and, if so, to specify which railway undertakings had been set up since the entry into force of Directive 91/440. In its answer, the Commission admitted that it had no knowledge of other subsidiaries set up by ENS's parent undertakings either before or after the adoption of Directive 91/440, reiterating, however, its view that the right of establishment is conferred directly on any interested railway undertaking by Article 52 of the Treaty.

144 The Court considers that the Commission's argument in this regard, to the effect that there is in theory no legal obstacle precluding railway undertakings from exercising their right of establishment in a Member State other than that in which they have their registered office, fails to take account of the economic context and characteristics of the relevant market as they appear from the documents in the case and is thus not sufficient, without further support, to establish the existence of restrictions of potential competition among the parent undertakings or between them and ENS.

145 As the applicants have explained at length in their pleadings, it would be unrealistic, given the novelty and the specific features of the night rail services in question, for the parent undertakings to set up other subsidiaries in other Member States having the status of railway undertakings for the sole purpose of forming a new joint venture to compete with ENS. The prohibitive cost of the investment required for such services through the Channel Tunnel and the fact that there are no economies of scale in the operation of a single route, as opposed to the four routes to be operated together by ENS, show how unrealistic potential competition is among the parent undertakings and between them and ENS. It is, moreover, clear from the documents before the Court that, following the publication in the *Official Journal of the European Communities* of the Commission's notice inviting interested parties to submit their observations on the ENS agreements as summarised in that notice, no third parties took any steps during the administrative procedure to submit observations as a potential competitor capable of being affected or concerned by the implementation of the ENS agreements (see paragraph 17 above). Finally, it may also be seriously questioned whether ENS has any existing or potential competitors in this context in view of the fact that, as the Commission acknowledged in its answers to the written questions put by the

Court, no subsidiaries have yet been set up in other Member States by any Community railway undertakings, whether before or after the adoption of Directive 91/440.

146 On the basis of the foregoing considerations, the Commission's finding that the ENS agreements are such as appreciably to restrict existing and/or potential competition among the parent undertakings and between them and ENS must be held to be vitiated by inadequate reasoning and/or error of assessment.

147 As regards the view that competition among the parent undertakings is restricted because each of the railway undertakings participating in the ENS agreements could either set up a subsidiary specialising as a transport operator or itself take on the role of transport operator and compete with ENS by buying the same necessary rail services, the Court considers that the Commission's assessment is here again based on an analysis of the market which does not correspond to the real situation. The Commission takes as its starting-point the assumption that in the market for rail passenger services there is in addition to railway undertakings another category of economic operators — transport operators — providing the same services as railway undertakings — passenger transport — but by buying or hiring 'necessary rail services' — locomotives, crews and access to infrastructure — from those undertakings. ENS, being, according to the decision, a transport operator, could thus be exposed to competition either from specialised subsidiaries set up by railway undertakings as transport operators or by those undertakings themselves acting directly on the market as transport operators, and its creation therefore restricts the parties' freedom to operate individually as transport operators on the relevant market.

148 However, the Commission's assessment in that regard cannot be examined without first answering the question whether international passenger services are provided not only by international groupings as provided for in Directive 91/440 but also by transport operators. As that question is raised, in substance, by the applicants

in the context of their second plea in law, it will therefore be examined in that context (see paragraphs 161 to 189 below).

— Restrictions on competition *vis-à-vis* third parties

149 The contested decision stresses that third-party access to the relevant markets is likely to be impeded by the existence of a special relationship between ENS and its parent undertakings, placing other operators at a disadvantage in competition for the necessary rail services provided by the parent undertakings, and by the Channel Tunnel usage agreement entered into by BR, SNCF and Eurotunnel, which allows BR and SNCF to retain a significant proportion — 75% — of the path capacity reserved for international train services.

150 With regard, first, to the special relationship between ENS and the railway undertakings concerned, it must be noted that the Commission's analysis is based on the premiss that the market for rail passenger transport is split into two parts: an upstream market in the provision of 'necessary rail services' (train paths, special locomotives and train crews) and a downstream market in passenger transport, on which transport operators such as ENS operate alongside railway undertakings. According to the decision, the parent undertakings could abuse their dominant position on the upstream market by refusing to provide necessary rail services to third parties competing with ENS on the downstream market.

151 Here again, however, the Commission's assessment cannot be examined without first answering the question whether there are also, in addition to international groupings, transport operators on the relevant markets, which will be examined in the context of the second plea in law, and the question whether the services

provided to ENS by the parent undertakings may be categorised as 'necessary or essential facilities', which falls within the scope of the third plea and must therefore be examined in that context (see paragraphs 190 to 221 below).

152 As regards, second, any restrictive effects arising out of the Channel Tunnel usage agreement, it must be borne in mind that the Commission's decision exempting that agreement from the prohibition in Article 85(1) of the Treaty ('the Eurotunnel decision') was annulled by judgment of the Court of First Instance of 22 October 1996 in Joined Cases T-79/95 and T-80/95 *SNCF and British Railways* v *Commission* [1996] ECR II-1491, on the ground that the Commission had made a factual error in its interpretation of the provisions of that agreement governing the allocation of train paths in the tunnel as between SNCF and BR on the one hand and Eurotunnel on the other.

153 As a measure of organisation of the procedure, the Court requested the parties to state their position on the relevance of that judgment for the present case. In its answer, the Commission considered that it was irrelevant for the appraisal of the legality of the contested decision, point 47 of which indicates that even if BR and SNCF did not hold all the available paths for international trains they would still control a significant proportion of them. The applicants, however, took the view that the judgment confirms that access to the Channel Tunnel is not closed and that the Commission incorrectly assessed the restrictive effects of the tunnel usage agreement *vis-à-vis* third parties.

154 The Court considers that, since the Commission specifically took the 'Eurotunnel agreement' as its basis in order to demonstrate in the contested decision that SNCF's and BR's allegedly privileged access to train paths in the tunnel placed undertakings competing with ENS at a competitive disadvantage, and since the Eurotunnel decision has been annulled by the Court of First Instance on the ground that it contained an error of fact in the interpretation of the provisions of the agreement relating to the allocation of train paths, the Commission cannot derive any valid argument from it with regard to the assessment of the ENS agreements.

— Aggravation of the restrictive effects on competition caused by the presence of a network of joint ventures

155 With regard, finally, to the alleged aggravation of the restriction of competition caused by the presence of networks of joint ventures (points 49 to 53 of the decision), it should first be noted that, according to the Commission's 1993 communication, special attention must be paid to the presence of networks of joint ventures set up by the same parents, by one parent with different partners or by different partners in parallel (point 17 of the communication). In particular, networks of joint ventures can restrict competition where competing parents set up several joint ventures for complementary products which they themselves intend to process or for non-complementary products which they themselves distribute, thus increasing the extent and intensity of the restriction of competition. Those considerations are also valid for the service sector (point 29 of the communication).

156 In the contested decision, the Commission considered that to be the case in the present instance, inasmuch as BR/EPS, SNCF, DB and NS were taking part to varying degrees in a network of joint ventures for the transport of both goods and passengers, in particular through the Channel Tunnel. It referred to the joint venture ACI, set up by, *inter alia*, BR and SNCF to provide combined transport of goods (Commission Decision 94/594/EC of 27 July 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.518 — ACI) (OJ 1994 L 224, p. 28, hereinafter 'the ACI decision')), and Autocare Europe, to which BR and SNCB are parties, which provides rail transport for motor vehicles. In its pleadings, the Commission referred for the first time in addition to the joint venture Intercontainer, set up by 26 railway undertakings, including BR and SNCF, and also operating on the market for combined transport of goods.

157 The contested decision does not, however, specify what joint ventures set up by the parent undertakings concern passenger transport services. As a measure of organisation of the procedure, the Court requested the Commission to specify the joint ventures operating on the passenger transport market in which, according to point 51 of the contested decision, ENS's parent undertakings are participating. In its answer, the Commission stated that it had no knowledge of any other joint ventures of ENS's parent undertakings for passenger transport. It noted, however, that 'SNCF, SNCB and BR (subsequently to the latter's privatisation, London & Continental Railways Ltd) jointly take part in Eurostar for passenger transport between the United Kingdom and the Continent', although it did not assert that point 51 was in fact implicitly referring to Eurostar. The Court therefore considers that, as regards the alleged presence of a network of joint ventures set up by the parent undertakings, the contested decision is vitiated by an absence of reasoning.

158 As regards the participation of the parent undertakings in joint ventures for combined transport of goods, it follows from point 29 of the Commission's 1993 communication that when parent undertakings set up joint ventures for 'non-complementary' services, competition may be restricted when those 'non-complementary' services are marketed by the parent undertakings themselves.

159 There is no indication in the contested decision that the parent undertakings themselves market the services provided by ACI, Intercontainer and Autocare. As a measure of organisation of the procedure, the Court requested the applicants to specify whether the transport services provided by ACI, Intercontainer and Autocare were marketed by them or by another undertaking. From their answers it appears that none of the parent undertakings markets or sells services provided by any of those three undertakings. In any event, even if they did market those services, the contested decision does not explain how the participation of some or all of the parent undertakings in a network of joint ventures operating on markets different from that of ENS would restrict competition among them at the level of the

creation of ENS. Consequently, the Commission's assessment of the aggravating effects on the restrictions of competition caused by the presence of a network of joint ventures does not contain a sufficient statement of reasons.

160 It follows from the foregoing that, as regards the assessment of the restrictions of competition arising out of the ENS agreements, the contested decision is vitiated by an absence or insufficiency of reasoning.

2. *The second plea: infringement of Regulation No 1017/68 and of the regulatory framework established by Directive 91/440*

Arguments of the parties

161 The applicants submit that in imposing the condition contained in Article 2 of the contested decision, the Commission used its powers under Article 5 of Regulation No 1017/68 in a manner inconsistent with Directive 91/440.

162 The Commission, they consider, extended the scope of the directive since, under Article 10(1), rights of access to infrastructure are granted only to international groupings of railway undertakings as defined in the directive and not to any transport operator wishing to run trains. When exercising its powers under Regulation No 1017/68, the applicants add, the Commission is also obliged to take account of the basic orientations of the common transport policy as defined by the Council. Judicial review of the Commission's assessment of the ENS agreements under Article 85 of the Treaty must therefore be carried out in the context of the Community legislation for the rail transport sector, which constitutes the legal framework within which competition within that sector is supposed to operate.

163 In particular, the basic elements of the Community's common transport policy for the railways sector are now embodied in Directive 91/440 which, for the first time, introduces a certain degree of intramodal competition and seeks to achieve the main objective of the rail transport policy, that of enhancing the efficiency and competitiveness of rail transport as against other modes of transport. Under the directive, access and transit rights are granted only to undertakings having the status of railway undertakings and international groupings of such undertakings. The directive addresses, moreover, only rights of access to infrastructure and does not provide for rights to the supply of services such as traction (locomotives and train crews). Nor does it contain any rules concerning the separation of management of locomotives and train crews from the operation of other rail services or the allocation of and payment for traction services, which is consistent with the objective of the directive, namely to allow railway undertakings to operate in a commercial manner and adapt to market needs, in particular in order to develop new services.

164 The distinction drawn by the Commission between railway undertakings and transport operators is thus fictitious since, for reasons pertaining to safety and the liability for transport risks, only railway undertakings are allowed to register coaches and to transport passengers over the rail infrastructure. Consequently, nobody but railway undertakings and the international groupings they create can offer passenger transport services to the public. That does not exclude the possibility for a railway undertaking to supply an entire train to, for example, a hotel chain or even rent out the coaches, but even in such a case the railway undertaking would remain the transport operator, bearing all the risks inherent in the transport services; the hotel chain would merely sell seat or berth capacity in the train to the public. In the applicants' submission, the core activity of railway undertakings is not to operate a trunk business of running locomotives on railway networks at the request of transport operators, allowing them to hook coaches on to its locomotives to run on a given route, but to provide integrated passenger services directly to the public.

165 ENS, moreover, in the applicants' submission, whilst a joint venture set up between four railway undertakings, constitutes in reality an international grouping of railway undertakings within the meaning of Article 3 of Directive 91/440 and not a 'transport operator'. It is clear from Article 5(3) of Directive 91/440 that railway undertakings are free to establish an international grouping with 'one or more' other railway undertakings, without any specific legal form being prescribed for such an association. Nor can the Commission infer from the operating agreements between ENS and SNCB that ENS is a transport operator, as it was on a voluntary basis that, before the Brussels-Glasgow/Plymouth route was finally abandoned, SNCB decided to supply the 'necessary rail services' to ENS and not under any obligation arising out of Directive 91/440 or Community competition law.

166 Consequently, ENS is not a transport operator active on a downstream market different from that of its parent undertakings but — by very reason of its status as an international grouping of railway undertakings — a vehicle through which those parent undertakings can offer rail services to the public. That distinction within the overall market for rail services between an upstream market and a downstream market, drawn by the Commission in order to demonstrate that ENS is a transport operator, is all the more artificial in that, as far as passenger transport is concerned, many transport services are provided by integral trains, of which the locomotive forms an inseparable part, so that, from a merely technical point of view, it is impossible to distinguish between those two markets.

167 Similarly, the fact that ENS must obtain traction from railway undertakings in order to be able to offer its services does not prevent it from having the status of an international grouping within the meaning of Article 3 of the directive, as it is sufficient that ENS is an emanation of those railway undertakings, which are by definition in a position to provide traction. Rights of access to the railway infrastructure of the Member States in which the parent undertakings are established are reserved for such groupings. If the Commission's view were accepted, however, it would mean allowing any undertaking to offer international passenger services even without being an emanation of railway undertakings and thus without being in a position to provide traction through them.

168 The applicants add that the creation of this new category of transport operators, in conjunction with the fact that necessary rail services are treated as 'essential facilities', deprives Directive 91/440 of its substance since, in its capacity as 'transport operator', a railway undertaking could claim access to networks in Member States without having to meet the requirements of the directive — being established in those Member States or having formed a grouping with a railway undertaking established in those Member States.

169 The applicants further maintain that, by requiring the railway undertakings to provide locomotives and train crews to transport operators on the same technical and financial terms as they allow to their grouping, the Commission ignored the fact that the right of access to infrastructure is conditional upon being able to provide traction and thus to having the status of a railway undertaking or a grouping of railway undertakings. Such a condition is, moreover, they claim, incompatible with the directive's aim of ensuring that railway undertakings are afforded a status of independent operators behaving in a commercial manner and adapting to market needs (third recital in the preamble) and that they are free for that purpose to 'control the supply and marketing of services and fix the pricing thereof' (Article 5(3) of Directive 91/440).

170 Finally, UIC and NS maintain that the contested decision has the effect of jeopardising the right to establish international groupings inasmuch as the Commission interprets Article 85(1) of the Treaty in such a way that the creation of any international grouping now falls under the prohibition contained therein. Even if the creation of an international grouping may be exempted from that prohibition under Article 85(3), the conditions to which the Commission has subjected the exemption in this case — a duration of only seven years and the obligation to provide any transport operator with the necessary rail services on the same terms as ENS — render the application of Directive 91/440 illusory. The conditions imposed by the Commission indirectly force the participants in international

groupings to supply the 'necessary rail services' to their grouping on an arm's length basis, thus depriving them of their freedom to decide on the commercial conditions under which they provide services to third parties. They might thus be obliged to share the benefits of their cooperation with any given third party without that third party having contributed to the costs of implementing an innovative project or sharing in the resulting commercial risks.

171 The Commission submits that the assertion that the competition provisions of the EC Treaty do not apply to rail transport is inconsistent with the relevant case-law and should be rejected (see Case 167/73 *Commission* v *France* [1974] ECR 359 and Joined Cases 209/84 to 213/84 *Ministère Public* v *Asjes and Others* [1986] ECR 1425).

172 It maintains that in this case the combined participation of all four railway undertakings is not required in order to operate the routes to which the ENS agreements relate. Each route to be served by ENS can actually be served by an international grouping of two railway undertakings established in the Member State of departure and in the Member State of ultimate destination. Thus, the London-Frankfurt/Dortmund route could be served by an international grouping consisting of BR and DB, which have rights of access to infrastructure in their respective Member States of establishment and transit rights in Belgium, France and the Channel Tunnel. Similarly, the service between London and Amsterdam could be operated by an international grouping composed of BR and NS, which have access rights in the United Kingdom and the Netherlands and transit rights in Belgium, France and the Channel Tunnel.

173 That conclusion, in the Commission's view, is corroborated by three facts. In the first place, ENS is not a railway undertaking within the meaning of the directive but a transport operator which, in order to provide the night rail services concerned, must obtain the necessary rail services from railway undertakings. The Commission rejects the applicants' argument that ENS is a mere instrument through which the parent undertakings can offer, within the legal framework introduced by Directive 91/440, international rail services to the public. ENS does

not itself exercise the right conferred by the directive on international groupings of railway undertakings — to run its own trains by providing its own traction — since it needs to purchase those services from its parent undertakings and SNCB. Consequently, ENS falls outside the scope of the directive, since it is in fact merely a variation on the traditional form of cooperation between railway undertakings, and so, contrary to the applicants' assertions, ENS and the railway undertakings concerned do not operate on the same market. The claim that the decision contradicts the directive and extends the category of undertakings entitled to access to railway infrastructure is thus, in the Commission's view, irrelevant. In support of its argument that ENS and its parent undertakings operate on different markets, the Commission refers to the case-law according to which it is sometimes necessary to distinguish two related, albeit distinct, markets (Joined Cases 6/73 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261, Case T-69/89 *RTE* v *Commission* [1991] ECR II-485 and Case T-70/89 *BBC* v *Commission* [1991] ECR II-535).

174 In reply to the applicants' argument that the distinction between the market for transport services and the market for necessary rail services is all the more unjustified in that many transport services are provided by integral trains, of which the locomotive forms an inseparable part, the Commission points out that ENS itself obtains only the locomotive from its parent undertakings, and the coaches separately.

175 In the second place, the Brussels-Glasgow/Plymouth route is offered by ENS even though SNCB is not a party to the agreement, thus demonstrating that the participation of all four railway undertakings established in the Member States concerned is not a *sine qua non* for the operation of the services involved.

176 In the third place, BR, SNCF and Intercontainer have set up the joint venture ACI, specialised in the combined transport of goods between the United Kingdom and the Continent, which again is not a railway undertaking within the meaning of the directive but a transport operator, whose shareholders include only two railway undertakings and which operates in a manner comparable to ENS, that is to say by obtaining the necessary rail services from railway undertakings in order to provide transport services.

177 The Commission further submits that transport operators which do not themselves qualify as railway undertakings and thus do not have the right of access to railway infrastructure must none the less be able to offer railway transport services by purchasing traction services and access to infrastructure from railway undertakings, in the same way as ENS and ACI. Consequently, the right to offer passenger rail services cannot be reserved to ENS; indeed, by letter to the Commission of 13 April 1994 (defence, Annex 6), the chairman of ENS confirmed the agreement of the railway undertakings to provide necessary services to competitors on the same routes. Even before that letter, ENS had informed the Commission by letter of 4 June 1992 of the decision of the notifying parties to provide 'without condition' traction and other necessary services to competitors of ENS operating on routes served by ENS.

178 The Commission further considers that the independence of the railway undertakings is in no way compromised by the condition imposed. Like all Community undertakings, they are subject to the obligation of non-discrimination and the rules on competition law, as is clear from the judgments in *Commission* v *France* and *Ministère Public* v *Asjes and Others*, both cited above.

179 Finally, the Commission rejects the applicants' argument that it regards any international grouping as falling within Article 85(1) of the Treaty and that the conditions it is imposing on the notifying parties are dissuasive and jeopardise the objectives of Directive 91/440 and the creation of other international groupings. It

stresses that the encouragement for the constitution of such groupings does not imply that all international groupings of railway undertakings are automatically deemed to be consistent with Community competition law.

Findings of the Court

180 According to the contested decision, the railway undertakings concerned are present on two markets — an upstream market for the supply of necessary rail services and a downstream market for the provision of passenger services. Operators on the latter market include not only railway undertakings but also a category of undertakings — transport operators — which, however, in order to operate on that market, must first purchase the necessary rail services provided by railway undertakings on the upstream market. ENS, in the Commission's view, is a specific instance of that category of transport operators, and thus any special treatment accorded to ENS by the notifying undertakings should also be accorded to third parties, whether international groupings or transport operators, on the same technical and financial terms. Finally, it is specified in Article 2 of the decision that the necessary services in question consist of the provision of the locomotive, train crew and path on each national network and in the Channel Tunnel.

181 It must therefore be considered whether, by imposing on the parent undertakings the condition that necessary rail services must be provided not only to international groupings but also to transport operators like ENS, the Commission applied the rules on competition in a manner contrary to the regulatory framework set up by Directive 91/440, so that the contested decision is vitiated by misuse of powers or lack of competence, as the applicants contend. In order to answer that question, it must first be determined whether ENS is a transport operator, as claimed by the Commission, or on the contrary an international grouping within the meaning of Directive 91/440, as claimed by the applicants. The latter question must also be

answered in order to consider whether the Commission was correct in its analysis of the restrictions on competition among the parent undertakings as a result of the fact that each of the railway undertakings participating in the ENS agreements could either set up a subsidiary specialising as a transport operator or itself take on the role of transport operator and compete with ENS by buying the same necessary rail services (see paragraphs 147 and 148 above).

182 Under Article 3 of Directive 91/440, an international grouping is defined as 'any association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States'. That provision does not lay down any specific mandatory form for such an association. The essential feature which is clear from that definition is merely that it must be a form of association under which the provision of international transport services is possible. The Court therefore considers that, failing a precise definition in Directive 91/440, use of the term 'international grouping' cannot be confined, as the Commission contends, to 'cooperative associations' among railway undertakings ('traditional joint operation agreements'), to the exclusion of any other form such as a cooperative, or even concentrative, joint venture.

183 That conclusion is not negated by the argument that, by virtue of Article 2 thereof, Directive 91/440 applies only to railway undertakings, that is to say undertakings whose main business is to provide rail transport services for goods and/or passengers and which themselves ensure traction (Article 3 of Directive 91/440), so that ENS, because it has to buy traction from the notifying undertakings, may not rely on the provisions of the directive or claim the status of an international grouping. In the first place, as the Commission has itself stressed in its pleadings, it was specified in a joint declaration by the Council and the Commission made when Directive 91/440 was adopted that the reference to traction did not necessarily imply ownership thereof. Whilst it is true that such declarations have no force in law, the Commission has none the less already incorporated that declaration into its practice when adopting decisions in the field, as may be seen from point 6 of its

Decision 93/174/EEC of 24 February 1993 relating to a proceeding under Article 85 of the EEC Treaty (IV/34.494 — Tariff structures in the combined transport of goods) (OJ 1993 L 73, p. 38), in which it is stated that '"railway undertaking" means any undertaking, established or to be established in a Member State, which has the means to provide rail haulage, the concept of haulage not necessarily implying ownership of the haulage equipment or the use of the undertaking's own workforce'.

184 In the second place, since, as noted above, an international grouping may take the form of a cooperative joint venture, as is the case for ENS, the very nature of such a form means that the parent undertakings may, as railway undertakings exercising the rights conferred on them by the directive, provide their joint venture with the equipment and staff required to perform its role on the market not directly but on the basis of cooperation agreements entered into with it, without thereby affecting that joint venture's legal status as an international grouping within the meaning of Directive 91/440. As the applicants explained in their written answers to the questions put by the Court and at the hearing, without being contradicted by the Commission, the decision to provide ENS with locomotives and train crews on the basis of operating agreements was due solely to tax considerations and not to the fact that ENS was supposed to operate on the market as a transport operator. The fact that ENS is not registered as a railway undertaking in the United Kingdom, as the applicants stated in their answers to the written questions put by the Court, has no effect on its legal status as an international grouping since, as the Commission itself stated at the hearing, the parent undertakings' operating licences are sufficient to enable ENS's trains to run on the routes concerned.

185 In the third place, it appears from the papers before the Court that in the economic context of the rail sector, as the applicants have argued, the activity of transport operator is unknown in the field of passenger services. Nor, moreover, has the Commission provided any instances of such a category of undertakings in that field, either in the contested decision or in its pleadings. Its reference to ACI is not relevant here. That reference ignores the specific features of the market for rail

passenger services, a market quite distinct from that for combined transport of goods, on which ACI does operate as a transport operator. More particularly, on the market for combined transport of goods, railway undertakings do not sell transport services directly to consignors, except in very exceptional cases involving large consignments. Combined transport services are rather arranged and sold to consignors by combined transport operators, which may be subsidiaries of railway undertakings. Such operators are transport undertakings with their own specific equipment — handling equipment and specialised wagons — and, in order to perform those services operators must purchase rail traction and access to infrastructure from railway undertakings, the only parties able to supply them (see the ACI decision, cited above, points 6 to 8, and Commission Decision 94/210/EC of 29 March 1994 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (IV/33.941 — HOV-SVZ/MCN) (OJ 1994 L 104, p. 34, points 10 to 12)).

186 Whilst the rail segment of the market for combined transport of goods is currently to a certain extent an open market, in that railway undertakings are not the only operators on it, the same is not true of the market for rail passenger services, on which the only operators are railway undertakings and, to a certain extent, international groupings of railway undertakings.

187 The Commission cannot, therefore, validly refer to the characteristics of another, separate market — the market for combined transport of goods — to justify categorising ENS as a transport operator.

188 Nor can that conclusion be undermined by the fact that ENS was originally to serve the Brussels-Glasgow/Plymouth route even though SNCB, from which ENS had obtained a right of access to Belgian infrastructure, was not one of its parent companies. As the applicants have submitted, that was the result of a traditional cooperation agreement between railway undertakings. Furthermore, the directive

in no way affects the possibility for ENS, as an international grouping within the meaning of Directive 91/440, to sign such agreements with other railway undertakings in order to obtain a contractual right of access to their infrastructure.

189 It follows from the foregoing, without there being any need to examine whether the Commission was guilty of misuse of powers or whether the decision is vitiated by lack of competence, that the Commission's assessment of ENS's legal status as that of a transport operator is based on false premisses. Moreover, since, as noted above, the activity of transport operator plays no role on the market for rail passenger services as that market actually functions at present, the Commission's analysis regarding restrictions on competition among the parent undertakings deriving from the fact that they could each act on the relevant market as transport operators in competition with ENS and the other parent undertakings (see paragraph 147 above) is also based on the same false premisses and thus cannot be upheld (see paragraph 148 above).

3. *The third plea: the condition imposed in Article 2 of the contested decision is disproportionate and unnecessary*

Arguments of the parties

190 EPS, ENS and SNCF submit that in requiring the notifying parties to supply to other international groupings or transport operators the same necessary rail services as they supply to ENS, the Commission has misapplied the 'essential facilities' doctrine, inasmuch as, with the exception of the provision of train paths, which is required by Directive 91/440 under certain conditions, none of the services supplied to ENS can meet the criteria for the application of that doctrine. NS adds that such an obligation has the effect not merely of undermining the railway undertakings' efforts in setting up international groupings but also of obliging

them to share the benefits of their cooperation with third parties without those third parties having to bear any of the commercial risks involved. In NS's submission, the economic effect of obliging the railway undertakings to make necessary services available to transport operators on terms which they cannot freely decide amounts, moreover, to an expropriation.

191 Furthermore, the applicants argue, the 'essential facilities' doctrine is applicable only under Article 86 of the Treaty, and only in a situation where one undertaking denies rivals access to facilities which are both essential to the rival's competitive capacity and to the existence of competition.

192 In this case, the Commission did not draw a distinction between facilities which are merely advantageous to a competitor and those which are essential for competition. The latter aspect in particular was not examined: whilst possession or control of infrastructure may be regarded as an 'essential facility', access to that infrastructure is nevertheless guaranteed for international groupings by Directive 91/440; nor does the decision contain the slightest evidence that the railway undertakings have exclusive access to the locomotives used for night services through the Channel Tunnel, crews or support staff, or that any actual or potential competitor would face any difficulty in securing them. ENS and EPS state that locomotives designed specifically for or capable of operation through the Channel Tunnel can be acquired from manufacturers or hired from other train operators on an open market. Nor has the Commission addressed the question of the availability of locomotives or train crews, or established the existence of any shortage of trained railway crews. Furthermore, the condition imposed obliges the railway undertakings to supply necessary rail services to international groupings and transport operators on their networks, that is to say outside and beyond the relevant routes.

193 The applicants further submit that the condition imposed is unnecessary. It is irrelevant to the first restriction of competition identified in the decision — of competition among the parties as a result of the formation of the joint venture. Nor is it justified as regards the restriction of competition *vis-à-vis* third parties, deriving from the alleged dominant position enjoyed by ENS's parent undertakings in the provision of rail services in their Member States of origin. None of the railway undertakings has entered into any exclusive relationship with ENS, and they are thus all free to deploy their locomotives, staff and any track over which they may have rights to any other undertaking. Moreover, since the business and leisure travel markets over the relevant routes also include air, coach and car travel, ENS does not occupy a dominant position and any refusal to supply a third party with the services referred to in the decision would thus have no impact on competition on those downstream markets. It is therefore unnecessary for a future provider of passenger services to obtain the rail services in issue in order to be present on the market as defined in the decision. In any event, the Commission has not adduced any evidence from third parties, in particular from actual or potential operators of competing services, to substantiate its assertion that the joint venture might place other operators at a disadvantage. The Commission's concern is thus entirely hypothetical.

194 The Commission points out, first of all, that a similar condition was imposed in the ACI decision — ACI being a joint venture set up between BR, SNCF and Intercontainer for the transport of goods between the United Kingdom and the Continent — against which, it stresses, no action has been brought by the parent undertakings.

195 The Commission further points out that the condition imposed does not require ENS's parent undertakings to supply to third parties all the services which they provide to their joint subsidiary (such as cleaning and marketing services), and in particular that no requirement is imposed on them in respect of rolling stock, the cost of which is regarded by the parent undertakings themselves as the main barrier to entry into the market.

196 It states, moreover, that access to rail infrastructure is at present for the most part controlled by the railway undertakings in their capacity as infrastructure managers and that the need to obtain access to infrastructure constitutes an important barrier to entry to the rail segment of the relevant market. To the extent that infrastructure managers and railway undertakings are distinct undertakings, the obligation imposed on the latter by the condition is not relevant.

197 Although in theory undertakings other than ENS's parent undertakings may have special locomotives and crews and although such locomotives may in theory be purchased or rented by any transport operator, the Commission notes, in reality only ENS's parent undertakings actually have them. It is thus a real and practical impossibility for transport operators to find an alternative. Consequently, it is undeniable that the railway undertakings concerned occupy a dominant position on the essential services market, which, according to the case-law (see the judgments in *Commercial Solvents*, *CBEM*, *RTE* and *BBC*, all cited above) justifies the condition imposed.

198 With regard to the claim that the condition imposed is disproportionate, the Commission states that the fact that the right of access to infrastructure is reserved by the directive for railway undertakings and international groupings of railway undertakings does not mean that other transport operators cannot operate services identical to those offered by ENS. Given that only railway undertakings have access to infrastructure and that new entrants have no independent right under the directive to request train paths from the relevant infrastructure managers, the railway undertakings must supply train paths to such operators in order to allow them access to the market. The condition imposed relates, moreover, only to the rail services necessary for entry to the rail segment of the relevant markets; it is thus not disproportionate and makes it possible to ensure the presence of a number of rail transport operators in order to enhance competition with other modes of transport.

199 The Commission denies, moreover, the assertion that the condition imposed on the railway undertakings concerned obliges them to supply necessary rail services on the whole of their networks, outside the relevant routes. The obligation concerns only access to the markets identified in the contested decision.

200 Finally, the Commission submits that the non-exclusive nature of the agreement between the railway undertakings and ENS is of no significance. Since, under the agreement, the railway undertakings share the risks and fortunes of ENS, it is unlikely that the same railway undertakings would wish to provide services to potential competitors.

201 The United Kingdom, in intervention, submits that the condition imposed could not be regarded as necessary since the Commission had already found at point 65 of the decision that the restrictions on competition were necessary in this case. The justification put forward, concerning the need to ensure the presence on the market of rail transport operators competing with ENS is, moreover, inappropriate since there are no such competing operators. The Commission has thus distorted competition by artificially encouraging operators to enter the market, a step which therefore does not lie within its powers under Article 13 of Regulation No 1017/68.

202 The decision is also vitiated by a failure to state properly and sufficiently the reasons for which the Commission applied the 'essential facilities' doctrine. In any event, the conditions required for that doctrine to be applied are not met. First, since the railway undertakings do not enjoy a dominant position on the markets identified by the Commission in its decision, the rail services in issue cannot be regarded as essential for competitors to enter those markets. The justification of the condition imposed based on a segmentation of the relevant markets demonstrates the Commission's defective reasoning, which is inconsistent in that regard with the market analysis set out in the decision. Second, by stating in the decision

that the parties to the ENS agreements must provide the 'necessary rail services' to new entrants if those entrants are not able themselves to supply them, the Commission implies that the railway undertakings may not have sole control of facilities the access to which is regarded as essential, and the condition imposed is thus unjustified on the facts.

203 In reply to the United Kingdom, the Commission states that a finding that an agreement setting up a joint venture entails restrictions on competition which are regarded as necessary does not mean that all the restrictions are indispensable. The condition imposed was specifically intended to ensure that the restrictions on competition remain within what is indispensable. Furthermore, the condition imposed reflects a concern distinct from the 'essential facilities' doctrine, seeking in this case to ensure that the conditions for exemption required by Article 85(3) of the Treaty and by Article 5 of Regulation No 1017/68 are satisfied.

204 Finally, the Commission submits that, in a composite market such as that defined in the decision, a barrier to access need not necessarily be erected in respect of all its segments. If such an approach were followed in the case of the predominance of one mode of transport within a multimodal market, only barriers to third-party entry to that mode of transport would be caught by Article 85 of the Treaty, leaving the other modes outside the ambit of competition law.

Findings of the Court

205 According to point 79 of the contested decision, the aim of the condition imposed in Article 2 of that decision is that of 'preventing the restrictions of competition from going beyond what is indispensable'.

206 However, as the Court has concluded from its examination of the first and second pleas in law, the Commission must be regarded as not having made a correct and adequate assessment in the contested decision of the economic and legal context in which the ENS agreements were concluded. It has thus not been demonstrated that those agreements restrict competition within the meaning of Article 85(1) of the Treaty and that they therefore need to be exempted under Article 85(3). Consequently, since the contested decision did not contain the relevant analytical data concerning the structure and operation of the market on which ENS operates, the degree of competition prevailing on that market or, therefore, the nature and extent of the alleged restrictions on competition, the Commission was not in a position to assess whether the condition imposed by Article 2 of the contested decision was or was not indispensable for the purpose of granting a possible exemption under Article 85(3) of the Treaty.

207 However, even if the Commission had made an adequate and correct assessment of the restrictions of competition in question, it would be necessary to consider whether it was a proper application of Article 85(3) to impose on the notifying parties the condition that train paths, locomotives and crews must be supplied to third parties on the same terms as to ENS, on the ground that they are necessary or that they constitute essential facilities, as discussed by the parties in their pleadings and at the hearing.

208 In that regard, it follows from the case-law on the application of Article 86 of the Treaty that a product or service cannot be considered necessary or essential unless there is no real or potential substitute (Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraphs 53 and 54, and Case T-504/93 *Tiercé Ladbroke* v *Commission* [1997] ECR II-923, paragraph 131).

209 Consequently, with regard to an agreement such as that in the present case, setting up a joint venture, which falls within Article 85(1) of the Treaty, the Court considers that neither the parent undertakings nor the joint venture thus set up may be regarded as being in possession of infrastructure, products or services which are

'necessary' or 'essential' for entry to the relevant market unless such infrastructure, products or services are not 'interchangeable' and unless, by reason of their special characteristics — in particular the prohibitive cost of and/or time reasonably required for reproducing them — there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market.

210 The question whether the Commission could validly regard the supply of (a) train paths, (b) locomotives and (c) crews to ENS by its parent undertakings as necessary or essential services which had to be made available to third parties on the same terms as to ENS and whether, in so doing, it provided a valid statement of reasons for its decision must be examined in the light of the above considerations and by analogy with the case-law cited in paragraph 208 above. Finally, that examination will also serve as the basis for determining whether the Commission made a correct analysis of the alleged restrictions of competition with regard to third parties arising out of the special relationship between the parent undertakings and ENS (see paragraph 151 above).

211 With regard, first, to train paths, whilst it is true that Article 2 of the contested decision requires the notifying undertakings to 'supply [train paths] to any international grouping of railway undertakings', it has none the less been held that the operative part of a decision must be read in the light of the terms of its preamble, which provide its basis — in the present case, point 81 of the contested decision. Point 81 states that the notifying undertakings 'should not ... be required to provide a path if the applicant is a grouping of railway undertakings within the meaning of Article 10 of Directive 91/440/EEC, so that it would be able to request a path itself from the infrastructure managers'. That obligation is thus imposed by the contested decision only in cases where the third party is not an international grouping but, as the Commission contends, a transport operator such as ENS. However, as has been held above, ENS is not a transport operator but an international grouping within the meaning of Directive 91/440. Moreover, transport operators as a category play no role on the market for rail passenger services as that market actually functions at present. Consequently, there are no grounds for

the condition imposed in so far as it seeks to oblige those parent undertakings already in possession of train paths to supply paths to third parties operating on the market as transport operators, since it is based on false premisses.

212 With regard, second, to the supply of locomotives, as pointed out above, locomotives cannot be regarded as necessary or essential facilities unless they are essential for ENS's competitors, in the sense that without them they would be unable either to penetrate the relevant market or to continue operating on it. However, since the decision defined the relevant market as the market for the transport of business travellers and the market for the transport of leisure travellers, both of which are intermodal, and since ENS's market share does not exceed 7% to 8% according to the Commission, or 5% according to the notification of the parties, on either of those intermodal markets, it cannot be accepted that a possible refusal by the notifying undertakings to supply ENS's competitors with special locomotives for the Channel Tunnel could have the effect of excluding such competitors from the relevant market as thus defined. It has not been demonstrated that an undertaking having such a small market share can be in a position to exert any influence whatever on the functioning or structure of the market in question.

213 Only if the market under consideration were the completely different, intramodal, market for business and leisure travel by rail, on which the railway undertakings currently hold a dominant position, could a refusal to supply locomotives possibly have an effect on competition. However, it was not that intramodal market which was finally considered relevant by the Commission, but the intermodal market (see points 17 to 27 of the contested decision). The first time that the Commission referred to the intramodal market for rail services as a segment of the intermodal market for business and leisure travel, in justification of the obligation imposed on the notifying undertakings to supply locomotives to ENS's competitors, was during the written procedure before the Court. Whilst it cannot be denied that the effects of an agreement may be analysed both with regard to a principal market and with regard to a segment thereof, both the distinction between the principal

market and its segment or segments and the reasons for drawing such a distinction must nevertheless be stated clearly and unambiguously in any decision applying Article 85(1) of the Treaty, which is not the case here.

214 Even if it may be assumed that the Commission's explanations given in that regard in its pleadings do not in fact involve a redefinition of the relevant market as defined in points 17 to 27 of the contested decision but seek, rather, to provide further clarification of that definition, its assessment is still vitiated by a failure to state the reasons on which it is based.

215 As the applicants have argued, the contested decision does not contain any analysis demonstrating that the locomotives in question are necessary or essential. More specifically, it is not possible to conclude from reading the contested decision that third parties cannot obtain them either directly from manufacturers or indirectly by renting them from other undertakings. Nor has any correspondence between the Commission and third parties, demonstrating that the locomotives in question cannot be obtained on the market, been produced before the Court. As the applicants have stated, any undertaking wishing to operate the same rail services as ENS through the Channel Tunnel may freely purchase or rent the locomotives in question on the market. It is clear, moreover, from the papers before the Court that the contracts for the supply of locomotives entered into between the notifying undertakings and ENS do not involve any exclusivity in favour of ENS, and that each of the notifying undertakings is thus free to supply the same locomotives to third parties and not only to ENS.

216 It must further be pointed out in that regard that the Commission has not denied that third parties may freely purchase or rent the locomotives in question on the market; it has merely asserted that the possibility is in fact purely theoretical and that only the notifying undertakings actually possess such locomotives. That

argument cannot, however, be accepted. The fact that the notifying undertakings have been the first to acquire the locomotives in question on the market does not mean that they are alone in being able to do so.

217 Consequently, the Commission's assessment of the necessary or essential nature of the special locomotives designed for the Channel Tunnel and, thus, the obligation imposed on the parent undertakings to supply such locomotives to third parties are vitiated by an absence or, at the very least, an insufficiency of reasoning.

218 For the same reasons, the obligation imposed on the parent undertakings also to supply train crews for special locomotives for the Channel Tunnel to third parties is similarly vitiated by an absence or an insufficiency of reasoning.

219 Consequently, the contested decision is vitiated by an absence or, at the very least, an insufficiency of reasoning in so far as it requires the applicants to supply to third parties in competition with ENS the same 'necessary services' as it supplies to ENS.

220 It further follows from the foregoing that the Commission's analysis of the restrictions of competition *vis-à-vis* third parties as a result of the special relationship between ENS and its parent companies is also unfounded (see paragraphs 150 and 151 above). Since, as demonstrated above, ENS is not a transport operator, the market for rail services can in fact be split into only two service markets: an integrated market for passenger services on which only railway undertakings and international groupings of railway undertakings operate, and a market for access to and management of railway infrastructure, controlled by infrastructure managers within the meaning of Directive 91/440 (see paragraphs 1 to 6, under 'Legal background', above). It must be added that the argument raised by the Commission at the hearing that, according to paragraph 55 of the judgment of the Court of First Instance of 21 October 1997 in Case T-229/94 *Deutsche Bahn* v *Commission*

[1997] ECR II-1689, the rail services market constitutes a sub-market distinct from the rail transport market in general is unfounded, since the Court's finding in that case related solely to the rail transport market in relation to combined transport of goods. Restrictions of competition with regard to third parties should therefore have been analysed on the two markets mentioned above.

221 As regards, first, access to infrastructure (train paths), it is true that access for third parties may in principle be hindered when it is controlled by competitors; nevertheless, the obligation of railway undertakings which are also infrastructure managers to grant such access on fair and non-discriminatory terms to international groupings competing with ENS is explicitly provided for and guaranteed by Directive 91/440. The ENS agreements therefore cannot, by definition, impede access to infrastructure by third parties. As regards the supply to ENS of special locomotives and crew for the Channel Tunnel, the mere fact of its benefiting from such a service could impede access by third parties to the downstream market only if such locomotives and crew were to be regarded as essential facilities. Since, for the reasons set out above (see paragraphs 210 to 215), they cannot be categorised as such, the fact that they are to be supplied to ENS under the operating agreements for night rail services cannot be regarded as restricting competition *vis-à-vis* third parties. That aspect of the Commission's analysis of restrictions of competition *vis-à-vis* third parties is therefore also unfounded (see paragraphs 150 and 151 above).

4. *The fourth plea: insufficient duration of the exemption granted*

Arguments of the parties

222 The applicants emphasise that the ENS agreements relate to a major long-term investment and that the return on the project is dependent on the securing of advantageous 20-year financing for the purchase of the specialised rolling stock, so that the limitation of the exemption to eight years is inadequate. The reference in

the decision to the period considered necessary by certain railway undertakings to ensure the viability of another agreement, concerning the combined transport of goods through the Channel Tunnel, is irrelevant since it relates to a joint venture operating in a different sector from ENS and in which none of the notifying parties participate.

223 As regards the justification in point 73 of the decision, to the effect that the duration of the exemption will depend, *inter alia*, on the period for which it can reasonably be supposed that market conditions will remain substantially the same, the applicants consider that the Commission has provided no evidence of any such foreseeable changes at the end of the period of exemption, whereas the financial risks are exacerbated by the relatively short duration of the exemption.

224 The applicants add that the Commission's practice in taking decisions has always been to consider that joint ventures requiring substantial long-term investments and seeking to develop a new product necessarily require a long lead time to ensure a return on capital. They consider that it is wrong to assert in the decision that the joint acquisition of the equipment can be distinguished from its commercial use, since the rolling stock used by ENS can only be used on the routes between the United Kingdom and the Continent. For all those reasons, the applicants conclude that the contested decision is vitiated by a manifest error of assessment and/or by absence or insufficiency of reasoning.

225 The Commission states that the duration of an exemption must be determined in relation to the market conditions at the time when the decision is made, account being taken of the reasonably foreseeable alterations on the relevant market in the

future. In the present case, it considers, the duration fixed for the exemption — ten years from the notification and eight years from the date on which the decision was adopted — allows reconciliation of realistic economic projections with the needs of legal certainty for undertakings. According to the notification of the agreements, the financial projections of the railway undertakings concerned suggest that the night services provided by ENS would generate sufficient revenue to cover expenses by the fourth year of operation (notification, p. 35, paragraph II.4. e.1.4, Annex 1 to the defence). In the Commission's view, the fact that the financing of the acquisition of the rolling stock extends over a period of 20 years does not justify granting a longer exemption, since a distinction can be made between the joint investment in equipment and the commercial use to which it is put.

226 In any event, the Commission adds, the exemption can be renewed more than once under Article 13(2) of Regulation No 1017/68 if the circumstances so justify, and renewal is in practice granted where the market conditions have not substantially changed. If substantial changes were to take place, the Commission could still renew its decision by attaching conditions differing from those in the previous decision.

227 The United Kingdom, in intervention, contends that the condition imposed on the railway undertakings and the duration of the exemption alter the financial basis on which the parties to the ENS agreements undertook to provide the new rail services in question. The scale of the investment made by the parties should have been an essential factor in determining the duration of the exemption. By not taking that into account, the decision is inconsistent with the policy of encouraging private-sector involvement in the development of trans-European networks.

228 In reply, the Commission states that the duration of the exemption granted is both adequate and justified and that, contrary to the United Kingdom's contention, the decision is consistent with its policy on the role of the private sector in the development of trans-European networks.

Findings of the Court

229 As the Court has concluded from its examination of the first and second pleas in law, the Commission must be regarded as not having made a correct and adequate assessment in the contested decision of the economic and legal context in which the ENS agreements were concluded. It has thus not been demonstrated that those agreements restrict competition within the meaning of Article 85(1) of the Treaty and that they therefore need to be exempted under Article 85(3). Consequently, the Commission was not in a position to assess the appropriate duration for any exemption to be granted under that provision.

230 However, even if it is assumed that the Commission's assessment of the restrictions on competition in the contested decision was adequate and correct, the Court considers that the duration of an exemption granted under Article 85(3) of the Treaty — or, as here, Article 5 of Regulation No 1017/68 — and Article 53(3) of the EEA Agreement must be sufficient to enable the beneficiaries to achieve the benefits justifying such exemption, namely, in the present case, the contribution to economic progress and the benefits to consumers provided by the introduction of new high-quality transport services, as stated in points 59 to 61 of the contested decision. Since, moreover, such progress and benefits cannot be achieved without considerable investment, the length of time required to ensure a proper return on that investment is necessarily an essential factor to be taken into account when determining the duration of an exemption, particularly in a case such as the present, where it is undisputed that the services in question are completely new, involve major investments and substantial financial risks and require the pooling of know-how by the participating undertakings (see points 63, 64 and 75 of the decision).

231 The consideration set out in point 73 of the decision, that 'the duration of the exemption will therefore depend inter alia on the period for which it can reason-

ably be supposed that market conditions will remain substantially the same', cannot, therefore, be regarded as decisive, on its own, for determining the duration of the exemption, without also taking account of the length of time necessary to enable the parties to achieve a satisfactory return on their investment.

232 However, the contested decision does not contain any detailed assessment of the length of time required to achieve a return on the investments in question under conditions of legal certainty, in the light, in particular, of the fact that the parties have entered into financial commitments covering a period of 20 years for the purchase of the special rolling stock. The Commission's statement at point 76 of the decision that, in connection with the combined transport of goods, some railways had informed it that a period of five years was needed in order to set up the new services and ensure their viability is irrelevant since it concerns a joint venture operating, as noted above (see paragraphs 185 to 187) on a different market from that on which ENS operates.

233 As regards the Commission's conclusion at point 75 of the contested decision, that the scale of investment cannot be allowed to become a decisive factor in determining the duration of the exemption because there is no necessary link between the joint acquisition of 'plant and machinery' and the commercial use to which it is to be put, it must be held that there is nothing in the decision to explain why there is 'no necessary link' between the acquisition and the use of such equipment, given that the rolling stock in question was acquired, and the financial commitments relating thereto were entered into, exclusively in the context of the agreements notified. In any event, the Commission has not challenged the applicants' assertion that other possibilities for the use of the rolling stock in question are extremely limited.

234 Consequently, the Commission's decision to limit the duration of the exemption granted for the ENS agreements is in any event vitiated by an absence of reasoning.

235 In the light of the foregoing, the applicants' fourth plea in law must be held to be well founded.

236 It follows from all the foregoing, without there being any need to examine the plea in law alleging infringement of Article 3 of Regulation No 1017/68, put forward by SNCF in Case T-384/94, that the contested decision must be annulled.

Costs

237 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants have applied for costs, the Commission must be ordered to pay the costs, including those incurred by SNCF as intervener in cases T-374/94 and T-384/94.

238 Under Article 87(4) of the Rules of Procedure of the Court of First Instance, the United Kingdom must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Commission Decision 94/663/EC of 21 September 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.600 — Night Services);**

2. **Orders the Commission to pay the costs;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland, as intervener, to bear its own costs.**

Kalogeropoulos Bellamy Pirrung

Delivered in open court in Luxembourg on 15 September 1998.

H. Jung A. Kalogeropoulos

Registrar President