II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(Only the German, English, French and Dutch texts are authentic)

(Text with EEA relevance)

(94/663/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 competition 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 application for exemption under Article 5 of Regulation (EEC) No 1017/68, submitted on 29 January 1993 in respect of certain agreements on the carriage of passengers by rail via the Channel Tunnel,

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

Having regard to the Commission's decision of 23 August 1993 to express serious doubts within the meaning of Article 12 (3) of Regulation (EEC) No 1017/68,

Having regard to the notice in which it announced that it was considering exempting the agreement and invited intrerested third parties to submit their observations [3],

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

Whereas :

I. THE FACTS

A. The notification

(1) On 29 January 1993 the Commission received an application from European Night Services Ltd (ENS), British Rail (BR), Deutsche Bundesbahn (DB), NV Nederlandse Spoorwegen (NS), Société nationale des chemins de fer français (SNCF) and Société nationale des chemins de fer belges (SNCB) seeking a declaration that Article 2 of Regulation (EEC) No 1017/68 did not apply to a number of agreements concerning the carriage of passengers by rail via the Channel Tunnel or, failing that, the exemption of the agreements under Article 5 of the Regulation.

[1] OJ No L 175, 23. 7. 1968, p. 1.
[2] OJ No C 149, 29. 5. 1993, p. 10.
[3] OJ No C 153, 4. 6. 1994, p. 15.

B. The parties

(2) BR, EPS, NS, DB, SNCF and SNCB are railway undertakings (hereinafter also referred to as 'railways') within the meaning of Council Directive 91/440/EEC [1].

(3) At the time of the notification European Passenger Services (EPS) was a wholly owned subsidiary of BR. Since 10 May 1994 it, too, has ranked as a railway undertaking, controlled by the public authorities in the United Kingdom. It replaces BR as supplier of international passenger services. At the same time, BR's holding in ENS was transferred to EPS.

(4) German Rail UK Ltd (GR UK) is a wholly owned subsidiary of DB.

(5) Transmanche Night Travel Ltd (TNT) is a wholly owned subsidiary of France Rail, which is itself a wholly owned subsidiary of SNCF.

(6) ENS is a joint venture set up between BR (now EPS), DB, NS and SNCF.

C. The markets

(7) The relevant markets are the markets in the transport of business travellers and of leisure travellers on each of the following routes:

— London-Amsterdam,

— London-Frankfurt/Dortmund,

— Paris-Glasgow/Swansea,

— Brussels-Glasgow/Plymouth.

D. The agreements

(8) The first agreement concerns the formation of ENS, which is a private company limited by shares and incorporated in the United Kingdom; its shareholders are:

— EPS: 61,5 %,

— TNT (SNCF): 11,5 %,

— GR UK (DB): 13,5 %,

— NS: 13,5 %.

(9) The business of ENS will be to provide and operate overnight passenger rail services between points in the United Kingdom and the Continent through the Channel Tunnel.

It is planned that from 1995/1996 there will be one such train every night in each direction on each of the following routes:

— London-Amsterdam,

— London-Frankfurt/Dortmund,

— Paris-Glasgow/Swansea,

— Brussels-Glasgow/Plymouth.

(10) The overnight services are intended to meet the needs of three categories of traveller:

— business travellers, expecting a comfortable bed and privacy, high levels of quality and service and convenient departure and arrival times,

— leisure travellers expecting a level of comfort the same as or similar to that of business travellers,

— leisure travellers who are more price-sensitive and will be satisfied with comfortable reclining seats designed for overnight travel.

(11) The second group of agreements consists of operating agreements concluded by ENS on 30 June 1992 with each of the railways which are parties to the ENS agreement and with SNCB.

(12) Under the operating agreements ENS will be responsible for issuing rail tickets in its own name on each route; each of the railways concerned agrees to provide the following services:

— traction over its network: provision of locomotive, train crew and path,

— cleaning services on board: cleaning of the rolling stock used, sleeper services, terminal operations and on-board personnel,

— daily servicing, daily maintenance, safety checks, emergency repairs on rolling stock arriving at the railway terminal,

— passenger-handling services for such of the night services as include commercial stops at a station on the railway's network, passenger security and safety at terminals or on trains, use of reservation systems, distribution of reservation systems through sales outlets,

— marketing services in cooperation with ENS, but excluding the distribution of tickets.

(13) In addition to those services, EPS and SNCF agree to provide traction through the Channel Tunnel, including locomotive, train crew and path.

(14) The service will require specialized rolling stock which is suitable for running on different rail systems and which meets the safety requirements for passage through the Tunnel.

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

(15) For the procurement of this rolling stock the participating railways BR, DB, NS and SNCF, through ENS, have entered into a sale and lease-back arrangement under which the lessors agree to lease the rolling stock to ENS for an initial period of 20 years.

II. ASSESSMENT

A. Relevant legal provisions

(16) The undertakings which are parties to the agreement have requested exemption under Article 5 of Regulation (EEC) No 1017/68 only. However, as the agreement is likely to have effects extending into the European Economic Area, it should also be assessed pursuant to Article 53 of the EEA Agreement. Thus the discussion below of Articles 85 and 86 of the Treaty applies equally to the equivalent provisions of that Agreement.

B. The relevant market

(a) *The market in services*

(17) The Court of Justice has held that 'the concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned' ([1]).

(18) In the case of passenger transport, then, the mere fact that different modes of a transport are technically substitutable does not suffice to show that they belong to one and the same market.

(19) It must be considered to what extent the different modes of transport are sufficiently interchangeable in the eyes of users.

(20) In this case the services offered by ENS are aimed essentially at two different categories of customer: those who travel in the course of their business and those who travel for leisure purposes.

(21) The first category seeks a rapid form of transport offering a high level of comfort, and with frequencies and timetables suited to business constraints. The price is not a decisive factor in the choice.

(22) Those on leisure trips, who bear their own costs, attach greater importance to the price. Speed, comfort and frequency are not decisive factors.

(23) This distinction in behaviour has been pointed out elsewhere, notably by the Institute of Air Transport in its study of rail/air complementarity in Europe ([2]).

(24) In the same study the Institute also concluded that high-speed trains and air transport are in competition mainly over distances between 350 and 1 000 km.

(25) In this case, therefore, there are two service markets.

(26) One is the market for the transport of business travellers, for whom scheduled air travel and high-speed rail travel are interchangeable modes of transport.

The overnight trains to be operated by ENS will also be a possible substitute, because of their level comfort and their timetables, which are especially suited to business trips.

(27) On the other hand there is the market in the transport of leisure travellers, for whom substitute services may well include economy-class air travel, train, coach and possibly private motor car.

(b) *The geographic market*

(28) In its judgment in Case 66/86, *Ahmed Saed Flugreisen,* the Court of Justice found that the carriage of travellers did not form one market ([3]).

The Court there concluded that 'the test to be employed is whether the scheduled flight on a particular route can be distinguished from the possible alternatives by virtue of specific characteristics as a result of which it is not interchangeable with those alternatives and is affected only to an insignificant degree by competition from them.'

(29) The Commission accordingly takes the view that the relevant geographic market does not include the whole of the United Kingdom, France, Germany and the Benelux countries, but is confined to the routes actually served by ENS, namely:

— London-Amsterdam,

— London-Frankfurt/Dortmund,

— Paris-Glasgow/Swansea,

— Brussels-Glasgow/Plymouth.

([1]) Case 85/76, *Hoffmann-La Roche* v. *Commission,* [1979] ECR paragraph 28, p. 461.

([2]) ITA/Paris, December 1991.

([3]) [1989] ECR, paragraph 40, p. 803.

C. The agreement

(30) ENS is a company incorporated in the United Kingdom with a capital of £ 100 000, shared between :

— EPS :	61,5 %,
— TNT (SNCF) :	11,5 %,
— GR UK (DB) :	13,5 %,
— NS :	13,5 %.

Although EPS is the majority shareholder, each of the railways is represented by one member on ENS's Board, and most important decisions require the agreement of all the members.

(31) ENS is thus an undertaking which is controlled jointly by four undertakings which are either railway undertakings or subsidiaries of railway undertakings. It is therefore a joint venture within the meaning of the Commission notice concerning the assessment of cooperative joint ventures [1].

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

(33) The parent undertakings are not withdrawing permanently from the relevant market. Their technical and financial resources would enable them easily to set up an international grouping within the meaning of Article 3 of Directive 91/440/EEC in order to provide overnight passenger transport services.

(34) EPS, SNCF, DB and NS continue to operate primarily on a market upstream from ENS's market, namely the market in necessary rail services which the railways sell to transport operators, including ENS.

(35) The Commission consequently takes the view that the joint venture ENS has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent.

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

(37) The operating agreements between ENS and each of the railways EPS, NS, DB, SNCF and SNCB constitute agreements within the meaning of Article 85.

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

D. The restrictions of competition

(a-1) *Restrictions on competition between parents and effects on third parties*

(38) For a proper understanding of existing and potential restrictions of competition, we must bear in mind the legal framework in which railways offer their services.

(39) Under Article 10 of Directive 91/440/EEC international groupings of railway undertakings providing passenger transport have a right of access to the railway infrastructures of the Member States of establishment of their constituent railways and transit rights on the infrastructures of other Member States in order to enable them to provide international services.

(40) The opportunities are open to existing railways, but also to new undertakings, including subsidiaries of existing ones.

(41) The Directive allows the Member States to enact domestic legislation which is more generous in the access it allows to infrastructure.

(42) This means that DB or NS would be entitled to form an international grouping with a railway in the United Kingdom, and to operate international transport services by buying from the infrastructure manager, Eurotunnel, the paths necessary to pass through the Channel Tunnel.

(43) Any railway party to the agreement would also be entitled to set up a subsidiary specializing as a transport operator, which would provide international transport services by buying the necessary rail services from the railways concerned.

(44) Lastly, a railway could itself take on the role of transport operator, and provide international services by buying the necessary rail services from the railways concerned.

(45) By entrusting the operation and marketing of these services to ENS, the railway undertakings EPS, SNCF, DB and NS have eliminated or appreciably restricted the scope for competition here.

(46) ENS's parent companies 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, and ENS will have direct access to those services under the operating agreements concluded with EPS, SNCF, DB, NS and SNCB. The existence of a

special relationship between the parent companies and ENS might place other operators at a disadvantage in competition for necessary rail services.

(47) 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 be able to operate international trains and to meet their commitments to Eurotunnel.

(48) Given the commercial strength of the parents, therefore, the formation of ENS may impede access to the market by transport operators in a position to compete with it.

(a-2) *Tighter restrictions caused by the presence of networks of joint ventures*

(49) 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 parents and on the market position of third parties.

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

(51) The Commission takes the view that that is happening here. BR/EPS, SNCF, DB and NS are taking 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, 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.

(52) The formation of ENS has to be seen against the background of this network of joint ventures; it further limits competition between the parties.

(53) From what has been said in paragraphs 38 to 52, therefore, it has to be concluded that the ENS agreements have as their object and effect the restriction of competition contrary to Article 85 (1) of the EC Treaty.

E. Effect on trade between Member States

(54) The purpose of ENS is to operate transport services between points in the United Kingdom and on the Continent. The agreement therefore affects trade between Member States.

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

(55) 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.

(56) According to the notification submitted by the parties, the main object of the joint venture is to market passenger transport services between the United Kingdom and the Continent.

(57) The joint venture also has the following commercial objectives:

— to exploit the commercial opportunities for passenger transport created by the opening of the Channel Tunnel,

— to enable EPS and SNCF to operate international trains through the Channel Tunnel in accordance with their obligations under the usage contract that they have concluded with Eurotunnel,

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

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

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

(a) *Contribution to economic progress*

(59) The formation of ENS facilitates the introduction of new high-quality transport services to accompany the opening of the Channel Tunnel.

For business travellers ENS offers a service which provides a substitute for air transport which has not previously existed.

In certain circumstances, therefore, the services offered by ENS are likely to increase competition between modes of transport.

(60) By promoting traffic between the United Kingdom and the Continent the agreement will contribute to the success of the Channel Tunnel.

Thus the formation of ENS is likely to facilitate economic progress.

(b) *Benefits to users*

(61) Users will benefit directly from the formation of ENS, which will offer them new high-quality transport services. Users will also profit from competition between these new services and air transport.

(c) *Restrictions indispensable*

(62) The legal framework which governs the market would allow the railways to supply those services in other ways.

(63) However, account has to be taken of the specific features of the case : in particular, the services involved are completely new, and, if they are to succeed, trains covering several routes on a regular basis must be laid on immediately ; this means that the financial risks are substantial and could be borne by a single undertaking only with great difficulty.

(64) The pooling of the know-how each of the railways has acquired on its own territory is also important for the success of the project.

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

(66) The Commission ought, however, to impose a condition enabling it to satisfy itself that the restrictions remain within what is indispensable, and ensuring the presence on the market of rail transport operators competing with ENS.

(d) *Competition not eliminated*

(67) In the case of business travellers alternative services are offered by airline companies.

(68) For their part leisure travellers have alternatives in air transport, coach transport and sea transport.

(69) Other transport operators similar to ENS should be able to supply competing services by buying the necessary rail services from railways.

(70) Thus, the formation of ENS does not eliminate all competition on the relevant market.

H. Terms of the exemption

(71) 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.

(72) When considering whether to grant an exemption the Commission has to analyse an agreement in the economic context in which it is to apply.

(73) The duration of the exemption will therefore depend *inter alia* on the period for which it can reasonably be supposed that market conditions will remain substantially the same.

(74) Such an assessment is difficult in this case, especially as the service is new and conditions on the rail transport market have changed substantially following the adoption of Directive 91/440/EEC.

(75) Account should also be taken of the fact that the parties have carried out major investments which will yield profitable returns only after several years ; the scale of investment cannot, however, be allowed to become a decisive factor in determining the duration of the exemption. There is no necessary link between the joint acquisition of plant and machinery and the commercial use to which it is to be put.

(76) In connection with the combined transport of goods, which likewise requires specialized and expensive equipment, the railways have informed the Commission that a period of five years is needed in order to set up the new services and ensure their viability.

(77) In this case it may be supposed that the commercial risk is greater, particularly because the service is one which in terms of quality is completely new.

(78) The Commission takes the view that the duration of the exemption can be set at eight years, that is to say, until 31 December 2002. The decision, however, takes effect from the date of notification of the agreements, namely 29 January 1993.

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

(80) New entrants to the market, whether groupings of railways or transport operators, if they are not able themselves to supply some or all of the necessary railway services, must be able to acquire from the railways party to the ENS agreement the same necessary rail services as those railways have undertaken to sell to their subsidiary.

(81) Those services consist of the provision of the locomotive, train crew and path on each national network and in the Channel Tunnel. The railways party to the agreement should not, however, 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.

(82) On their own networks the railways must supply these services on the same technical and financial terms as they allow to ENS.

(83) The railways should not be required to supply these services if the new entrant is able to supply them itself, or if the railways do not have the necessary traction available.

(84) These obligations are independent of the general obligations imposed on the railways by Article 86 of the EC Treaty,

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 relating to European Night Services Ltd (hereinafter 'ENS') from 29 January 1993 to 31 December 2002.

Article 2

The exemption set out in Article 1 is subject to the condition 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 3

This Decision is addressed to the following undertakings:

— European Passenger Services
ESP House
Waterloo Station
UK-London SE1 8SE,

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

— Deutsche Bahn AG
Friedrich-Ebert-Anlage, 43-45
D-60327 Frankfurt am Main,

— NV Nederlandse Spoorwegen
Hoofddirectie
Moreelsepark
Postbus 2025
NL-3500 HA Utrecht,

— European Night Services Ltd
Mercury House
117, Waterloo Road
UK-London SE1 8UL.

Done at Brussels, 21 September 1994.

For the Commission

Karel VAN MIERT

Member of the Commission