II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(93/174/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway [1], as amended by the Act of Accession of Greece,

Having regard to the publication [2] of the essential contents of the agreement in question in accordance with Article 26 (3) of Regulation (EEC) No 1017/68,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in the field of transport,

Whereas :

I. THE FACTS

A. Characteristics of the combined transport industry

(1) Railway companies only exceptionally sell combined transport services direct to consignors.

(2) In the vast majority of cases, combined transport services are sold to consignors by specialized operators which may be subsidiaries of railway companies or independent companies.

(3) Operators purchase from the railway companies a rail haulage service which comprises the supply of a locomotive and access to infrastructures.

(4) Up to 31 December 1992 each national railway company held a complete legal monopoly to supply such services on the infrastructures it owns or which it was licensed to use exclusively by the national authorities.

(5) Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways [3] was implemented on 1 January 1993. Article 10 (2) of the Directive states that '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'.

(6) Pursuant to Articles 2 and 3 of Directive 91/440/EEC, '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.

[1] OJ No L 175, 23. 7. 1968, p. 1.
[2] OJ No C 195, 1. 8. 1992, p. 3.
[3] OJ No L 237, 24. 8. 1991, p. 25.

(7) These provisions mean that, after the entry into force of Directive 91/440/EEC, railway companies will still be the only enterprises authorized and able to provide rail haulage services.

(8) Combined transport operators that are not recognized as railway companies will have to continue purchasing rail haulage solely from the railway companies.

(9) It should be noted that the cost of rail haulage is a determining factor of the price which operators charge for their combined transport services.

B. The relevant market

(10) The relevant market is the market for rail transport services provided by railway companies to combined transport operators. In the context of this case, the services constitute primarily the provision of rail haulage, access to the rail infrastructure and the international coordination of these services between the different railway companies which provide such services.

C. The 'tariff structures' agreement

(11) In 1989 the railway companies that were members of the 'Interunit Subsidiary Committee' of the International Railways Union (UIC) started work on drawing up a common tariff structure for the sale of rail haulage, taking as a basis the intermodal transport unit (ITU) which corresponds to one consignment by road.

(12) The first agreement was concluded by the railway companies in 1990.

(13) That agreement was one of the points challenged in the statement of objections adopted by the Commission on 2 August 1991 concerning the combined transport of goods. The Commission considered that both the content of the agreement and the context in which it would operate were contrary to Article 85 of the EEC Treaty.

(14) On 21 January 1992 the railway companies sent a substantially amended version to the Commission, which legally constitutes a new agreement under Article 85.

(15) The agreement applies to the sale of rail haulage, excluding the sale of complete trains, in the international combined transport of goods.

(16) The railway companies have defined jointly the grid of coefficients set out in the Annex and have agreed to invoice incidental costs at a flat rate of 1 %.

(17) The agreement applies for five years as from 1 March 1992, leaving aside any minor amendments that may be made to it.

(18) The application of the new tariff structure must comply with the principle of income neutrality, that is, overall it must not entail any increase or decrease in income for the railway companies. Those companies must carry out calculations to ensure compliance with this principle. For this purpose, readjustments may be carried out on certain routes.

II. LEGAL ASSESSMENT

A. Relevant legal provisions

(19) Article 2 of Regulation (EEC) No 1017/68 takes over the prohibition contained in Article 85 (1) of the EEC Treaty of all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 7 of the Regulation corresponds to Article 85 (2) of the EEC Treaty in that it provides that agreements or decisions prohibited under the Regulation shall be automatically void. Article 8 is based on Article 86 of the EEC Treaty, which prohibits the abuse of dominant positions. These provisions do not alter the substantive content of Article 85 (1) and (2) and Article 86 and are purely declaratory. They were incorporated into the Regulation because Member States were divided at the

time over whether the competition rules did in fact apply to transport. The matter was settled when the Court of Justice held that the competition rules were also applicable to transport [1]. The references below to Article 85 (1) and (2) thus also relate to Articles 2 and 7 of Regulation (EEC) No 1017/68, and references to Article 86 also relate to Article 8 of Regulation (EEC) No 1017/68.

As regards exemption from the prohibition, Article 5 of the Regulation contains provisions which spell out the rule in Article 85 (3) with regard to the transport sector in question. The provisions are essentially modelled on the rules in Article 85 (3). Exemption is governed by Article 12 of the Regulation, which also establishes an opposition procedure.

B. Concept of agreement between undertakings

(20) The provisions of the new combined transport tariff structure were defined and adopted by the railway companies meeting within the Interunit Subsidiary Committee of the UIC.

(21) Interunit was set up to establish cooperation between piggyback companies and railway companies engaged in international combined transport activities in Europe.

(22) The Interunit Subsidiary Committee of the UIC is a working party which groups together those railway companies involved in combined transport.

(23) The agreement between the railway companies on a common tariff structure is therefore an agreement within the meaning of Article 85 of the Treaty.

C. Restrictions of competition

(24) The agreement in question comprises, on the one hand, provisions on the structure of sales prices and methods for determining such prices and, on the other hand, a common decision on the incidental costs set at a flat rate of 1 % of the total rail haulage price.

(25) Although the structure established by the railway companies does not directly concern haulage prices, it will nevertheless have at least an indirect effect on tariff levels.

(26) Without an agreement between the companies concerned, operators could negotiate with each company for possibly more advantageous terms which could be passed on to users.

(27) Each railway company could adopt its own tariff structure to attract traffic operating on competing combined transport routes.

(28) The agreement therefore restricts existing competition between railway companies on combined transport routes.

(29) It also restricts the potential competition which could emerge after 1 January 1993 if the railway companies make use of the opportunities afforded by Directive 91/440/EEC.

(30) The provisions of the agreement between the railway companies concerning incidental costs relate to the amount of such costs and not only to the tariff structure.

(31) In the absence of an agreement fixing the amount of such charges at 1 % of the haulage cost, operators could negotiate with each company and possibly secure a more advantageous rate based, in particular, on the incidental services actually provided by the railway companies.

(32) Similarly, each railway company could vary the rate to improve its competitive position in relation to other railway companies.

(33) The agreement between the railway companies on fixing a standard-rate incidental charge thus has the effect of restricting competition between those companies in breach of Article 85 (1) of the Treaty.

D. Effect on trade between Member States

(34) The agreement concluded between the railway companies to establish a common tariff structure and fix a uniform flat rate for incidental costs concerns the international transport of goods, chiefly between Member States.

[1] See Judgment of the Court of Justice of 4 April 1974 in Case 167/73, Commission v. France, [1974] ECR 359, paragraph 29 *et seq.*; Judgment of 30 April 1986 in Joined Cases 209/84 to 213/84 Ministère Public v. Asjes, [1986], ECR 1425, paragraph 42.

(35) The agreement thus affects trade between Member States within the meaning of Article 85 (1) of the Treaty.

E. Article 3 of Regulation (EEC) No 1017/68

(36) It is clear from the wording of Article 3 that it applies to agreements of which the sole object and effect is :

— to apply technical improvements,

or

— to achieve technical cooperation,

provided that the undertakings can rely on the means listed in the said Article 3 (a) to (g) to attain these objectives.

For the purposes of this proceeding, the Commission must check whether the agreement establishing a common tariff structure is aimed either at applying technical improvements or at achieving technical cooperation.

(37) To that end, account must be taken of the information obtained by the Commission and the statements made by the representatives of the railway companies in the course of the proceeding.

(38) It emerges from those data that the introduction of a new tariff structure based on the ITU is chiefly in response to two concerns of the railway companies.

(39) First, the old wagon-based tariff structure had encouraged operators to build new types of wagons to take advantage of the tariff structure and secure the lowest possible haulage price.

The wagon-based structure had thus been used by operators in some instances as a means of obtaining a reduction in prices which the railway companies were reluctant to grant.

The new tariff structure based on the ITU is partly designed to overcome this problem.

(40) Secondly, in 1989 the railway companies adopted a strategy for the development of their combined transport activities. It is clear that, for the railway companies, the new tariff structure is an important part of that strategy.

(41) It must be concluded from the foregoing that the agreement on a new tariff structure does not have the sole object of applying technical improvements or achieving technical cooperation but aims in particular at preventing a reduction in the revenue of the railways and forms an integral part of their strategy for the development of their combined transport activities.

(42) As regards the effects of the agreement, the new structure is not designed, overall, to lead to an increase or decrease in income for the railway companies but will nevertheless affect prices for certain routes and for individual consignments.

(43) It must therefore be concluded that the effects of the agreement in question are not limited to the application of technical improvements or to technical cooperation but that there will also be an impact on prices for certain routes and for individual consignments.

(44) In addition, the conditions provided for in Article 3 (1) (g) of Regulation (EEC) No 1017/68 are not met.

(45) Pursuant to Article 3 (1) (g), the prohibition provided for in Article 2 of Regulation (EEC) No 1017/68 and hence in Article 85 (1) of the Treaty may under certain conditions not be applicable to agreements on transport tariff structures, provided such agreements do not lay down transport rates and conditions.

(46) The agreement between the railway companies on the new tariff structure, however, includes both a grid of tariff coefficients and a decision to invoice incidental costs at a flat rate of 1 % of the haulage price.

(47) It is clear that the agreement fixing the amount of incidental costs is not an element of the tariff structure but an agreement on transport prices, which is in breach of the conditions set out in Article 3 (1) (g).

(48) In conclusion, the conditions laid down in Article 3 of Regulation (EEC) No 1017/68 are not met in the present case.

F. Article 5 of Regulation (EEC) No 1017/68

(49) The agreement on a common tariff structure for the sale of rail haulage by railway companies meets

the conditions of Article 5 of Regulation (EEC) No 1017/68.

(a) *Furthering of economic progress*

(50) Combined transport operators are dependent on railway companies for the supply of rail haulage. They can nevertheless in certain cases choose from a range of technically substitutable routes involving different railway companies. In such cases operators may draw benefit from the competition between railway companies for the supply of rail haulage. The existence of a common tariff structure makes it easier for operators, generally of a small size, to compare routes and thus enhances competition between those routes.

(51) A common tariff structure also makes it easier for haulage suppliers to set international prices which, in certain conditions, is likely to increase the efficiency of combined transport compared with other modes of transport.

(52) The provisions of the tariff structure can influence the choice of rolling stock used by operators. Yet a tariff structure that will be in force for several years gives combined transport companies the stability they need to invest in rolling sock. The availability of recent, suitable rolling stock is necessary for the development of combined transport.

(53) In principle, the fixing of a common rate for incidental costs constitutes an agreement on tariffs. In the present case, however, it is absolutely secondary to the total price. In addition, the fixing of a common rate, given the particular conditions in which the market operates, is likely to facilitate price comparisons between the different suppliers of rail haulage.

In general, these elements help to improve the quality of transport services and to further economic progress.

(b) *Benefits for users*

(54) Users of combined transport gain from the agreement in question as they benefit from increased competition between international routes and between operators, as well as from greater scope for investment in modern rolling stock.

(c) *Indispensable nature of restrictions of competition*

(55) The Commission considers that in general an agreement on a common tariff structure is not really an agreement on prices but is nevertheless liable to have the same harmful effects on the operation of the market.

In the present case, however, account must be taken of the characteristics of the market in question and in particular the obligation on the railway companies to cooperate in international transport in certain ways, for regulatory but also technical reasons connected with the existence of different and mutually incompatible infrastructures.

The Commission considers that the agreement fixing a common rate for incidental costs may, in view of the special features of the sector, facilitate transactions between haulage suppliers and operators by eliminating unnecessary procedures and invoices involving quite small sums.

(56) The legal position changed on 1 January 1993 with the implementation of Directive 91/440/EEC, which allows a railway company to operate international combined transport services on its own.

It must be borne in mind, however, that technical difficulties and the absence of technical harmonization will still make some forms of cooperation necessary between railway companies for a transitional period.

(57) Consequently, the Commission takes the view that the restrictions of competition resulting from the agreement in question are necessary, at least for a transitional period and in view of the specific situation in the relevant market, in order to attain the objectives referred to above.

(d) *No elimination of competition*

(58) The Commission also considers that the agreement between the railway companies does not eliminate competition in a substantial part of the market in question.

(59) With the exception of the flat rate of 1 % for incidental costs, the agreement does not relate to rail haulage prices, which continue to be set independently by each company.

(60) Competition between the various routes and therefore between the different railway companies will be maintained.

(61) The entry into force on 1 January 1993 of Directive 91/440/EEC on the development of the Community's railways should also make for increased competition between the railway companies.

G. Context in which the agreement operates

(62) The agreement operates in a different context from that prevailing on 2 August 1991. The principal differences are the possibility for any combined transport operator to operate non-exclusively in all segments of the relevant market and the stated intention of the railway companies to confine their tariff agreements to individual international routes.

(63) It can therefore be concluded that the conditions for exemption pursuant to Article 5 of Regulation (EEC) No 1017/68 are now met.

H. Conditions governing exemption

(64) Article 13 of Regulation (EEC) No 1017/68 provides that a decision granting exemption must indicate the period for which it is to be valid and may be accompanied by conditions and obligations.

(65) The agreement concerned by this proceeding was concluded for five years. The Commission considers that the conditions for exemption for a period of five years from its implementation are met.

(66) The granting of exemption must, however, be made subject to certain conditions.

(67) As regards the rate of remuneration for incidental costs, its use must be optional and an exact list should be drawn up of the services covered by these costs and sent to operators and to the Commission, which must check that the remuneration received corresponds to the services actually provided.

(68) Market trends may require that minor modifications be made to the tariff structure. In view of the special features of the sector, however, such changes should be made after consulting the representatives of operators and should be implemented only after notice of one year.

(69) The agreement relates only to international combined transport, the railway companies reserving the right for the time being to apply different tariff structures to domestic transport services.

In certain specific instances international transport can, however, form a combination of several domestic transport operations. In such cases, the total price for rail haulage will be determined by applying several different domestic tariff structures and may therefore be different from the price obtained by applying a single international tariff structure.

The coexistence of different tariff structures may, on certain routes, lead to discrimination between different operators.

(70) The railway companies should therefore start work to ensure that the coexistence of different tariff structures at the national and international level does not lead to discrimination on different routes.

(71) Railway companies applying the common tariff structure should apply the same structure to all enterprises seeking to acquire rail haulage services, in particular to prevent discrimination between operators.

(72) The agreement in question relates only, with the exception of incidental costs, to the structure of tariffs. Implementation of the agreement must not lead directly or indirectly to generalized agreements or concerted action on the level of tariffs.

(73) One of the advantages of the agreement is that it offers operators some stability to invest in rolling stock. To that end, it is necessary to ensure that the railway companies that signed the agreement are not able to withdraw from it without giving reasonable notice.

(74) Lastly, the railway companies must ensure that the principle of income neutrality is complied with and that any adjustments are carried out in respect of certain routes if the application of the new structure entails excessive tariff changes,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 5 of Regulation (EEC) No 1017/68, Article 85 (1) of the EEC Treaty is hereby declared inapplicable for the period 1 March 1992 to 28 February 1997 to the tariff structure agreement on the sale of rail haulage in the international combined transport of goods concluded by the railway companies of the Community.

Article 2

The following obligations are attached to the exemption in Article 1:

(a) the railway companies must draw up and send to operators and the Commission by 30 March 1993 at the latest a list of the incidental costs covered by the flat rate of 1 %, it being understood that application of that rate is optional;

(b) all amendments to the tariff structure shall be subject to prior consultation of the operators' representatives and to a minimum period of notice of one year;

(c) the railway companies must ensure that the coexistence of domestic and international tariff structures does not lead to discrimination between routes: they shall take all necessary measures before 31 December 1993;

(d) the railway companies that are parties to the agreement must apply the same international tariff structure to all enterprises seeking to acquire rail haulage services;

(e) the agreement on the tariff structure must not lead directly or indirectly to agreements or concerted action on the level of tariffs;

(f) each railway company party to the agreement must give notice of one year if it wishes to apply a different tariff structure;

(g) the railway companies that are parties to the agreement must ensure, within one year of the date of entry into force of the agreement, that the principle of income neutrality is complied with, and must make any adjustments in respect of certain routes if the application of the new structure leads to excessive tariff changes.

Article 3

This Decision is addressed to:

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Done at Brussels, 24 February 1993.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX

	≤ 8 t	> 8 t ≤ 16,5 t	> 16,5 t ≤ 22 t	> 22 t ≤ 33 t	> 33 t
≤ 6,15 m	0,37	0,45	0,55	0,75	0,85
6,16 to 7,82 m	0,37	0,50	0,55	0,75	0,85
7,83 to 9,15 m	0,50	0,55	0,75	0,75	0,85
9,16 to 10,90 m	0,65	0,65	0,85	0,85	0,90
10,91 to 13,75 m	0,70	0,75	1	1	1
Semi-trailers	0,70	0,75	1	1	1