COMMISSION DECISION

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)

(Only the English and French texts are authentic)

(Text with EEA relevance)

(94/894/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 No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal,

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 [2], as last amended by the Act of Accession of Spain and Portugal,

Having regard to the notice [3] published pursuant to Article 19 (3) of Regulation No 17 and Article 26 (3) of Regulation (EEC) No 1017/68,

After consulting the Advisory Committees on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

A. The notification

(1) On 2 November 1987 the Channel Tunnel Group Limited (hereinafter referred to as CTG), a company incorporated under English law, and France Manche SA (FM), a company incorporated under French law, notified a usage contract concluded on 29 July 1987 by British Railways Board (BR) and Société nationale des chemins de fer français (SNCF), requesting a declaration of non-applicability of the prohibition in Article 2 of Regulation (EEC) No 1017/68, in accordance with Article 5 of that Regulation. The notification was approved by all parties to the contract.

(2) The Commission published a summary of the notification [4] in accordance with Article 12 (2) of Regulation (EEC) No 1017/68.

(3) The Commission then decided not to express any serious doubts within the period of 90 days laid down in Article 12 (3) of Regulation (EEC) No 1017/68, thus exempting the contract for three years running from the date of publication in the *Official Journal of the European Communities*, that is to say until 15 November 1991. This Decision renews that exemption.

B. Brief description of the fixed link

(4) The fixed link comprises a twin bored rail tunnel link, with associated service tunnel, under the English Channel between Fréthun in the Pas-de-Calais and Cheriton in Kent, together with terminal areas and dedicated facilities for control of access to and egress from the tunnels, including in particular the frontier control facilities.

There are crossovers between the two single track tunnels to facilitate train and shuttle movements in the reverse direction during periods of maintenance or incidents to trains, shuttles or fixed installations.

(5) The signalling system is designed to a allow three-minute headways between trains and/or shuttles and shorter headways will be possible in future.

The system will be capable of being upgraded to provide fully automatic train operation.

(6) The infrastructure must allow the operation of international trains between United Kingdom and Continental stations and of shuttles carrying cars, coaches, caravans and freight vehicles between Fréthun and Cheriton.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No L 175, 23. 7. 1968, p. 1.
[3] OJ No C 210, 30. 7. 1994, p. 15.
[4] OJ No C 292, 16. 11. 1988, p. 2.

(7) The passenger shuttles will usually consist of two rakes each made up of 13 carrier wagons together with loading and unloading wagons. Wagons will either be double-deck to carry vehicles not exceeding 1,93 metres in height or single-deck to carry vehicles such as coaches and caravans.

(8) The freight shuttles will consist of up to 25 carrier wagons together with two loading and unloading wagons. Carrier wagons will be designed to carry lorries weighing up to 44 tonnes. The length of a freight shuttle excluding the locomotive will be approximately 560 metres and the trailing load will be in the region of 2 000 tonnes.

C. The enterprises

(9) The Channel Tunnel Group Ltd (CTG) is a wholly-owned subsidiary of Eurotunnel plc, a company incorporated under English law, whose registered office is in London.

(10) France Manche SA (FM) is a wholly-owned subsidiary of Eurotunnel SA, a company incorporated under French law, whose registered office is in Paris.

(11) The objects of CTG and FM are the planning, financing, construction and operation of the Channel Tunnel.

(12) The object of Eurotunnel SA is the acquisition of shareholdings in companies engaged directly or indirectly in the construction or operation of a fixed cross-Channel link or any other fixed link and, more generally, all operations of a financial, commercial and industrial nature likely to facilitate such activities.

(13) The object of Eurotunnel plc is the acquisition of the entire share capital issued by CTG, thus acting as a holding and coordination company, and the undertaking of all activities relating to the planning, development, construction, financing and operation of tunnels or other fixed transport links under the Channel, together with all other related activities.

(14) CTG and FM are concessionaires for, and managers of, the Channel Tunnel and have for the purpose set up a partnership, Eurotunnel, represented by two joint chairmen. The term 'Eurotunnel' will be used in this Decision to refer to both concessionaires.

(15) British Railways and Société nationale des chemins de fer français are two railway undertakings within the meaning of Article 3 of Council Directive 91/440/EEC [1].

D. The concession

(16) By an instrument dated 14 March 1986 CTG and FM were jointly and severally granted by the United Kingdom Secretary of State for Transport and the French Minister for Transport the right to carry out the development, financing, construction and operation of a fixed link under the English Channel between the Department of Pas-de-Calais in France, and the County of Kent in England. The duration of the concession was originally to be 55 years but was extended in 1994 to 65 years.

E. The usage contract

(17) The usage contract was concluded on 29 July 1987 by CTG and FM, in their capacity as concessionaires, and by BR and SNCF, in their capacity as railway undertakings which would use the Tunnel.

(18) Generally speaking, the contract covers the use of the Tunnel by passenger and freight trains operated by the railways, and by shuttles carrying motor vehicles and their passengers and operated by Eurotunnel.

(19) According to the parties, the contract is intended to establish an equitable and feasible division of the new infrastructure, i.e. the fixed link, between the two separate markets, consisting, on the one hand, of the markets in the transport of passengers and freight by train, operated by BR and SNCF, and, on the other, the market in the transport of accompanied motor vehicles through a special system of shuttles operated by Eurotunnel. The parties maintain that this separation is justified by the fact that the concessionaires have neither the experience nor the resources necessary to provide by themselves a complete rail-transport service.

(20) Under the contract, the concessionaires undertake to keep the Tunnel open for the passage of trains throughout the term of the agreement and in accordance with the technical specifications which have been laid down.

(21) The capacity of the Tunnel is measured in standard paths per hour in each direction. The concessionaires are to use their best endeavours to ensure that on the commencement date its capacity will be at least 20 standard paths per hour.

(22) The railways undertake to operate regular commercial services for both passenger and freight trains from the specified commencement date throughout the term of the agreement, complying with specified quality and frequency criteria. They must also ensure that the Tunnel carries the highest possible level of traffic compatible with their normal commercial criteria.

(23) BR and SNCF further undertake to have on their own territory sufficient railway infrastructure for transport in the Tunnel, in the 12 months following its opening, of 17 400 000 passengers, 5 200 000 tonnes of non-bulk freight and 2 900 000 tonnes of bulk freight.

(24) BR and SNCF are also required to have, by the time of opening of the Tunnel, enough suitable rolling-stock to carry the traffic.

(25) Under Clause 6.2 of the contract, BR and SNCF are entitled throughout the term of the agreement

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

to 50 % of the capacity of the fixed link, per hour in each direction, to operate international passenger and goods trains unless they agree to surrender part of their entitlement, any withholding of such agreement requiring justification.

(26) Eurotunnel accordingly undertakes to sell to BR and SNCF according to their needs up to 50 % of the capacity of the Tunnel. BR and SNCF undertake to operate the transport services specified in recital 22 but do not undertake to buy 50 % of the capacity of the Tunnel.

(27) In the course of the proceedings BR and SNCF informed the Commission that over 12 years the capacity needed to provide their transport services would average approximately 75 % of the capacity reserved to them by the usage contract.

(28) As consideration for use of the fixed link, the railways are to pay the concessionaires usage charges comprising a fixed component and a variable component. For the first 12 years of usage, these charges will consist of a minimum amount laid down in Clause 7.5 of the contract.

(29) In addition, a portion of the costs incurred by the concessionaires in connection with the operation, maintenance and renewal of the fixed link are to be reimbursed by the railways in accordance with principles laid down in Schedule V to the contract.

(30) Clause 25 of the contract requires the concessionaires and BR and SNCF to discuss the marketing of their services with the aim of ensuring the optimum use of the fixed link.

(31) Furthermore, under Clause 28.5 of the contract, the concessionaires are to use their best endeavours within the framework of the investment programme to allow the railways to operate motorail and motorail sleeper services, it being understood that such operation must not be such as to prejudice the commercial operations of the concessionaires.

(32) The term of the contract is identical to the period of the concession, namely 65 years.

F. The legislative framework in which the agreement operates

(33) Article 61 of the EC Treaty lays down that freedom to provide services in the field of transport is governed by the provisions of the Title relating to transport. The principles of freedom to provide services laid down in Articles 59 and 60 of the Treaty must therefore be implemented by establishing the common transport policy based on Article 75 of the Treaty.

(34) That is the objective of Directive 91/440/EEC, which introduces for railway undertakings and international groupings a right of access, on certain conditions, to the railway infrastructure of Member States in order to provide international rail transport services.

(35) That Directive has created a new legal framework within which the rules on competition between enterprises must produce their effects. Within this legal framework, enterprises may conclude agreements whose lawfulness must be assessed in the light of the rules on competition.

(36) The scope of the Directive is defined by applying two criteria:

— the Directive applies, first, to the management of railway infrastructure, as defined in Annex 1.A to Commission Regulation (EEC) No 2598/70 of 18 December 1970 specifying the items to be included under the various headings in the forms of accounts shown in Annex I to Council Regulation (EEC) No 1108/70 of 4 June 1970 [1], with the exception of the final indent,

— the Directive applies, second, to rail transport activities of the railway undertakings established, or to be established, in a Member State, with the exception of undertakings whose activity is limited to the provision of solely urban, suburban or regional services.

(37) Pursuant to Clause 23.1 of the contract, the concessionaires must request the governments of the United Kingdom and France to include the fixed link under the Cotif [2] in the list of lines governed by the uniform rules concerning contracts for international carriage of passengers and luggage by rail (CIV) [3], and the uniform rules concerning contracts for international carriage of goods by rail (CIM) [4]. The concessionaires must be indicated as operators of such lines as to the trains.

(38) Furthermore, the fixed link constitutes infrastructure for the passage of international trains and shuttles, the latter forming a rail transport system whose operation is geographically restricted to the Tunnel.

(39) The fixed link thus constitutes railways infrastructure within the meaning of Article 3 of Directive 91/440/EEC, Eurotunnel being the manager. BR and SNCF are railway undertakings having rights of access to the railway infrastructure on the conditions laid down in Article 10 of the Directive.

G. Observations received from interested parties

(40) After it had published the notice required by Article 19 (3) of Regulation No 17 and Article 26 (3) of Regulation (EEC) No 1017/68,

[1] OJ No L 278, 23. 12. 1970, p. 1.
[2] Convention concerning international carriage by rail, dated 9 May 1980.
[3] Appendix A to the Cotif.
[4] Appendix B to the COTIF.

the Commission received observations from ten interested parties, making three main points:

— care had to be taken to give full effect to the provisions of Directive 91/440/EEC dealing with the conditions of access to infrastructures;

— the proportion of paths reserved to BR and SNCF must not be too high, as this would prevent others from running a sufficient number of trains;

— any exemption must not be for too long a period, given the changes currently under way in the operation of the market.

II. LEGAL ASSESSMENT

A. The relevant legal provisions and procedural rules

(41) The parties to the contract notified it under the procedural rules in Regulation (EEC) No 1017/68.

(42) However, the contract is concerned not only with transport but also with the provision of infrastructure, which does not constitute transport.

(43) Regulation No 17 was made inapplicable to transport by Council Regulation No 141 [1]; this was done in order to take account of the distinctive features of the transport sector.

(44) The third recital to Regulation No 141 states that 'the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services'.

(45) According to Article 1 of Regulation No 141: 'Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the Treaty, within the transport market.' The 'supply of transport' consists, here, in making available to users international trains for the transportation of passengers and goods, together with shuttles capable of transporting road vehicles. Such services are to be regarded as true transport services.

(46) Regulation No 141 and the procedural regulations specific to the transport sector consequently cover only those anti-competitive practices which are concerned with the transport market in the sense that they relate directly to the provision of a transport service.

(47) It is clear from the case-law of the Court of Justice [2] that the organization of dock work, while it may be complementary and indispensable to sea transport, must nevertheless be distinguished from sea transport and constitutes a separate market.

(48) That being so, the Commission takes the view that the business of providing an infrastructure lies outside the scope of the procedural regulations specific to the transport sector, and that it falls under Regulation No 17 where the application of Articles 85 and 86 of the EC Treaty is concerned.

(49) In the present case, then, the procedural regulation applicable to the provisions of the contract dealing with transport services is Regulation No (EEC) 1017/68, while Regulation No 17 applies in respect of the provision of infrastructure.

(50) Since the contract is liable to produce effects in the territory of the European Economic Area, its lawfulness must also be examined in the light of Article 53 of the EEA Agreement.

B. The relevant markets

B.1 *The market in the provision of hourly paths for rail transport in the Channel Tunnel*

(51) The Channel Tunnel is an essential railway infrastructure whose manager sells capacity to railway undertakings wishing to run international trains.

(52) The use of hourly paths on this infrastructure is indispensable to the railway undertakings supplying transport services; they incorporate the purchase price of the paths into the price they charge their customers, who pay an all-in price to the carrier.

(53) The fact that users pay an all-in price to the carrier, however, is not in the Commission's view sufficient to show that the infrastructure manager's activity forms an integral part of the supply of transport within the meaning of Article 1 of Regulation (EEC) No 1017/68.

(54) According to the case-law of the Court of Justice [3] and the Commission's practice as developed in its decisions [4], the provision of port services may constitute a reference market for the purposes of the competition rules.

(55) The Commission considers that this argument may be transposed to the present case, as far as the provision of hourly paths in the Channel Tunnel is concerned.

[1] OJ No 124, 28. 11. 1962, p. 2751/62.

[2] Case C-179/90, *Merci convenzionali porto di Genova*, [1991] ECR I-5923.

[3] See footnote to paragraph 47.

[4] Decision 94/19/EC of 21 December 1993, *Sea Containers* v. *Stena Sealink* (OJ No L 15, 18. 1. 1994, p. 8.

(56) This infrastructure constitutes an essential facility for railways wishing to provide transport services between the United Kingdom and the Continent.

(57) The Commission concludes that the provision of infrastructure capacity in the Channel Tunnel is a reference market geographically confined to the Channel Tunnel and its access areas. In accordance with the findings of the Court of Justice already referred to, this market constitutes a substantial part of the common market.

B.2 *The markets in the international transport of passengers and freight between the United Kingdom and the Continent*

(58) According to the case-law of the Court of Justice, 'the concept of the ..... market ..... implies ..... that there can be effective competition between the products [or services] which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the [services] forming part of the same market' (1).

(59) Consequently, in the case of transport, technical substitutability between different modes of transport alone is not sufficient to demonstrate that they form part of the same market.

(60) It is necessary to assess whether these different modes of transport are sufficiently interchangeable from the standpoint of users.

(61) Furthermore, the Court of Justice has ruled that there is no global market in transport (2). Possible alternative transport must be appraised in terms of each international route.

(62) It must therefore be concluded in this case that the undertakings which will provide transport services between the United Kingdom and the Continent will be operating on several markets which have different characteristics and where competition between modes of transport functions in different ways. The following markets in particular can be identified.

(63) There is the market in the transport of goods travelling in the same vehicle, container or swap body, the goods remaining unloaded throughout the operation.

Following the opening of the Channel Tunnel this can be done:

— by lorry, using the railway services and shuttles operated by Eurotunnel,

— by lorry, using sea transport services, and

— by international train between a terminal in the United Kingdom and a terminal on the Continent (3).

(64) The transport of passengers travelling in the course of their business and the transport of passengers travelling for leisure purposes are two separate markets, because of the nature of the services they are looking for and the nature of competition between modes of transport.

(65) Business travellers seek 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 their choice of mode of transport. The aeroplane, the high-speed train and the high-quality night train are all possibilities.

(66) Those on leisure trips, who bear their own costs, attach greater importance to the price; rapidity, comfort and frequency are not decisive factors. Here rail travel, road travel using a Channel Tunnel shuttle or sea transport for one leg of the journey, and economy-class air travel can constitute substitute modes of transport (4).

(67) Thus the markets described at recitals 62 to 66 do not form an exhaustive list.

C. **The concept of agreement**

(68) The usage contract signed by CTG, FM, BR and SNCF constitutes an agreement within the meaning of Article 85 of the EC Treaty, notwithstanding the terminology used in that contract.

D. **Restrictions on competition**

D.1 *Restrictions on competition on the transport markets*

(69) Pursuant to Article 10 of Directive 91/440/EEC, in the transport of passengers and conventional freight, international groupings of railway undertakings have access rights to the railway infrastructures in the Member States of establishment and transit rights in the infrastructure of other Member States for the purposes of operating international transport services.

(70) In order to operate combined international transport services, each railway undertaking has rights of access to railway infrastructure in the Community.

(1) See, for example, Case 85/76, *Hoffman-La Roche* v. *Commission*, [1979] ECR 461, at paragraph 28.

(2) Case 66/86, *Ahmed Saeed Flugreisen*, [1989] ECR 803.

(3) See Commission Decision 94/594/EC, ACI (OJ No L 224, 30. 8. 1994, p. 28).

(4) See Commission Decision 94/663/EC, *Night Services* (OJ No L 259, 7. 10. 1994, p. 20).

(71) These rights are available to existing railway undertakings and to any new railway undertakings, including subsidiaries of existing railway undertakings which may establish themselves in a Member State as railway undertakings.

(72) Furthermore, the Directive leaves Member States free to enact more liberal legislation governing access to infrastructure.

(73) In the case at issue here, the usage contract provides for a division of the transport markets between, on the one hand, Eurotunnel, which operates the shuttles and, on the other, BR and SNCF, which operate international trains carrying passengers and freight.

(74) In accordance with Clause 28.5 of the contract, BR and SNCF may operate motorail and motorail sleeper services which may, under certain conditions, compete with shuttles operated by Eurotunnel. However, under the contract, these operations may not be such as to prejudice Eurotunnel's commercial operations.

(75) Eurotunnel, however, as a railway undertaking within the meaning of Directive 91/440/EEC, could legally operate international combined transport trains between the United Kingdom and the Continent in competition with BR and SNCF.

(76) Similarly, Eurotunnel could legally form an international grouping with another railway undertaking and operate international trains carrying passengers or conventional freight in competition with BR and SNCF.

(77) Moreover, the carriage of lorries on shuttles constitutes a form of international combined transport of goods within the meaning of Directive 91/440/EEC.

(78) BR and SNCF may therefore operate such services or passenger transport services individually or as an international grouping under Article 10 of that Directive and in competition with Eurotunnel.

(79) By dividing the abovementioned markets between BR, SNCF and Eurotunnel, the usage contract has as its object and effect an appreciable prevention or restriction of competition in breach of Article 85 (1) of the EC Treaty.

D.2. *Restrictions on competition on the market in the provision of hourly paths for rail transport in the Channel Tunnel*

(80) Eurotunnel, as the Channel Tunnel concessionaire, owns all of the hourly paths for the operation of transport services through the Tunnel.

(81) However, 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.

(84) It must therefore be concluded 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.

E. Effect on trade between Member States

(85) The contract covers the conditions for the use of the Channel Tunnel, which links two Member States. It therefore affects trade between Member States within the meaning of Article 85 of the EC Treaty.

F. Article 85 (3) of the EC Treaty and Article 5 of Regulation (EEC) No 1017/68

(a) *Contribution to economic progress*

(86) The Channel Tunnel constitutes railway infrastructure intended to permit the transport of passengers and freight between the United Kingdom and the Continent.

(87) That transport will be performed by international trains linking stations in the United Kingdom and the Continent, and by shuttles carrying vehicles between France and the United Kingdom.

(88) On the basis of the statistics available, it is difficult to give a definite forecast of the level of traffic services provided by shuttles and by international passenger and freight trains.

(89) In any event it is necessary that road vehicles arriving at an entry to the Tunnel should be carried in satisfactory conditions. Likewise, it is in the interests of consumers to be able to make proper use of international train services from the opening of the Tunnel.

(90) It is important to bear in mind here that the shuttle transport of vehicles and the international rail transport to be offered are new services requiring investment in specialized equipment which will be recovered over long periods.

(91) The specialized shuttle equipment can be used only in the Tunnel. The international trains to be used for transport through the Tunnel could technically be used elsewhere, but this would not be justifiable in commercial terms.

(92) Generally speaking, therefore, transport operators need certain assurances that infrastructure capacity will be available for shuttle operations and for international trains.

(93) The availability of capacity for shuttle services and for international trains is also important in order to ensure the development of competition between these two modes of transport.

(94) The Commission is therefore of the opinion that the division of Channel Tunnel capacity between the shuttle services and international trains is of such a nature as to promote economic progress, having regard to the particular features of the Tunnel.

(95) Furthermore, due account must be taken of the fact that the operation of both shuttle services and international trains requires advanced technology and specialized equipment which are not interchangeable.

(96) Given the particular nature of this case, it may therefore be considered that the specialization of BR and SNCF in international trains and Eurotunnel in shuttles is such as to contribute to economic progress.

(97) It should also be emphasized that construction of the Tunnel involves considerable private investment and that the undertaking on the part of BR and SNCF to operate international trains during the concession period, using the hourly paths sold by Eurotunnel, manifestly contributes to the success of the project. Another point worth emphasizing is that BR and SNCF have undertaken to pay charges in lump-sum form throughout the first 12 years. This undertaking makes a direct contribution to the project's financial equilibrium.

(98) The undertakings given also represent important guarantees for the banks which are providing financing for the overall Eurotunnel project.

(99) The Commission is therefore of the opinion that the agreement involved is such as will promote economic progress.

(b) *Benefits to consumers*

(100) Consumers will benefit directly from the establishment of regular services by shuttles and international trains throughout the term of the contract, providing alternative cross-Channel transport in competition with other forms of transport. They will in particular benefit directly from the increased competition that will result from the introduction of new services.

(c) *Indispensable nature of the restrictions*

(101) The division of the Tunnel's capacity between shuttle services and international trains is indispensable, notably in view of the requirements of the transport policy of the Community and of the Member States.

(102) Nevertheless, in the light of the forecasts of traffic and of the number of paths actually used, 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 contribute to the success of the project. Clause 6.2 of the contract in fact stipulates that the concessionaires may request BR and SNCF to agree to surrender part of their entitlement to use the fixed link and that such agreement is not to be unreasonably withheld. It is in any case necessary to minimize the effects on competition by ensuring that railway undertakings other than BR and SNCF are able to obtain hourly paths to operate international trains. The Commission will therefore attach appropriate conditions and obligations to its decision.

(d) *No elimination of competition*

(103) For the same reasons as are set out in recital 102, the agreement involved must not eliminate all competition and the Commission will therefore attach appropriate conditions and obligations to its decision.

G. Exemption procedures

(104) Under Article 13 of Regulation (EEC) No 1017/68 and Article 8 of Regulation No 17, any exemption decision must indicate the period for which it is valid, and conditions and obligations may be attached.

(105) In determining the length of the exemption, account must be taken of the exceptional nature of the infrastructure and of the need to create the conditions for its successful use.

(106) It must be emphasized here that the agreement is of great importance to the project.

(107) The funding for the project is mostly in the form of bank loans, to be repaid essentially over a period of some 30 years. The undertakings given by BR and SNCF under the usage contract manifestly help to guarantee these loans.

(108) The Commission therefore considers that, having regard to the exceptional circumstances of the case, an exemption of 30 years can be granted.

(109) Certain conditions and obligations must nevertheless be attached to the exemption to make sure that the restrictions on competition do not go beyond what is indispensable and that the agreement does not afford the undertakings involved the possibility of eliminating competition.

(110) On this matter, SNCF and BR made the following observations to the Commission:

Given a 12-year time span, and subject to the obvious limits of any forecasts, the capacity needed for all this traffic represents an average of about 75 % of the capacity reserved to BR and SNCF under the usage contract concluded with Eurotunnel. That figure takes account of disparities in the speeds of the various types of traffic in the tunnel. The average rate of 75 % is also liable to fluctuate according to the time of day: it is impossible for the time being to be more categorical, in view of the uncertainties as to the pattern of demand.

Eurotunnel stated that, on the basis of its traffic forecasts, the reservation of 75 % to BR and SNCF seemed unexceptionable.

(111) Under Clause 6.2 of the contract, Eurotunnel may request BR and SNCF to agree to surrender part of their entitlement to buy capacity in the fixed link — such agreement not to be unreasonably withheld.

(112) The Commission therefore considers that BR and SNCF would not be justified in objecting to other railway undertakings buying hourly paths from the manager of the infrastructure in order to provide international passenger or freight train services.

(113) However, BR and SNCF must have available the hourly paths necessary to provide an appropriate level of service, that is 75 % of the capacity of the Tunnel reserved for international trains, so that they can operate their own services and those of their subsidiaires. Although BR and SNCF have stated that 75 % is to be understood as a daily figure, the Commission believes that the reservation of 75 % of capacity for those undertakings alone should be set as an hourly figure, for the following reasons:

(114) In the first place, the agreement between Eurotunnel and BR/SNCF as to the reservation of capacity is expressed on an hourly rather than a daily basis.

(115) In the second place, it is essential that railway undertakings other than BR and SNCF should be able to secure paths at all hours of the day, including peak hours. It is generally agreed that, for any given service, the paths are not all equally useful or equally valuable. In the case of a businessman, for example, it is essential that the services offered shall enable in to reach the main European capitals in the early morning and to return home in the late afternoon. The interchangeability between different international trains is therefore limited within certain fixed periods. Hence it is indispensable that users should genuinely create competition between two or more carriers at the hours which are relevant to them.

(116) This must not prevent the proportion of paths from being adjusted by agreement between the manager of the infrastructure, BR, SNCF and any other railway undertakings concerned.

(117) Thus BR and SNCF should be able to use more than 75 % of the hourly capacity if the need arises and if the infrastructure manager has capacity available.

(118) The other railway undertakings should likewise be able to use more than 25 % of the hourly capacity if the manager has capacity available.

(119) Such adjustment must not restrict the right of BR and SNCF to use up to 75 % of the hourly paths reserved for international trains, nor the right of the other railway undertakings to use up to 25 %.

(120) The fixing of the percentage of hourly paths actually needed by BR and SNCF is linked to traffic forecasts, which are very difficult to make over a period of 30 years.

(121) The proportion of paths reserved to BR and SNCF, 75 %, must therefore be re-examined by the Commission after 12 years, that is to say, not later than 31 December 2006.

(122) In view of the length of the period of exemption, the railways involved must also inform the Commission every year of the number of hourly paths actually used, and Eurotunnel must inform it of the number of any applications for paths which could not be met because none was available.

(123) This Decision does not prejudice the applicability of Article 86 of the EC Treaty, in particular as regards the fixing of charges for use of the Tunnel, nor that of Directive 91/440/EEC.

(124) This Decision makes Article 85 (1) of the EC Treaty, Article 2 of Regulation (EEC) No 1017/68 and Article 53 (1) of the EEA Agreement inapplicable to the usage contract of 29 July 1987 between BR, SNCF and Eurotunnel, and it is without prejudice to the Commission's position should the parties to that contract, or the content

thereof, be changed, or in the event of any major change in market conditions,

HAS ADOPTED THIS DECISION:

Article 1

In accordance with Article 85 (3) of the EC Treaty, Article 5 of Council Regulation (EEC) No 1017/68 and Article 53 (3) of the Agreement on the European Economic Area, Article 85 (1) of the EC Treaty, Article 2 of Regulation (EEC) No 1017/68 and Article 53 (1) of the Agreement on the European Economic Area are hereby declared inapplicable for a period of 30 years beginning on 16 November 1991 to the usage contract dated 29 July 1987 made between the Channel Tunnel Group Ltd, France Manche SA, the British Railways Board and the Société nationale des chemins de fer français.

Article 2

The following conditions and obligations are attached to the exemption provided for in Article 1:

A. **Conditions**

(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 subsidiaires.

(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 to use up to 75 % of the hourly paths reserved for international trains during that period if the need arises, nor the right 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.

B. **Obligations**

(h) BR and SNCF must inform the Commission every year from 1 January 1995 onwards of the number of hourly paths used, by hour and in each direction, calculated on a monthly basis.

(i) The Channel Tunnel Group Ltd and France Manche SA must inform the Commission every year from 1 January 1995 of the average number of applications for hourly paths submitted by railway undertakings or groupings of railway undertakings other than BR and SNCF which could not be met because none were available.

Article 3

This Decision is addressed to:

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

2. SNCF,
   88, rue St Lazare,
   F-75009 Paris;

3. The Channel Tunnel Group Limited,
   The Adelphi,
   John Adam Street,
   UK-London WC2N 6JT;

4. France-Manche S.A.,
   112, avenue Kléber,
   BP 166, Trocadéro,
   F-76770 Paris Cedex 16.

Done at Brussels, 13 December 1994

For the Commission
Karel VAN MIERT
Member of the Commission