II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(Only the English and French texts are authentic)

(94/594/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competiution to transport by rail, road and inland waterway [1], as amended by the Act of Accession of Greece, and in particular Article 5 thereof,

Having regard to the summary of the relevant agreements published in accordance with Article 12 (2) of Regulation (EEC) No 1017/68 [2],

Having regard to the Commission's decision to raise serious doubts within the meaning of Article 12 (3) of Regulation (EEC) No 1017/68, taken on 27 May 1993,

Having regard to the notice published [3] in accordance with Article 26 (3) of Regulation (EEC) No 1017/68, in which the Commission announced that it was considering exempting the agreement and invited interested parties to submit their observations,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions in the Transport Industry,

Whereas :

I. THE FACTS

A. The notification

(1) On 13 November 1992 the Commission received an application from the British Railways Board (BR), Société Nationale des Chemins de Fer Français (SNCF) and Intercontainer (IC) seeking a declaration under Article 5 of Regulation (EEC) No 1017/68 that Article 2 of the Regulation was inapplicable to two agreements they had concluded between them.

B. The parties

(2) BR and SNCF are two public railway undertakings whose main business is to provide rail transport services for goods and passengers, using their own rail traction for the purpose.

[1] OJ No L 175, 23. 7. 1968, p. 1.
[2] OJ No C 57, 27. 2. 1993, p. 5.
[3] OJ No C 115, 26. 4. 1994, p. 5.

(3) IC is a cooperative jointly owned by 24 railway undertakings, including BR and SNCF, and is specialized in the combined transport of goods in Europe.

(4) Fret Manche Europe (FME) is a French *groupement d'intérêt économique* formed by SNCF and IC.

(5) Allied Continental Intermodal Services Ltd (ACI) is a company formed jointly by BR, SNCF and IC, which have subheadings of 25 %, 25 % and 50 % respectively.

C. Special features of the combined transport market

(6) In the combined transport of goods, railway undertakings do not sell transport services direct to consignors, except in very exceptional cases involving large consignments.

(7) Combined transport services are arranged and sold to consignors by combined transport operators, who may be subsidiaries of railway undertakings. These operators are transport undertakings with their own specific equipment: maintenance facilities and specialized wagons. They approach customers, organize transport by entire trainloads or in isolated consignments, complete the administrative and customs formalities on crossing borders, and supervise delivery of loads on arrival.

(8) To perform these services, operators must purchase rail traction services and access to infrastructure from railway undertakings, the only parties able to supply them.

D. The relevant market

(9) The relevant market is the market in international transport between the United Kingdom and continental Europe of goods travelling in the same road vehicle, container or swap body, the goods remaining unloaded throughout the operation.

(10) Before the boring of the Channel Tunnel, such loads travelled by lorry or train to a seaport, then onward by boat, and then overland once again.

(11) As a result of the opening of the Tunnel, transport can be provided:

— by lorry, using Eurotunnel's rail shuttle services;

— by lorry, using sea transport services;

— by international train, travelling between a terminal in the United Kingdom and a terminal on the continent.

E. The agreements

(12) ACI was formed by BR, SNCF and IC on 2 September 1992, in order to exploit the oppotunities created by the opening of the Channel Tunnel for the transport between the United Kingdom and continental Europe of goods loaded in road vehicles, containers, swap bodies, semi-trailers or other loading units suitable for intermodal transport.

(13) According to the parties, ACI will do business on the same level of the market as IC, that is to say as a combined transport operator. Likewise according to the parties, BR and SNCF will be doing business at a level different of that from ACI, namely as suppliers of rail traction.

(14) ACI's main business will be the sale of terminal-to-terminal combined rail transport services. It will also perform certain related services such as the provision of wagons, maintenance at terminals, customs clearance and wagon pool management for other organizations.

(15) The routes initially served will link the United Kingdom to points in Italy, Spain, Switzerland, Austria, Germany and France. Further routes will be decided by ACI's Board.

(16) It is intended that ACI should sell its services on a wholesale basis, to any customer, but primarily to forwarding agents and intermodal and integrated operators, including companies associated with European railway undertakings.

(17) The duration of the ACI agreement, at 55 years, is the same as that of the agreement concluded on 29 July 1987 between Eurotunnel, BR and SNCF, under which a proportion of train paths available in the Channel Tunnel was to be held for BR and SNCF. The duration may, however, be shortened by agreement between the parties or in the event that one party takes control of the entire capital of ACI.

(18) The second agreement is a 'wagon provision agreement' between ACI, BR and FME, under which BR and FME agree to provide ACI with specialized low-platform railway wagons for the movement of containerized freight. BR and FME are to provide 720 such wagons by 1993 and 1 200 by 1994, with an option to raise the number to 1 800 if certain conditions are satisfied. In addition, BR intends to buy up to 2 000 specialized wagons for its own purposes, while SNCF has 300.

(19) To carry on the business, ACI will hire wagons from FME and BR according to the terms outlined in the wagon provision agreement or, in the event of insufficiency, in such other manner as it shall determine.

(20) ACI is to offer to sub-hire any long-term surplus of wagons in the following order:

1. first to the wagon providers for use on routes through the Channel Tunnel, in the same ratio as they provided wagons to ACI;
2. second, to other intermodal freight operators for use on routes through the Channel Tunnel;
3. third, to the wagon providers for use on routes not passing through the Channel Tunnel, in the same ratio as they provided wagons to ACI; and
4. fourth, to other intermodal freight operators for use on routes not passing through the Channel Tunnel.

II. LEGAL ASSESSMENT

A. Relevant legal provisions

(21) When they notified the agreements the parties to the agreements requested a declaration under Article 5 of Regulation (EEC) No 1017/68 that Article 2 of that Regulation was inapplicable.

For reasons which it set out in Decision 93/174/EEC [1] (tariff structures in the combined transport of goods), the Commission is of the opinion that land transport is subject to Article 85 (1) of the Treaty. Exemption, however, is governed by Article 12 of Regulation (EEC) No 1017/68, which provides for an opposition procedure and is itself based on Article 5 thereof. Since the agreements in question are capable of havinf an effect in the territory of the European Economic Area, they are also subject to Article 53 of the EEA Agreement.

B. The concept of agreements between undertakings

(22) ACI is a company 50 % of whose capital is held by IC and 25 % each by BR and The Board is made up of two representatives of BR, two of SNCF and four of IC. Decisions are to be taken by a simple majority of the members, except that important decisions require the agreement of one representative of each of the three parent undertakings. A chairman is appointed for two years by rotation between the members of the board.

(23) Thus BR, SNCF and IC have joint control of ACI, which constitutes a joint venture within the meaning of the Commission Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the Treaty [2].

(24) ACI is operate on a lasting basis and to perform all the functions of an autonomous economic entity.

(25) Among the parent undertakings, IC, and in some measure BR and SNCF too, are not withdrawing fully and permanently from ACI's market. BR and SNCF will continue to do their main business on an upstream market, the market in the necessary rail services which railway undertakings sell to combined transport operators.

(26) The Commission consequently takes the view the joint venture has as its object and effect the coordination of the competitive conduct of undertakings which remain independent.

(27) ACI is accordingly a cooperative joint venture caught by Article 85 of the EC Treaty.

[1] OJ No L 73, 26. 3. 1993, p. 38.

[2] OJ No C 43, 16. 2. 1993, p. 2.

C. **The restrictions of competition**

(a) *Restrictions on competition between the parent undertakings and effects on third parties*

(28) IC is a combined transport operator accustomed to selling international combined transport services. It would therefore have no great difficulty in supplying combined transport services between United Kingdom and continental Europe by itself, buying the necessary railway undertakings.

(29) BR and SNCF both have the technical and financial resources needed to be able to supply services on ACI's market by themselves.

(30) BR and SNCF are therefore potential competitors on this market, especially as Article 10 (2) of Council Directive 91/440/EEC [1] gives railway undertakings established in one Member State a right of access to the infrastructure in the other Member States for the purpose of operating international combined transport goods services.

(31) By entrusting the marketing of these services to a joint venture, BR, SNCF and IC have eliminated of appreciably restricted the competition there would be between them if they were to supply the same services on an individual basis.

(32) IC is one of the main combined transport operations in Europe. BR and SNCF retain their dominant positions on the markets in the rail services necessary to combined transport operators in the United Kingdom and France.

(33) The existence of a special relationship between the parent undertakings and their joint subsidiary might place other combined transport operators at a disadvantage in competition for the necessary rail services.

(34) The parties to the agreements also control the bulk of the specialized wagons needed to supply the relevant services through the Tunnel ; independent operators would be unable to bear similar investment costs alone.

(35) The usage contract concluded between Eurotunnel, BR and SNCF has also to be taken into consideration. Even if in this case Community law would prevent BR and SNCF from holding all the available paths for international trains, they will nevertheless control an appreciable proportion of those paths in order to operate international trains and to meet their commitments to Eurotunnel.

(36) Given the commercial strength of the parent undertakings, therefore, the formation of ACI may impede access to the market by compined rail transport operators in a position to compete with it.

(b) *Tighter restrictions caused by the presence of networks of joint ventures*

(37) In general, networks of joint ventures can have a particularly restrictive effect on competition because they intensify the effects of individual joint ventures on the policy of the parent undertakings and on the market position of third parties.

Every new joint venture set up strengthens the links between the parent undertakings, and consequently weakens what competition there still is between them. This is the case where the parent undertakings form several joint ventures providing complementary or non-complementary services.

(38) The Commission takes the view that that is happening in the case at issue. BR and SNCF are taking part to varying degrees in a network of joint ventures for the operation of goods transport, particularly combined transport services, and passenger transport.

(39) In the combined transport business, BR and SNCF, along with other railway undertakings, have stakes in the capital of IC. As regards transport through the Channel Tunnel, BR and SNCF are party to the formation of European Night Services Ltd, which is to transport passangers, and BR is party to the formation of Autocare Europe, which is to provide rail transport for motor vehicles.

(40) The formation of ACI has to be seen against the background of this network of joint ventures. It further limits competition between the parties. Given the investment they have made jointly in these projects, the parties will be reluctant to compete with one another on the relevant markets or elsewhere.

(41) The network effect is augmented by the fact that these joint ventures intend to supply services through the Channel Tunnel, where BR and SNCF jointly hold a substantial share of the paths available for international trains.

[1] OJ No L 237, 24. 8. 1991, p. 25.

(42) From what has been said in recitals 29 to 42, therefore, it has to be concluded that the ACI agreements have as their object and effect the restriction of competition contrary to Article 85 (1) of the EC Treaty.

D. Effect on trade between Member States

(43) The purpose of ACI is to operate transport services between the United Kingdom and continental Europe. The agreement therefore affects trade between Member States within the meaning of Article 85 (1).

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

(44) It is clear from the wording of Article 3 of Regulation (EEC) No 1017/68 that it applies to agreements the sole object and sole effect of which is :

— to apply technical improvements,

or

— to achieve technical cooperation,

by the means set out in points (a) to (g) of the same Article.

(45) According to the notification submitted by the parties, the main object of the joint venture is to market combined transport and related services between the United Kingdom and continental Europe.

(46) The joint venture also has three other commercial objectives :

— to exploit the commercial opportunities created by the opening of the Channel Tunnel for the transport of containerized goods ;

— to enable BR and SNCF to operate international trains through the Channel Tunnel in accordance with their oblications under the usage contract they have concluded with Eurotunnel ;

— to share the financial risk associated with the operation of regular train services as soon as the Tunnel opens.

(47) The Commission accordingly takes the view that the ACI agreement is not an agreement the sole object and sole effect of which is to apply technical improvments or to achieve technical cooperation, so that the requirements of Article 3 of Regulation (EEC) No 1017/68 are not satisfied.

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

(a) *Contribution to economic progress*

(48) The opening of the Channel Tunnel creates new opportunities for railway undertakings and combined transport operators.

The formation of ACI is intended to take advantage of these opportunities in order to provide new transport services.

(49) The grouping function performed by ACI will be particularly important factor in the development of combined transport.

(50) Although it is not yet fully clear to what extent the different modes of transport can be substituted for one another, the services offered by ACI may in certain circumstances increase competition with sea transport.

(51) In general, therefore, the formation of ACI is likely to promote economic progress.

(b) *Benefits for users*

(52) Users will benefit directly, as ACI is to introduce services which did not previously exist.

(c) *Indispensable nature of the restrictions*

(53) One of the parent undertakings, IC, is an important combined transport operator which has been providing European-scale services for many years ; it might well be able to provide new services between the United Kingdom and continental Europe by itself.

(54) Under Article 10 of Directive 91/440/EEC, BR and SNCF are also entitled to provide international combined transport services themselves.

(55) But account has to be taken of the specific features of the case : in particular, the service is completely new, and if it is to succeed trains covering several routes on a regular basis must be laid on immediately, which would involve considerable financial risks which a single undertaking would be unable to bear alone.

(56) The fact that know-how, facilities and human resources are being pooled by the three parties should also contribute to the successful lauch of regular services when the Channel Tunnel opens.

(57) Nonetheless, the Commission should impose conditions so as to limit the restrictions as much as possible and, in particular, to guarantee the presence on the market of combined transport operators in competition with ACI.

(58) The Commission accordingly takes the view that the restrictions of competition associated with the formation of ACI are necessary, at least for a transitional period, in view of the specific features of the relevant market.

(d) *No elimination of competition*

(59) There are transport operators in Europe other than ACI and IC which are capable of supplying the same services. The formation of ACI consequently does not eliminate competition in respect of a substantial part of the relevant market.

G. Terms of exemption

(60) Article 13 of Regulation (EEC) No 1017/68 states that an exemption decision must indicate the period for which it is to be valid, and that conditions and obligations may be attached.

(61) The combined transport operators are generally of the opinion that a period of five years is needed to set up the new services and ensure their viability.

(62) A period of the same order is needed to allow the transfer of know-how from the parent undertakings, especially IC, to the joint venture.

(63) Account has also to be taken of the fact that market conditions may change substantially over the next few years, so that it cannot be forseen with certainty what the position with regard to competition will be more than five years hence.

(64) The Commission accordingly takes the view that the duration of the exemption can be set at five years from the date on which the Channel Tunnel opens to goods trains.

(65) The exemption must, however, be subject to certain conditions aimed at preventing the restrictions of competition from going beyond what is indispensable.

(66) First, consignors and other transport operators must be able to acquire from BR and SNCF the same necessary rail services as BR and SNCF provide to ACI.

(67) BR and FME must also agree to hire their specialized wagons to any operator or consignor, under contracts of at least six months' duration, if they go unused for six months or more, so that those operators or consignors can run services in competition with ACI through the Tunnel. No priority must be given to applications from subsidiary or associated undertakings.

(68) Given the specialized nature of the wagons, however, priority may be given to services using the Tunnel.

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 5 of Regulation (EEC) No 1017/68 and Article 53 (3) of the EEA Agreement, Article 85 (1) of the EC Treaty and Article 53 (1) of the EEA agreement are hereby declared inapplicable to the agreements between British Railways Board, Société Nationale de Chemins de Fer Français and Intercontainer relating to Allied Continental Intermodal Services Ltd for a period of five years from the date on which the Channel Tunnel opens to good trains.

Article 2

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

(a) the railway undertakings party to the ACI agreement must supply to any consignor or combined transport operator the same rail services as they supply to their subsidiary ACI, on a non-discriminatory basis;

(b) BR and FME must hire out to any operator or consignor the specialized wagons they have at their disposal for the transport of containers through the Channel Tunnel under contracts of at least six months' duration, if they go unused for six months or more; the parties may not give priority to subsidiary months' associated undertakings, but may give priority to undertakings wishing to supply services through the Channel Tunnel.

Article 3

This Decision is addressed to :

British Railways Board,
Euston House,
24 Eversholt Street,
UK-London NW1 1DZ;

SNCF,
88, rue Saint Lazare,
F-75009 Paris;

Intercontainer,
85, rue de France,
B-1070 Bruxelles.

Done at Brussels, 27 July 1994.

For the Commission
Karel VAN MIERT
Member of the Commission