JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
22 October 1996 *

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

Société Nationale des Chemins de Fer Français, a public undertaking governed by French law established in Paris, represented by Barbara Rapp-Jung and Nathalie Flandin, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Victor Elvinger, 31 Rue d'Eich,

applicant in Case T-79/95,

and

British Railways Board, a company governed by English law established in London, represented by Thomas Sharpe QC, of the Bar of England and Wales, instructed by Alexandre R. M. Nourry, Solicitor, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

applicant in Case T-80/95,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Lindsey Nicoll and Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agents, assisted by K. P. E. Lasok, Barrister of Gray's Inn, and Kenneth Parker QC, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

* Languages of the cases: English and French.

and

Channel Tunnel Group Ltd, a company governed by English law established in London,

France Manche SA, a company governed by French law established in Paris,

together constituting

Eurotunnel, a joint-venture company whose head office is in London,

represented by Christine Héron Schwaighofer and Christian Roth, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

British Railways Board being supported also by

European Passenger Services Ltd, a company governed by English law established in London, represented by Thomas Sharpe QC, of the Bar of England and Wales, instructed by Alexandre R. M. Nourry, Solicitor, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

interveners,

v

Commission of the European Communities, represented by Francisco Enrique González Díaz and Carmel O'Reilly, of its Legal Service, and Guy Charrier, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATIONS for the annulment of Commission Decision 94/894/EC of 13 December 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/32.490 — Eurotunnel) (OJ 1994 L 354, p. 66) and, in the alternative, for the annulment of the conditions laid down in Article 2(A) of that decision,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: C. P. Briët, President, B. Vesterdorf, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 25 June 1996,

gives the following

Judgment

Facts

1 By a treaty signed on 12 February 1986, the French Republic and the United Kingdom agreed to authorize the construction and operation by private concessionaires of a rail link beneath the English Channel (hereinafter 'the fixed link' or 'the tunnel') between Fréthun in the Pas-de-Calais and Cheriton in Kent.

2 By an agreement signed on 14 March 1986 with the UK Secretary of State for Transport and the French Minister for Town Planning, Housing and Transport, the two companies Channel Tunnel Group and France Manche obtained the concession to build and operate the tunnel. For that purpose, they established a joint-venture company under the name of 'Eurotunnel'. The concession was originally for 55 years but was extended to 65 years in 1994.

3 Annex I to the concession agreement lays down the operating conditions for a shuttle service between Fréthun and Cheriton. Channel Tunnel Group and France Manche (hereinafter 'Eurotunnel'), as the concessionaires, are required to guarantee the minimum shuttle frequency laid down by the agreement (Clause A. I.32 of the agreement). In addition, the provisions in Annex I indicate that the tunnel will also be used to allow the passage of international trains belonging to railway undertakings other than Eurotunnel between places in the United Kingdom and places on the Continent (hereinafter 'international trains').

4 On 29 July 1987 Eurotunnel and the applicants entered into an agreement concerning the use of the fixed link (hereinafter 'the usage contract'), which was entered into in the context and for the duration of the concession obtained by Eurotunnel.

5 Clause 6.2 thereof states that the applicants are 'at all times during the term of [the usage contract] ... entitled to fifty per cent (50%) of the capacity, per hour in each direction, of the fixed link ... unless ... they agree to surrender part of their entitlement, such agreement not to be unreasonably withheld'. The remaining capacity, measured in standard hourly paths, remains available to Eurotunnel, the infrastructure manager. In consideration of the use of the fixed link, the applicants are to pay to Eurotunnel charges comprising a fixed element and a variable, decreasing, element calculated by reference to actual traffic. During the first twelve years the charges may not be lower than a certain threshold. Pursuant to Clause 10 of the contract the applicants are also to reimburse Eurotunnel a portion of the costs of operating the fixed link, as set out in Schedule V. They undertake in addition to make substantial investment in order to organize their respective railway

infrastructures according as required by usage of the tunnel and to have available special rolling stock suitable for such use.

6 On 2 November 1987 Eurotunnel, in agreement with the applicants, notified the usage contract to the Commission with a view to obtaining a declaration of the non-applicability of the prohibition laid down in Article 2 of Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterways (OJ, English Special Edition 1968 (I), p. 302). The Commission published a summary of the notification in the *Official Journal of the European Communities* on 16 November 1988 (OJ 1988 C 292, p. 2), in accordance with Article 12(2) of Regulation No 1017/68. It decided to allow the 90-day period provided for in Article 12(3) of the regulation to expire without raising any serious doubts, thereby granting an exemption for three years from the date of publication of the summary of the notification.

7 By letter of 25 January 1989 Eurotunnel requested the Commission to adopt a formal decision granting exemption for a period equal to the duration of the usage contract. The Commission published a summary of that request in the Official Journal of 17 July 1990 (OJ 1990 C 176, p. 2), in accordance with Article 26(3) of Regulation No 1017/68.

8 On 20 September 1991 Eurotunnel sent the Commission a memorandum explaining that the terms of the usage contract were compatible with Article 2 of Regulation No 1017/68.

9 By letter of 28 February 1994 the Commission requested the Société Nationale des Chemins de Fer Français ('SNCF') to communicate to it 'forecasts for passenger and freight traffic between the United Kingdom and the Continent during the first

twelve years of the tunnel's operation' and 'the number of hourly paths, by times of day, which [the applicants] expect to use in catering for that traffic'. By letter of 29 March 1994 SNCF replied that 'looking twelve years ahead, and subject to the natural limitations of forecasts of this kind, the capacity necessary to carry the whole of that traffic represents on average approximately 75% of the capacity reserved for [the applicants] by the usage contract with Eurotunnel. That figure takes account of the varying speeds of the various types of train in the tunnel. The average figure of 75% may moreover be subject to variation either way, depending on the time of day, without it being possible to be more explicit at present, given the uncertainties as to demand.'

10 By letter of 2 May 1994 the Commission sent the applicants a draft of a new notice it was preparing to publish in the Official Journal concerning the possible exemption of the usage contract. SNCF made observations on that draft notice by letters of 19 May and 13 June 1994. British Railways Board ('BR') did so by letter of 14 June 1994.

11 In the Official Journal of 30 July 1994 (OJ 1994 C 210, p. 15), the Commission published a notice pursuant to Article 19(3) of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and Article 26(3) of Regulation No 1017/68. In that notice (paragraph 19), the Commission explained that operating conditions in the rail transport sector had been significantly altered by the adoption of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25). The notice went on to point out (paragraph 21) that the usage contract comprised two different aspects: a sharing of

infrastructure capacity, covered by Regulation No 17, and a sharing of the transport market, covered by Regulation No 1017/68. It referred (paragraph 24) to a 20% reduction in the hourly paths attributed to the applicants to enable the usage contract to qualify for exemption under Article 85(3) of the EC Treaty.

12 The directive referred to in the Commission's notice made two innovations with a view to improving the efficiency and competitiveness of the Community rail network. First, it provided for accounting separation between the operation of transport services and the management of infrastructure (Article 6). Secondly, it opened the railway sector to a certain extent to the freedom to provide services. In particular, Article 10 established, with effect from 1 January 1993, and subject to certain conditions, a right of access to railway infrastructure in the Community. Subsequently, the Council went on to adopt Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees (OJ 1995 L 143, p. 75).

13 By letters of 11 and 14 October 1994 the Commission informed SNCF and BR that it was proposing to reduce the capacity allocated to the applicants by 25% rather than 20%, following comments it had received from ten interested third parties. The applicants commented on that proposal by letters dated 19 October 1994.

The contested decision

14 The Commission adopted the contested decision on 13 December 1994. It is based (paragraph 49) on Regulation No 1017/68 in so far as the contract deals with transport services, and on Regulation No 17 in so far as it deals with the provision of infrastructure.

15 The decision identifies the relevant markets (paragraphs 51 to 67) as:

— on the one hand, the market in providing hourly paths for rail transport in the tunnel, as an essential facility for railway undertakings wishing to provide transport services between the United Kingdom and the Continent, the market being geographically confined to the tunnel and its access areas;

— on the other hand, a number of markets in the international transport of passengers and freight between the United Kingdom and the Continent.

16 It goes on to refer (paragraphs 69 to 84) to two restrictions on competition arising from the contract.

17 On the transport markets, the contract provides for a division of the markets between Eurotunnel, which concentrates on the operation of shuttles, and the applicants, which operate international trains carrying passengers and freight. Since each party could legally operate services reserved for the other, that division of the market restricts competition between Eurotunnel and the applicants.

18 On the market in the provision of hourly paths for rail transport in the Channel Tunnel, the contract provides that the applicants are at all times entitled to 50% of the capacity of the tunnel. Since under the terms of the contract half the tunnel capacity is reserved for shuttle services and the other half for international passenger and freight trains, the applicants are in fact entitled to 100% of the hourly paths available for that latter category of transport. Accordingly, other railway undertakings cannot obtain from the infrastructure managers the hourly paths

necessary to operate international passenger or freight trains in competition with the applicants.

19 The decision declares that Article 85(1) of the Treaty, Article 2 of Regulation No 1017/68 and Article 53(1) of the EEA Agreement do not apply to the contract for a period of 30 years beginning on 16 November 1991. Since the Commission considers that the reservation for the applicants of all the hourly paths available for international trains is not essential to them for the provision of their transport services and to contribute to the success of the project (paragraph 102), it has made the exemptions subject to conditions and obligations.

20 The conditions (hereinafter 'the disputed conditions') are set out in Article 2(A) of the contested decision:

'(a) In accordance with Clause 6.2 of the usage contract, BR and SNCF must not withhold their agreement to the sale by the managers of the infrastructure to other railway undertakings of the hourly paths necessary to operate international passenger and freight services.

(b) However, BR and SNCF must have available the hourly paths necessary to provide an appropriate level of services during the period up to 31 December 2006, that is up to 75% of the hourly capacity of the tunnel in each direction which is reserved for international passenger and freight trains, in order to operate their own services and those of their subsidiaries.

(c) Over the same period the other railway undertakings and groupings of undertakings shall have available at least 25% of the hourly capacity of the tunnel in each direction in order to run international passenger and freight trains.

(d) The conditions set out in (b) and (c) shall not prevent BR and SNCF, during that period, from using more than 75% of the hourly capacity if the other railway undertakings do not use the 25% of capacity remaining.

(e) The conditions set out in (b) and (c) shall similarly not prevent railway undertakings other than BR and SNCF from using, during that period, more than 25% of the hourly capacity if BR and SNCF do not use the 75% of capacity which is reserved to them.

(f) Such adjustments shall in no way restrict the right of BR and SNCF to use up to 75% of the hourly paths reserved for international trains during that period if the need arises, nor the rights of the other railway undertakings to use up to 25% of that capacity.

(g) The proportion of paths reserved to BR and SNCF will be re-examined by the Commission before 31 December 2006.'

Procedure and forms of order sought

21 SNCF and BR brought these actions by applications lodged at the Registry of the Court of First Instance on 7 and 8 March 1995 respectively.

22 They each made an application for suspension of the operation of Article 2(A) of the contested decision pursuant to Articles 185 and 186 of the Treaty. By order of the President of the Court of First Instance of 12 May 1995 (Joined Cases T-79/95 R and T-80/95 R *SNCF and British Railways* v *Commission* [1995] ECR II-1433), those applications were dismissed and costs were reserved.

23 By applications lodged at the Registry on 31 July 1995 and 18 August 1995 the United Kingdom and Eurotunnel respectively applied to intervene in both cases in support of the applicants. European Passenger Services Ltd (hereinafter 'EPS') applied on 18 August 1995 for leave to intervene in support of the applicant in Case T-80/95. The applicants requested confidential treatment vis-à-vis Eurotunnel for a number of documents in the application. The applications to intervene and the requests for confidential treatment were granted by orders of the Court of First Instance (Third Chamber, Extended Composition) of 18 December 1995.

24 The applicants, the United Kingdom and EPS claim that the Court should:

— annul the Commission's decision;

— in the alternative, annul the decision in so far as it is accompanied by conditions (Article 2(A));

— order the Commission to pay the costs.

25 Eurotunnel claims that the Court should annul the Commission's decision of 13 December 1994 concerning Eurotunnel (IV/32.490).

26 The Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

27 Upon hearing the report of the Judge-Rapporteur the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory enquiry. However, it requested the parties to provide replies to certain written questions in advance of the hearing, which they did within the time allowed.

28 The parties submitted oral argument and their replies to the oral questions put by the Court of First Instance at the hearing on 25 June 1996.

29 After hearing the views of the parties on the subject at the hearing, the Court of First Instance (Third Chamber, Extended Composition) decided to join the cases for the purposes of the judgment.

Substance

Preliminary observations

30 The applicants rely on six identical pleas in support of the application for the annulment of the decision or, in the alternative, of the disputed conditions. These are, first, misinterpretation of the scope of Regulation No 1017/68; second, breach of Article 85(1) of the Treaty, Article 2 of Regulation No 1017/68 and Article 53(1) of the EEA Agreement; third, breach of Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement; fourth, misuse of powers; fifth, infringement of the rights of the defence; and sixth, breach of Article

190 of the Treaty. SNCF also alleges breach of Article 8(3) of Regulation No 17 and Article 13(3) of Regulation No 1017/68 as regards the withdrawal of an exemption. Finally, Eurotunnel questions in its intervention the Commission's power to adopt the contested decision.

31 The Court notes that in the second and third pleas the applicants first allege that the Commission's legal reasoning was based on an error of fact, vitiating not only the assessment of the way in which the contract would restrict competition, but also the examination of that contract in the light of Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement.

32 It is therefore necessary to consider first of all whether the second and third pleas are well founded in so far as they allege error of fact.

The alleged error of fact

Summary of the arguments of the parties

33 The applicants argue that the Commission's conclusion, in paragraph 84 of the contested decision, that the contract 'has as its object and effect the restriction of competition on the market in the provision of hourly paths for rail transport in the tunnel and on the transport markets' is based on the consideration that 'half of the capacity of the tunnel is reserved for shuttle services and the other half for international passenger and freight trains' (paragraph 81) and that therefore the applicants have 100% of the hourly paths available for the latter category of transport

(paragraph 82). Supported by all the interveners, they insist that there is nothing in the contract which reserves half of the tunnel's capacity to Eurotunnel for shuttles and the remainder to the applicants for the operation of international passenger and freight trains.

34 The Commission relied almost exclusively on a single statement appearing in the notification (point III.1. c(ii)) in order to conclude that it would be impossible for other railway undertakings to obtain tunnel paths for international trains. Moreover, the Commission made no mention of the statements made subsequently by Eurotunnel in its memorandum of 20 September 1991 (see paragraph 8, above) contradicting the Commission's interpretation of the contract. Thus paragraph 3.1.3 of the memorandum states that 'Eurotunnel has no interest in favouring one means of transport above the other since they cater for different needs. In fact, the repartition of capacity will, in the future, be decided by the demand of the users'.

35 Eurotunnel could make the tunnel available to other railway undertakings by turning over to them part of its own capacity. As manager of the infrastructure Eurotunnel is responsible for allowing access to the tunnel by other railways on request. As there is no obligation for Eurotunnel to assign its 50% of capacity to shuttle services, it would be entirely consistent with the general scheme of the contract to allow other undertakings to apply for access to the tunnel.

36 In its statements in intervention (paragraph 4 and paragraphs 80 to 86), and at the hearing, Eurotunnel also stated that there was nothing in the contract which provided that the 50% of capacity not allocated to the applicants must be reserved for

shuttle services. Therefore, the contract did not prevent Eurotunnel from making part of its own capacity available to third parties for the operation of international trains. On the whole, the tunnel offered sufficient physical capacity to satisfy any demand from third parties. Legally, third parties were entitled under Directives 91/440 and 95/19 in any event to gain access to infrastructures in the Member States.

37 The applicants consider that the Commission's conclusion that they were entitled to 100% of the hourly paths available for international trains, thereby excluding third parties from obtaining the hourly paths necessary for that transport category, was an error of fact which led the Commission to accompany the decision to exempt with conditions described by them as superfluous and disproportionate.

38 The Commission does not accept the arguments put forward by the applicants and the interveners and relies on a number of documents, some of which, it claims, indicate that the applicants and Eurotunnel split the market — a point which is not discussed in the context of this plea — whilst others indicate that tunnel capacity was shared equally between the shuttle services and international trains. As regards the alleged sharing of tunnel capacity the Commission makes particular reference to point III.1. c(ii) of the notification.

39 It also refers to points 3.1.1 and 3.1.2 of the memorandum of 20 September 1991 (see paragraph 8, above), which read as follows:

'3.1.1 Since the capacity of the tunnel is necessarily limited, the capacity had to be divided between the two means of transport. According to the present repartition, neither the trains nor the shuttles may use more than 50%.

3.1.2 The 50/50 repartition was not established once and for all. If the experience shows that there is a great demand for one of the means of transport, its share of the capacity can be increased; see Article 6.2(1) of the contract.'

40 In the light of those sources the Commission considers that under the contract the half of the tunnel capacity not allocated to the applicants must be used for shuttles. Since the other half must be used for international trains and all the capacity for international trains is reserved for the applicants, other undertakings wishing to run international trains through the tunnel will be unable to obtain the necessary hourly paths.

41 It adds that even if the agreement did not so split the transport markets, so that other railway undertakings may still use Eurotunnel paths for international trains, the clause reserving 50% of tunnel capacity for the applicants for 65 years restricts competition in any event.

Findings of the Court

42 In the contested decision (paragraphs 73 to 79) the Commission first stated that there was a division of the transport market between Eurotunnel and the applicants, which undertook to concentrate on the market in shuttles and the market in international trains respectively. It found (paragraphs 86 to 103) that those restrictions on competition on the transport market met the four conditions necessary for obtaining exemption under Article 85(3) of the Treaty.

43 Next (in paragraphs 80 to 84 and 101 to 103) it found that in the so-called market in the provision of hourly paths for rail transport in the tunnel there were restrictions on competition which were not themselves eligible for exemption under Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement.

44 The way in which it evaluated the restriction of competition on that market resulting from the reservation to the applicants of 50% of the capacity is to be found in paragraphs 81 to 83 of the contested decision:

'(81) [...] the terms of the contract show that half of the capacity of the tunnel is reserved for shuttle services and the other half for international passenger and freight trains.

(82) Furthermore, BR and SNCF are at all times entitled to 50% of the capacity of the tunnel to operate international trains or actually 100% of the hourly paths available for that category of transport unless they surrender part of their entitlement. Under the terms of the contract, BR and SNCF do not undertake to buy 50% of the capacity of the tunnel but the managers of the infrastructure undertake to sell that capacity if the need arises.

(83) Accordingly, other railway undertakings cannot obtain from the managers of the infrastructure the hourly paths necessary to operate international trains carrying passengers or freight in competition with BR and SNCF.'

45 It is common ground that under Clause 6.2(i) of the contract the applicants are entitled to 50% of the tunnel capacity for the duration of the contract.

46 However, the applicants and Eurotunnel challenge the factual premisses set out in paragraphs 81 and 82 of the decision on which the Commission based its assessment of the availability of tunnel capacity to other railway undertakings.

47 Thus all the parties to the contract have argued before the Court that, contrary to the statement in paragraph 81 of the decision, the contract nowhere provides for half of the tunnel capacity to be reserved for shuttles. As for the conclusion in paragraph 82, to the effect that the applicants are entitled to 100% of the hourly paths for international trains, that, too, is incorrect: Eurotunnel has expressly explained in both its statements in intervention and at the hearing that there is nothing in the contract to prevent capacity being made available to other railway undertakings wishing to operate international trains, by taking the paths necessary from its own capacity.

48 The first point to be made is that all the parties to the contract agree that the Commission misinterpreted the contract. It is possible, however, that the interpretation favoured by the applicants and Eurotunnel amounts in fact to an amendment of the contract subsequent upon the adoption of the contested decision, a modification which might lead the Commission to revoke its decision, but which could not lead to the annulment of the decision by the Court. Since the lawfulness or otherwise of a decision must be determined at the time of its adoption (see *inter alia* Case 40/72 *Schroeder* v *Germany* [1973] ECR 125, paragraph 14, and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* v *Fattoria Autonoma Tabacchi and Donatab* [1994] ECR I-4863, paragraph 43), it is necessary to ascertain whether when the decision was adopted the Commission made an error of fact in finding that there had been a 50/50 division of tunnel capacity between shuttles and international trains, the capacity allocated to Eurotunnel being exclusively for shuttles and that to the applicants exclusively for international trains.

49 It is plain that no provision in the contract reserves, either expressly or impliedly, half of tunnel capacity for shuttle services and the other half for international passenger and freight trains, notwithstanding the statement in paragraph 81 of the decision that 'the terms of the contract show' that such a division exists.

50 The Commission maintains that its interpretation of the contract is based on the wording of the notification and on a number of passages in Eurotunnel's memorandum of 20 September 1991 (see paragraph 8, above). It argues that the notification enables the parties to an agreement to communicate to it their interpretation of the nature and content of the contract. Accordingly, it considers that if the applicants were of the opinion that Eurotunnel's notification gave an inaccurate interpretation of the contract, they would not have approved the terms of the notification.

51 Point III.1. c(ii) of the notification to which the Commission refers (Case T-79/95, defence, paragraph 107; Case T-80/95, rejoinder, paragraph 36) reads as follows:

'The contract aims to achieve an equitable and practicable apportionment of the new infrastructure between, on the one hand, the markets for passenger and freight transport by train and, on the other hand, the market for the transport of accompanied motor vehicles by specially designed railed shuttle.'

52 Although that passage refers to 'an equitable and practicable apportionment' of the tunnel it does not support the Commission's hypothesis that the contract provides for capacity to be shared equally between shuttle services and international train services.

53 As for the memorandum of 20 September 1991, its terms are not unequivocal, as is demonstrated by the fact that both the Commission and the applicants seek to rely on passages in it to support their respective interpretations. Whilst the extract cited by the Commission (see paragraph 39, above) appears to bear out its interpretation it also makes it clear that 'the 50/50 repartition was not established once and for all' and that it may vary according to demand.

54 During the administrative procedure conducted before the Commission, moreover, the applicants expressly drew the latter's attention to the fact that the contract did not reserve half of tunnel capacity for shuttles and the other for international trains, so that other railway undertakings would be able to use Eurotunnel paths to operate international trains.

55 In a letter from BR to the Commission dated 19 October 1994 (application in Case T-80/95, Annex 16), for example, there appears the following statement:

'It is a fundamental misconception to consider for the purposes of Directive 91/440 and competition policy that the capacity of the tunnel available for the passage of through trains is limited to the capacity reserved by the contract that BR and SNCF made with Eurotunnel. It is the case ... that the contract puts us under obligations to pass the trains of other railway operators. But the contract in no way prevents Eurotunnel from making other capacity available to other railways operators and the contract does not give to BR and SNCF any right to oppose that course of action. For Eurotunnel to refuse to do so would no doubt be abusive.'

56 Similarly, in a letter from BR to the Commission of 25 October 1994 (application in Case T-80/95, Annex 16) the applicant in Case T-80/95 says:

'There is a profound misunderstanding about the nature of the usage contract ... The usage contract does not in any way prevent third parties from entering the same market [as BR and SNCF]. It provides for BR and SNCF to pass the trains of other railways through the tunnel, as we are keen to do. But as well as that, there is nothing in the contract to stop Eurotunnel from giving access to third

parties. The contract that Eurotunnel made with BR and SNCF secures us entitlement to only half the capacity'.

57 The letter sent by SNCF to the Commission on 19 October 1994 likewise contradicts the argument that the applicants were entitled to all the hourly paths for international trains (application in Case T-79/95, Annex 8):

'Eurotunnel ... disposant des autres 50% de la capacité du tunnel peut les utiliser soit pour son activité d'exploitation des services de navettes, soit pour satisfaire à sa tâche de gestionnaire d'infrastructure du tunnel, ... à savoir de satisfaire des demandes d'accès provenant d'entreprises ferroviaires tierces. En effet, Eurotunnel n'est soumise par les gouvernements français et britannique à aucune obligation d'utiliser un pourcentage déterminé de la capacité d'infrastructure en cause pour l'exploitation des services de navettes. Or, la flotte de navettes dont dispose potentiellement Eurotunnel ne requiert nullement l'intégralité des 50% qui sont la part d'Eurotunnel en vertu de la convention d'utilisation'.

('Since Eurotunnel ... is entitled to the other 50% of tunnel capacity, it may use that either for running shuttles or to meet its obligations as manager of the infrastructure ... that is to say to meet requests for access from other railway undertakings. The French and British Governments have not placed Eurotunnel under any obligation to use a particular percentage of infrastructure capacity for shuttle services. The shuttle fleet which Eurotunnel will have available to it will certainly not require the full 50% which is Eurotunnel's share under the usage contract'.)

58 Those extracts show that the statements made by all the parties to the contract in the course of the procedure before the Court to the effect that the points contained in paragraphs 81 and 82 are inaccurate as regards the facts (see paragraph 47, above) rely on an interpretation of the contract compatible with its own terms and with the notification of 2 November 1987 and, furthermore, are in accordance with

the information provided by the applicants at the last stage of the administrative procedure before the Commission. The interpretation given by the applicants and Eurotunnel of their contract cannot therefore be regarded as a modification made after the adoption of the contested decision.

59 The Commission's statements in paragraphs 81 and 82 of the decision to the effect that half of the tunnel capacity is reserved for shuttle services and the other for international trains and that the applicants are entitled to all the capacity reserved for international trains are therefore vitiated by an error of fact.

60 The assessment in the contested decision (paragraphs 83 and 84) of the restrictive effects of the contract on competition is founded on that error. Thus, in its evaluation of those effects as regards other railway undertakings, the Commission failed to have regard to the possibility that Eurotunnel might still cede some of its own capacity to other undertakings wishing to run international trains through the tunnel.

61 The possibility for other railway undertakings to obtain hourly paths from Eurotunnel's capacity is a real one: the minimum shuttle service which Eurotunnel is obliged to operate under the concession contract (see paragraph 3, above) represents only 40% of its own capacity (paragraph 113 of Eurotunnel's statement in intervention in Case T-79/95 and paragraph 112 of its statement in intervention in Case T-80/95). Moreover, it was expressly stated at the hearing that Eurotunnel uses only 66% of its capacity at present.

62 As regards the Commission's argument that reserving 50% of capacity to the networks for 65 years is in any event a breach of Article 85(1) of the Treaty, it must be stated that even if that were to constitute a restriction of competition the fact remains that the Commission's assessment of the restrictive effects of the contract on competition as regards other railway undertakings in the contested decision was wrong.

63 The Commission's error of fact also influenced its assessment of the contract in the light of Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement. The decision states that 'the reservation for BR and SNCF of all of the hourly paths available for international trains is not essential to them for the provision of their transport services and to contribute to the success of the project' (paragraph 102) and that it may, moreover, eliminate all competition (paragraph 103). In order to make the contract eligible for exemption the Commission deemed it necessary to impose conditions (paragraphs 102 and 103) in order to ensure that other railway undertakings could obtain hourly paths for the operation of international trans. Under the conditions set out in Article 2(A) of the decision the applicants may be obliged to cede up to 25% of the capacity reserved to them by Clause 6.2(i) of the contract.

64 If the Commission had correctly assessed the opportunities available to other railway undertakings to obtain the hourly paths necessary to run international trains through the tunnel it might not have deemed it necessary to impose conditions on the applicants. Alternatively, it could have imposed conditions on both the applicants and Eurotunnel, which might have had the effect of enabling less onerous conditions to be imposed on the applicants than the current ones. However, since it is not for the Court to substitute its own assessment for that of the Commission

in proceedings for annulment (see *inter alia* Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 113, and Case T-548/93 *Ladbroke Racing* v *Commission* [1995] ECR II-2565, paragraph 54), Article 2(A) of the decision, which imposes the disputed conditions on the applicants, must be annulled.

65 Those conditions constitute an essential part of the decision, inseparable from the remaining provisions. In accordance therefore with the applicants' main claims, the decision must be annulled in its entirety and it is not necessary to rule on the other pleas for annulment which were advanced.

Costs

66 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 defendant has been unsuccessful and the applicants have applied for costs, it must be ordered to pay the costs, including those relating to the applications for interim measures.

67 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in proceedings are required to bear their own costs. The United Kingdom will therefore bear its own costs. As regards the other interveners, Eurotunnel did not apply for costs and must therefore bear its own costs. The costs incurred by EPS, which requested that the Commission be ordered to pay its costs, shall be borne by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby declares:

1. **Cases T-79/95 and T-80/95 are joined for the purposes of the judgment.**

2. **Commission Decision 94/894/EC of 13 December 1994 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/32.490 — Eurotunnel) is annulled.**

3. **The Commission shall bear its own costs together with those of the applicants, including the costs relating to the applications for interim measures. It shall also bear the costs of the intervener European Passenger Services Ltd.**

4. **The United Kingdom of Great Britain and Northern Ireland, together with Channel Tunnel Group Ltd and France Manche SA (Eurotunnel), shall bear their own costs.**

Briët Vesterdorf Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 22 October 1996.

H. Jung B. Vesterdorf

Registrar President