one in which Solvay does not itself market the product. (See recitals 36–38, *post*). ICI has also kept Solvay informed of its sales policy and intentions in Sweden, the one market of any importance where both producers are present. To all intents and purposes the respective commercial policies of the two producers in soda-ash have been maintained exactly as they were set out in 'Page 1000'.

The rigid market division in soda-ash may be contrasted with that now pertaining in caustic soda which was also the subject of 'Page 1000'. There are now a large number of caustic-soda producers in the Community and despite the handling risks it is freely transported across national borders. ICI now produces caustic soda in Germany as well as in the United Kingdom and operates stock tanks in France and the Netherlands from which it supplies customers throughout the Community. Solvay for its part operates a stock tank on Merseyside from which it supplies customers in the United Kingdom.

Notes and questions on the Decision on *Soda Ash*

1. If concentrated markets have been treated as separate for decades, whether because of state-imposed quotas, or an agreement allocating markets, is it likely that each firm will start penetrating the former territory of the others as soon as the quotas or agreement are abrogated? Give reasons. See *Ministère Public v Tournier*, at 6.1.6 below.
2. (Point 27, paragraph 2). Why do you think the parties competed in supplying caustic soda, but not soda ash? Do you think this was due to the structure of supply or a continued concerted practice relating only to soda ash? Give reasons.
3. When a legal cartel becomes unlawful on accession to the Community, how can it be terminated? Is there a duty to compete aggressively? If a legal adviser discovers that his firm is party to a cartel how can he terminate the infringement? Is it enough to tell the other parties that the firm will no longer abide by the cartel agreement, or must it start competing aggressively on published prices on the termination of the agreement even if this does not make commercial sense? Should it report the agreement to the Commission and claim leniency?
4. Since the introduction of the leniency policy, a lawyer advising a firm that is party to a cartel will have to consider fast whether to inform the Commission and seek leniency.
5. The Commission and Council had imposed anti-dumping duties on the cheaper and better-quality American soda ash. Would it have been more effective to abolish these? The Directorate General in charge of anti-dumping duties can initiate proceedings on its own and, as such, does not need the consent of the Commissioner for Competition.

6.1.4 *Re Wood Pulp Cartel: A Ahlström Oy and Others v Commission (Woodpulp II)*, (C–89, 104, 114, 116–117 and C–125–129/85) 31 March 1993, [1993] ECR 1–1307, [1993] 4 CMLR 407, [1993] 1 CEC 466

I have reproduced considerable excerpts from this case not only because it is important on the meaning of a 'concerted practice', but also because the Court's experts illustrate at points 102–105 what pricing policies may be expected in an oligopolistic market.

3. In the contested decision, the Commission found that 40 wood pulp producers and three of their trade associations had infringed Article 81(1) EEC by concerting on prices.

Fines of between 50,000 and 500,000 ECUs were imposed on 36 of the 43 addressees of the decision.

A. The product

4. The product which gave rise to the alleged concertation was bleached sulphate pulp, obtained by the chemical processing of cellulose and used for the production of high-quality papers.

5. Bleached sulphate pulp is manufactured from both softwoods and hardwoods. Since softwood has longer and stronger fibres, softwood pulp is of better quality. Within two categories, pulps are further subdivided into two sub-groups: pulps made from wood produced in northern countries, which has grown relatively slowly, and pulps made from wood produced in southern countries. That grading has led to four price levels which correspond, in decreasing order, to northern softwood, southern softwood, northern hardwood and southern hardwood.

6. Paper is manufactured from a mixture of pulps whose composition is determined by the grades and properties which the manufacturer wishes the paper to have, and by the equipment at his disposal. Within any product category, pulps are very largely interchangeable but, once the mixture has been determined, the manufacturer is reluctant to alter it for fear of having to make adjustments to his equipment and to carry out time-consuming and costly trials.

7. From the manufacturer's point of view, the price of the pulp accounts for 50 per cent. to 75 per cent. of the cost of the paper.

B. The producers

8. At the material time, there were more than 50 undertakings selling pulp in the Community. Most were established in Canada, the United States of America, Sweden and Finland. Sales were made through subsidiaries, agents or branches established in the Community. Frequently, the same agent represented several producers. ...

10. The United States applicants, with the exception of Bowater, were members of the Pulp, Paper and Paperboard Export Association of the United States, formerly named Kraft Export Association (hereinafter referred to as 'KEA'). KEA was established under the Webb Pomerene Act of 10 April 1918 under which United States companies may, without infringing United States antitrust legislation, form associations for the joint promotion of their exports. That Act permits producers *inter alia* to exchange information on the marketing of their products abroad and to agree on export prices. IPS withdrew from KEA on 13 March 1979. ...

C. The customers and commercial practices

12. During the period in question, a single producer generally had 50 or so customers in the Community, with the exception of Finncell (a Finnish joint sales organisation) which had 290.

13. Pulp producers commonly concluded with their customers long-term supply contracts which could last for up to five years. Under such contracts, the producer guaranteed his customers the possibility of purchasing each quarter a minimum quantity of pulp at a price which was not to exceed the price announced by him at the beginning of

the quarter. The customer was free to purchase more or less than the quantity reserved for him and could negotiate reductions in the announced price.

14. 'Quarterly announcements' constituted a well-established trading practice on the European pulp market. Under that system, some weeks or, at times, some days before the beginning of each quarter, producers communicated to their customers and agents the prices, generally fixed in dollars, which they wished to obtain in the quarter in question for each type of pulp. The prices varied according to whether the pulp was to be delivered to ports in northwest Europe (Zone 1) or to Mediterranean ports (Zone 2). The prices were generally published in the trade press.

15. The definitive prices invoiced to customers (hereinafter referred to as 'the transaction prices') could be either identical to the announced prices or lower where rebates or different kinds of payment concessions were granted to purchasers.

D. The administrative procedure ...

19. Since the answers to the statement of objections suggested that the transaction prices were different from the announced prices, in September 1982 the Commission requested the parties concerned to furnish proof thereof, as it is empowered to do under Article 11 of Regulation 17. Over 100,000 invoices and credit notes were thereupon forwarded to the Commission.

E. The decision

20. On 19 December 1984 the Commission adopted the contested decision. As stated earlier, that decision is addressed to 43 of the addressees of the statement of objections. Six of the addressees of the decision have their registered offices in Canada, 11 in the United States, 12 in Finland, 11 in Sweden, one in Norway, one in Portugal and one in Spain. Fines of between 50,000 and 500,000 ECUs were imposed on only 36 of those addressees. The Norwegian, Portuguese and Spanish addressees, as well as one of the Swedish producers, two Finnish producers and one United States producer, were not fined.

The Commission found that most of the applicants had concerted on

(a) prices for bleached sulphate wood pulp announced for deliveries to the European Economic Community' during the whole or part of the period from 1975 to 1981,

(b) the actual transaction prices charged in the common market for most of that period.

(c) The US applicants had concerted on both announced and transaction prices through KEA, which recommended prices, but no fine was imposed in respect of this infringement.

(d) Some of the applicants exchanged individualised data concerning prices for deliveries of hardwood pulp to the European Economic Community from 1973 to 1977 through Fides.

(e) export bans had been imposed by some of the applicants on customers of wood pulp in the common market.

Some of the firms gave the Commission a commitment to quote at least half their sales to the Community in the currency of the buyer, rather than in dollars, and to refrain from the other practices found. They appealed against the decision.

In an earlier judgment, *Woodpulp* [1988] ECR 5193, the ECJ held that the Commission was competent to forbid agreements made outside the Community if they were implemented within it.

The ECJ decided to obtain an expert's report on parallelism of prices.

I have deleted the paragraphs in which the ECJ quashed the decision in so far as it condemned a cartel relating to the actual prices charged on transactions. The alleged concertation had not been adequately identified in the statement of objections. The Court went on to consider the decision in so far as it condemned the quarterly announcements of maximum prices in advance.

A. The system of quarterly price announcements constitutes in itself the infringement of Article 81 EC

59. According to the Commission's first hypothesis, it is the system of quarterly price announcements in itself which constitutes the infringement of Article 81 EEC.

60. First, the Commission considers that that system was deliberately introduced by the pulp producers in order to enable them to ascertain the prices that would be charged by their competitors in the following quarters. The disclosure of prices to third parties, especially to the press and agents working for several producers, well before their application at the beginning of a new quarter gave the other producers sufficient time to announce their own, corresponding, new prices before that quarter and to apply them from the commencement of that quarter.

61. Secondly, the Commission considers that the implementation of that mechanism had the effect of making the market artificially transparent by enabling producers to obtain a rapid and accurate picture of the prices quoted by their competitors.

62. In deciding on that point, it must be borne in mind that Article 81(1) EEC prohibits 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.

63. According to the Court's judgment in *Suiker Unie* [[1975] ECR 1663, paras 26 and 173 at 6.1.2 above], a concerted practice refers to a form of co-ordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical co-operation between them. In the same judgment, the Court added that the criteria of co-ordination and co-operation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the Common Market.

64. In this case, the communications arise from the price announcements made to users. They constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.

65. Accordingly, the system of quarterly price announcements on the pulp market is not to be regarded as constituting in itself an infringement of Article 81(1) EC.

B. The infringement arises from concertation on announced prices

66. In the second hypothesis, the Commission considers that the system of price announcements constitutes evidence of concertation at an earlier stage. In paragraph 82 of its decision, the Commission states that, as proof of such concertation, it relied on the parallel conduct of the pulp producers in the period from 1975 to 1981 and took on different kinds of direct or indirect exchange of information.

67. It follows from paragraphs 82 and 107 to 110 of the decision that the parallel conduct consists essentially in the system of quarterly price announcements, in the simultaneity or near-simultaneity of the announcements and in the fact that announced prices were identical. It is also apparent from the various telexes and documents referred to in paragraph 61 *et seq.* of the decision that meetings and contacts took place between certain producers with a view to exchanging information on their respective prices. ...

2. The other evidence adduced by the Commission

...

101. It is apparent from the expert's report, together with the ensuing discussion, that the experts regard the normal operation of the market as a more plausible explanation for the uniformity of prices than concertation. The main thrust of their analysis may be summarised as follows:

(i) Description of the market

102. The experts describe the market as a group of oligopolies—oligopsonies consisting of certain producers and of certain buyers and each corresponding to a given kind of pulp. That market structure results largely from the method of manufacturing paper pulp: since paper is the result of a characteristic mixture of pulps, each paper manufacturer can deal only with a limited number of pulp producers and; conversely, each pulp producer can supply only a limited number of customers. Within the groupings so constituted, co-operation was further consolidated by the finding that it offered both buyers and sellers of pulp security against the uncertainties of the market.

103. That organisation of the market, in conjunction with its very high degree of transparency, leads in the short-term to a situation where prices are slow to react. The producers know that, if they were to increase their prices, their competitors would no doubt refrain from following suit and thus lure their customers away. Similarly, they would be reluctant to reduce their prices in the knowledge that, if they did so, the other producers would follow suit, assuming that they had spare production capacity. Such a fall in prices would be all the less desirable in that it would be detrimental to the sector as a whole: since overall demand for pulp is inelastic, the loss of revenue resulting from the reduction in prices could not be offset by the profits made as a result of the increased sales and there would be a decline in the producers' overall profits.

104. In the long-term, the possibility for buyers to turn, at the price of some investment, to other types of pulp and the existence of substitute products, such as Brazilian pulp or pulp from recycled paper, have the effect of mitigating oligopolistic trends on the market. That explains why, over a period of several years, fluctuations in prices have been relatively contained.

105. Finally, the transparency of the market could be responsible for certain overall price increases recorded in the short-term: when demand exceeds supply, producers who are aware—as was the case on the pulp market—that the level of their competitors' stocks is low and that the production capacity utilisation rate is high would not be afraid to increase their prices. There would then be a serious likelihood of their being followed by their competitors.

(ii) Market trends from 1975 to 1981

...

(iv) Specific criticisms of the Commission's explanation made by the experts

...

3. Conclusions

126. Following that analysis, it must be stated that, in this case, concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks.Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.

127. In the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission. Article 1(1) of the contested decision must therefore be annulled. ...

A. Concertation on announced prices and the exchange of information on transaction prices ...

B. Concertation on transaction prices

133. In Article 1(3) of its decision, the Commission also found that the applicants who were members of KEA concerted on transaction prices within that association ...

138. It follows that, in establishing the infringement relating to transaction prices, the Commission must have relied essentially on documents gathered after the statement of objections was drawn up. Since the members of KEA had no opportunity to make their views known on those documents, Article 1(3) of the contested decision must be annulled for disregard of the rights of the defence in so far as it concerns that infringement.

C. Effect on trade between Member States

139. Pursuant to Article 81 EEC, anti-competitive conduct may not be penalised by the Commission unless it may also affect trade between Member States.

140. In paragraphs 136 *et seq.* of its decision, the Commission considers that that is so in the present case. The uniform price level resulting from the practices at issue impeded trade which would otherwise have arisen by reason of the differences in demand, exchange rates and transport costs. Such trade would have been carried out through independent intermediaries and paper makers reselling their pulp surpluses on the more buoyant market of another Member State.

141. The applicants belonging to KEA challenged that contention on three fundamental grounds. To begin with, their activities are limited to exportation to the Community and do not affect trade between Member States. Next, there is practically no trade in the product between Member States: the few pulp mills in the Community use virtually their entire output in their own paper plants. Furthermore, having regard to storage costs, paper makers generally buy pulp only for their own consumption. Finally, the applicants consider that their market share was too small to have an appreciable impact on trade between Member States.

142. The first objection to the first two arguments is that, as the Court has held: see Case 123/83, *BNIC v Clair* [[1985] ECR 391] any agreements whose object or effect is to restrict competition by fixing prices for an intermediate product is capable of affecting intra-Community trade, even if there is no trade in that intermediary product between Member States, where the product constitutes the raw material for another product marketed elsewhere in the Community. In this case, it should be noted that wood pulp accounts for 50 to 75 per cent of the cost of paper and, consequently, there is no doubt that the concertation which took place on prices for pulp affected trade in paper between the Member States.

143. Similarly, the third argument advanced by the members of KEA, based on their narrow market share, must be rejected. In that regard, it must be borne in mind that, as the Court has held on several occasions: see, for example, Joined Cases 100–103/80, *Musique Diffusion Francaise v EC Commission* [[1983] ECR 1825] if an agreement is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States.

144. In this case, it is apparent from Table 2 annexed to the decision that the exports of the United States producers varied between 14.10 and 17.67 per cent of total consumption of pulp in the Community during the period at issue. Since market shares of that size are not insignificant, it must be held that concertation on announced prices and the exchanges of information which took place within KEA were capable of affecting trade between Member States.

D. Application of the principle of non-discrimination ...

VI The clauses prohibiting export and resale

...

VII The undertaking

178. The United States applicants—including Bowater but excluding IPS—and the Canadian applicants Westar, Welwood, MacMillan, Canfor and British Columbia have sought the annulment of the undertaking annexed to the decision, in whole or in part. ...

The Commission argued that the undertaking should stand.

181. That point of view cannot be accepted. The obligations imposed on the applicants by the undertaking must be regarded in the same way as orders requiring an infringement to be brought to an end, as provided for by Article 3 of Regulation 17. It follows from Joined Cases 6–7/73, *Commercial Solvents v EC Commission* [[1974] ECR 223] that that provision authorises the Commission to take any measures which are necessary to terminate the infringement which has been established and may include both orders to act and injunctions to refrain from acting. In giving that undertaking, the applicants thus merely assented, for their own reasons, to a decision which the Commission was empowered to adopt unilaterally. ...

185. Accordingly, the provisions of the undertaking must be annulled in so far as they impose obligations other than those resulting from findings of infringements made by the Commission which have not been declared void by the Court.

VIII The Fines ...

186. It follows from the foregoing that only the infringements or part of the infringements set out in Article 1(3), (4) and (5) of the operative part of the decision must be upheld. Those infringements are, it will be recalled, in the first place, in the case of the members of KEA, concertation on announced prices and the exchange of individualised data on prices within that association, secondly, in the case of Finncell, the exchange of individualised data on prices with other producers within Fides and, thirdly, in the case of the Canadian applicants St. Anne, Westar, MacMillan and Canfor, the insertion of clauses prohibiting export or resale in contracts or general conditions of sale.

A. The infringements relating to KEA

187. It is apparent from paragraph 146 of the decision that no fine was imposed on the United States producers in respect of their participation in KEA's activities. Since this action is the first in which the Webb Promerene Act is in issue, the defendant has acknowledged that the producers concerned were unaware that their conduct was contrary to the EC Treaty.

operation and success. Given this technological dependence on Corning, Corning holds, in spite of the reduction of its voting rights and management powers, an influential position in each joint venture which it can use to coordinate the competitive relationship between those joint ventures ...

The Commission went on to emphasise that Corning appointed a different technical manager for each joint venture, and retained three representatives on the UK board, and a financial controller for the German joint venture.

53. The fact that the partners have agreed not to communicate competitive information between the joint ventures does not materially change the above assessment. The distortion of competition results from the existence of the network of inter-related competing joint ventures, within which one partner is able to influence the joint ventures' behaviour on the market. ...

56. In conclusion, the notified agreements have as their foreseeable effect restrictions and distortions of competition within the common market and are likely to affect trade between Member States. Unless exempted under Article 81(3), they are prohibited by Article 81(1).

...

B. Article 81(3)

(a) Improvement of production and promotion of technical progress

59. The agreements enable several European companies to produce a high-technology product with significant advantages over traditional cables in the Community and promote technical progress in relation to both optical fibres and optical cables. Moreover, the joint ventures facilitate a more constant and rapid transfer of Corning's technology than would otherwise be possible. This concurrent introduction of Corning's most up-to-date technology in the common market is essential to enable the European companies to withstand competition from non-Community producers, especially in the USA and Japan, in an area of fast-moving technology.

The Commission persuaded the parties to modify their agreements so as to qualify for exemption. Corning Glass retained less control over each joint venture, the territorial restraints on each were reduced, a Chinese wall prevented market information passing from one joint venture to another and each party was enabled to expand the capacity of the joint venture even if the other did not share in the expense or results of the expansion.

The joint ventures were permitted to make only passive sales to the countries where Corning had given a licence without a joint venture, but each joint venture was not so protected. The possible restriction of production in each joint venture by Corning to protect another joint venture was further avoided by giving each parent the right to require expansion of the production capacity of the joint venture, jointly if the other so wished and, if not, at its own expense. The cable makers were permitted to buy fibres elsewhere. The duration of the joint ventures as limited to 15 years, with a possibility of renewal.

Notes and questions on the Decision in *Optical Fibres*

1. (Point 46). Did each joint venture fall within Art 81(1)? If not, this was the first joint venture not caught by Art 81(1). The joint venture was to make optical fibres in Europe. Could Siemens or BICC have made optical fibres profitably in the EC without help from Corning Glass? Could Corning have done so without the help from BICC or Siemens?
2. (Point 47). Should the Commission be concerned about co-operation between one parent and the joint venture in a concentrated market (a) if the joint venture is an undertaking the parents have acquired, and (b) if the joint venture is one the parents have created?
3. (Points 45, 48 and 53). How may a network of joint ventures with a common parent in a concentrated market with entry barriers restrict or distort competition?

   Would the network restrict or distort competition more or less if the common parent provided finance rather than technology? Would you be concerned if the supply was not concentrated or if the barriers to entry were low? Would a party other than the common party know of the network's existence? Is the existence of a network a question that joint ventures should habitually ask before investing under an agreement that may be void?
4. (Points 48 and 59). Why is a licence to a joint venture a particularly good way of disseminating rapidly developing technology? Would other ways of exploiting the technology be as good for Europe?
5. Should the Commission have considered the network of licences as well as the network of joint ventures? Did it?
6. What are (a) the advantages, and (b) the disadvantages in principle of the Commission intervening in commercial transactions after they have been implemented for some years?
7. Are you happy with the particular amendments and safeguards imposed by the Commission? See V Korah (1987) *European Law Review* 18.
8. Is this a particularly well-reasoned decision for its time?

11.2.3 *Elopak/Metal Box-Odin*, 13 July 1990, [1990] OJ L209/15, [1991] 4 CMLR 832, [1990] 2 CEC 2066

This is the first and almost the only joint venture which the Commission cleared completely rather than exempted. It is said that there were many joint ventures in concentrated market where proceedings were not opened, however, because neither party could have achieved the functions of the joint venture on its own. The decision sets out the various causes for concern about joint ventures.

The Commission explained Elopak's activities in making and selling cartons for pasteurised milk, juice, etc., i.e. products that last only for a few days, and those of Metal Box in making and selling metal closures, PET and polythene bottles, plastic packaging, etc. Metal Box also makes an aseptically filled 'milk can' (a polypropylene container with an aluminium top) for long-life liquids.

I. The Facts

A. Subject of the Decision

1. This Decision concerns agreements between Elopak and Metal Box. The object of the agreements is to establish Odin, jointly owned by Elopak and Metal Box, which is to

carry out the research and development of a container with a carton base and separate closure that can be filled by an aseptic process with UHT processed foods. Odin will also develop the machinery and technology for filling these new containers and if successful undertake production and distribution of the new containers and their filling machines.

2. The object of the notification was to benefit from the procedure provided for in Article 7 of Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 81(3) of the Treaty to categories of research and development agreements [[1985] OJ L53/5]. Failing benefit of such procedure the parties sought, pursuant to Articles 2 and 4 of Regulation No 17, negative clearance or exemption under Article 81(3) of the Treaty to categories of research and development agreements (now expired and replaced by Regulation 2657 below). ...

C. The agreements

The essential elements of the notified agreements, which were made on 23 April 1986, are summarized below.

5. Elopak and Metal Box create for an indefinite period a 50/50 jointly owned company, Odin, to research, develop and if successful ultimately exploit (i.e. manufacture and distribute) a new form of paperboard-based package with separate closure (a laminated metal lid) and the filling and sealing machinery and technology associated with this new package. The new package will be for shelf-stable UHT-treated particulate foods (i.e. not liquids) filled aseptically. This new product and the new associated filling, sealing and handling machinery and technology constitutes the field of the agreement. Odin will be controlled by a board composed of equal numbers of Elopak and Metal Box representatives.

6. Metal Box and Elopak grant Odin licences to exploit anywhere in the world all their respective intellectual property rights (patented and unpatented) relevant for the field of the agreement. Both parents will grant a similar licence to Odin for any new intellectual property rights they may obtain. Odin will not use these intellectual property rights for any purpose other than in the field of the agreement and will keep such rights confidential. Odin will be the owner of any improvements made by it to the intellectual property rights.

7. Within the field of the agreements Odin shall have the exclusive right to exploit the intellectual property rights licensed from the parents and any improvements it may make. As Odin's exclusivity extends only to the field of the agreements it must be seen as a field of use exclusivity. If Odin decides not to exploit the new technology in any particular country, the parents shall have the right to exploit the technology in that country when such opportunity is offered by Odin to third parties.

8. The parents can obtain from Odin a non-exclusive licence (without the right to sub-license) for any improvement made by Odin provided that:

—the use or exploitation of such improvements is unlikely to conflict with Odin (i.e. all uses outside the field of the agreement are permissible), or
—Odin decides not to exploit this technology for the purposes of Odin.

9. Elopak and Metal Box are free to carry out R & D or exploitation either independently or with a third party in the field of packaging systems for shelf-table particulate foods provided they do not use either the know-how of the other partner in Odin or any improvements made by Odin except as specified in the agreements.

...

Provision was made for the parents to enjoy licences to Odin's technology and that of the other party should the arrangement break up.

14. All information received by Odin or by one party from the other under these agreements will be treated confidentially. Elopak and Metal Box will also carry out for a fee on a contract basis research and development work requested by Odin. Odin will be the owner of any intellectual property arising during such contract work. Elopak and Metal Box will keep confidential all information disclosed or developed under such contracts.

D. The products and the market

15. It is intended that the new product will be based on Elopak's gable-top carton, made from paper boards coated with polyethylene or aluminium, and will have a separate closure (a laminated metal lid). It will be capable of being aseptically filled and sealed so that it can be used to package UHT-processed food products containing particles. Also to be developed along with the new product are the associated sterilizing, filling, sealing and handling equipment which must all be adapted to suit the new product and the filling and sealing process yet to be developed. Foods packed in the new product will have a shelf-life of several months. It is expected that the UHT process will affect the quality of the packaged foods less than the sterilization used in canning. A prototype filling machine has in fact been developed and Odin intends to invite customers to submit the prototype to a trial.

16. The market for the product has not yet been developed nor has consumer acceptance been tested. However, uses for it might include soups, sauces, pie-fillings, fruit, vegetables, baby foods, pasta products and pet foods. That being so the new product, if successfully developed, could constitute an adequate technical substitute to metal cans principally, but also to glass jars and certain 'brick' type cartons capable of being filled with UHT-treated liquids or semi-solids by an aseptic process.

17. The markets for the packages with which the new products is likely to compete are oligopolistic in structure: for metal cans-Nacanco, Continental Can, American Can, PLM (Swedish origin), and CMB Packaging referred to above; for glass jars—Owens Illinois, St Gobain and PLM; for 'brick' type cartons—Tetrapak and PKL (Germany).

18. The cost of transport of metal cans and glass jars but not of 'brick' type cartons limits the geographical extent of the relevant market. The new product, like Elopak's current gable-top carton, will probably be transported as flattened blanks separately from closures. The distance over which it can be economically transported will therefore probably be greater than is currently possible with metal cans and glass jars. The existence of these other competitors even within the oligopolistic structure of the market and the fact that the transport costs of the new product will probably not limit severely the geographical extent of the relevant market means that the creation of Odin will not create any significant foreclosure effects.

19. The new product will not compete with Elopak's current gable-top containers used for fresh milk. On this market in any case there are several competitors including Tetrapak which possesses its own technology.

E. Observations of third parties

20. No written observations were received within the time period laid down in the Commission's notice published pursuant to Article 19(3) of Regulation No 17.

II. Legal Assessment

A. Regulation (EEC) No 418/85

21. The parties have applied to benefit from the procedure provided for in Article 7 of Regulation (EEC) No 418/85. However, the notified agreements do not fulfil the conditions necessary for this simplified procedure which does not apply to joint undertakings such as Odin which not only extend to production but also distribution. Furthermore, such an application presupposes that the agreements fall within the scope of Article 81(1), which is not the case here, with the result that the requested compatibility of the notified agreements must be stated by individual negative clearance decision.

(a) Odin will undertake distribution of the new products and such joint distribution is not covered by Regulation (EEC) No 418/85 (see Article 1(2)(d)). In addition Article 2(e) obliges any joint undertaking charged with manufacture of the products to supply them only to the parties; an obligation not fulfilled when Odin, and not the parents, is charged solely with distribution. Therefore, since the agreements do not fulfil the conditions of Article 2 the simplified procedure laid down in Article 7 of Regulation (EEC) No 418/85 cannot be applied.

(b) For the reasons explained below Article 81(1) is not applicable either to the creation of the joint venture (because the parties are neither competitors nor potential competitors) or to any of the individual provisions of these agreements. Consequently, the agreements do not need any exemption under Article 81(3), rather the agreements can be granted a formal negative clearance.

B. Article 81(1)

22. Odin is jointly and equally owned and controlled by both parent undertakings. As a result the joint venture must be considered under Article 81(1).

23. Although at the time of notification the product as well as the market for it had yet to be developed it can be expected that the relevant geographical market is the Community. It is difficult to define exactly the relevant product market on which the new product will compete. It is considered that this product may constitute an adequate technical substitute for the packaging of shelf-stable UHT-treated particulate foods (including semi-liquids but not liquids) filled aseptically. Although the product will probably constitute a technical substitute for metal cans, glass jars and certain 'brick' type cartons, consumer preference may give rise to its own special market.

24. In this case for the reasons hereafter set out it will be seen that at the time of the conclusion of the agreements:

—Elopak and Metal Box were not competitors, actual or potential, in the relevant product market, and
—the development of the product by either party on its own was highly unlikely.

25. Elopak does not possess a complete range of its own or fully proven technology in the field of packaging UHT-process foods with an aseptic filling for both machines and cartons. As a distributor of liquipak aseptic machines, it did not have access to the patented technology embodied in these machines which are solely for cartons containing liquids. Elopak's know-how which is principally for cartons containing liquids is not enough to permit it to develop on its own the new product for aseptically filled cartons with a separate closure for particulate foods. Even access to BTG technology will develop only its know-how regarding sterilization of cartons.

Metal Box has no experience with the type of board cartons to be used as the basis for the new product. Special know-how for cartons is necessary if they are to withstand the heat of the filling process whilst still retaining stability and giving a shelf life of several months. These cartons must in any case be adapted to be capable of accommodating a laminated metal lid.

Neither party could in the short term enter the market alone as such entry would require a knowledge of the other party's technology which could not be developed without significant and time-consuming investment.

Both Metal Box's and Elopak's experience and resources are necessary to develop the new product which will be a combination of their respective technical and commercial know-how. The technical risks involved in carrying out research for a brand new product yet to be proven and which involves a whole new area of technology for each partner, and the risks involved in developing the new filling, sealing and handling machinery necessary, would realistically preclude each party from attempting to carry out research and development on its own. In addition, considerable commercial risks are involved not only in gaining final consumer acceptance for the new carton but also in persuading food processors/packers to reinvest in the expensive new packaging and sealing equipment that will inevitably be necessary for the new product. Moreover, Odin will have to provide a rapid after-sales and maintenance service for filling and sealing equipment which food processors require if they are to be persuaded to re-equip. Back-up services are essential if breakdowns and delays, which can be very costly in terms of spoilt foods, are to be avoided.

Consequently, combining the know-how of each party reduces considerably the technical risks involved, thus diminishing the financial burden to be borne jointly.

26. In activities outside the field of the joint venture the parties are neither competitors nor potential competitors. Elopak is a manufacturer of cartons for fresh or pasteurised liquids-a market in which Metal Box has no interests. Consequently, the creation of Odin will not have any impact on any existing competitive or potentially competitive relationship between the parents. Odin may, however, become a competitor of Metal Box, a point which is dealt with below.

27. The creation of Odin is not likely to lead to foreclosure of similar possibilities to potential competitors. As has been stated, until the product is developed and successfully marketed it is difficult to say on which relevant product market it will compete most effectively. Notwithstanding this uncertainty, there are several other very large metal can makers in the EEC who have at least equivalent technical know-how to Metal Box's. In the market for cartons, Elopak is only one of several companies using Excello technology on a non-exclusive basis. In addition, Tetrapak in particular, with a much bigger market share, has not only its own technology equivalent to Elopak's for fresh milk, but also aseptic technology for 'brick' style cartons which are already used to a limited extent for UHT-processed foods. PKL also possess this latter technical ability.

28. As the parties could not realistically be regarded as competitors, actual or potential, and the creation of the joint venture entails no foreclosure risk, and the agreement does not involve the creation of a network of competing joint ventures, the agreements to establish Odin do not fall within the terms of Article 81(1).

29. The specific provisions of the agreement must however be examined to ascertain whether such provisions restrict competition within the meaning of Article 81(1), or whether they are no more than is necessary to ensure the starting up and the proper functioning of the joint venture. In particular, account must be taken of the fact that if successfully developed and marketed, Odin's new product may compete to some extent with Metal Box's current output.

Provision relating to the activities of the parents

30. The grant to Odin of the exclusive right to exploit the proprietary know-how in the field of the agreement (which is very narrowly defined to include only the highly specific product in question) is a guarantee to each party that its partner will devote its full efforts to the project. As the success of Odin depends on such efforts these provisions will make each of them willing both to bear the financial, technical and commercial risks involved as well as to divulge secret know-how. This is particularly important in this case where a significant proportion of the proprietary know-how involved is not protected by patents. A similar analysis applies to the provisions relating to the nonexclusive licence of improvements which may be granted by Odin to its patents and to those limiting the use of such improvements. These ensure that Odin will be able to exploit exclusively the proprietary know-how in the field of the agreement.

31. Even though the protection afforded to Odin by the exclusive right to exploit goes beyond any initial starting-up period for new technology and may extend for the life of Odin it cannot realistically be seen how, in view of the following circumstances, it might infringe Article 81(1):

—Both parents' proprietary know-how (and not just that of one parent) plus further R & D work by Odin are necessary to develop not only the new product but also the machinery and technology linked to it; they are also necessary to the manufacture and marketing of the product which, even if successfully developed, must still win consumer acceptance and, after that, be adapted to possible changes in consumers' demand, quality requirements and production technology;

—there are no explicit restrictions in relation to price, quantity, customers or territory placed on Odin's activities, even though its new product may compete to some extent with Metal Box's current output,

—the exclusivity is limited to the field of the agreement which is very narrowly defined; moreover the parents are not restricted in research and development or exploitation of closely related and possibly competing products.

The exclusivity in this case cannot in the circumstances be compared to exclusive licences of proprietary know-how which is ready for technical exploitation either in a licensor/licensee relationship (see *Boussois/Interpane* Decision [[1987] OJ L50/30]) or where the licensor is a partner in a joint venture with which it can compete directly (see Commission Decision *Mitchell-Cotts/Sofiltra* [[1987] OJ L41/31]).

32. The grant to Odin of a non-exclusive licence to use its parents' know-how and the provisions for updating this know-how and keeping it confidential do not infringe Article 81(1). These provisions do not restrict the possibility for the parents to conduct R & D in closely related and competing fields. In fact such R & D is expressly permitted as long as each party does not use the other party's know-how or Odin's improvements (although such improvements may be used outside the field of the agreement). These provisions, like those relating to secrecy do no more than guarantee the confidentiality of secret know-how, and prevent the other party from using Odin as a vehicle to obtain know-how to which it would not otherwise have access.

33. The parties' obligations in relation to licensing technology at dissolution or break-up do not infringe Article 81(1). In such an event both parties will have access not only on an unlimited basis to improvements made by Odin but also to the use in the field of the agreement of the other party's know-how. Thus, on break-up of Odin or sale by one party, both parties are free to compete using all know-how including that of the other party in the field of the agreement and using their own and Odin's improvements in any field. The limit on the use of the other party's proprietary know-how to the field of the agreement is a necessary consequence of cooperation limited to a specific field of activities. In fact since a break-up or sale can be quite readily brought about by either party, this provision does no more than ensure such an eventuality will not be used as a pretext by one party to obtain the other party's know-how outside the highly specific field of the agreement. Ease of break-up or sale (with the associated access to know-how) also ensures that Metal Box cannot use its joint controlling position in Odin to prevent the new product being fully and actively exploited if it considers that each exploitation might harm the products it currently produces. Similarly Metal Box cannot impose any territorial restrictions on Odin's product or sales without either provoking a break-up if Elopak so wishes or without Elopak being entitled to seek the right to exploit the new product in the territory in which Metal Box opposes exploitation by Odin. Elopak in particular has no incentive to limit Odin's output or the geographical scope of its sales. Neither is there any reason to suppose that Metal Box will use its co-control in Odin in a manner incompatible with Article 81(1).

34. Nor are the following restrictions caught by Article 81(1): (a) the obligation on each parent, for five years after break-up of Odin (or sale by one party of its shares), not to allow a competitor of the other parent to use that other parent's know-how or improvements made by Odin, and (b) the provision giving the seller right of first refusal in the event of a further sale. Such provisions are a necessary result of the creation of Odin without which the two parents could not reasonably be expected to cooperate. In the absence of such provisions and especially in view of the ease with which a sale or break-up can be brought about, the possibility of a competitor obtaining know-how which is essential if Odin is to develop successfully the new products. Nor should a competitor have immediate access to Odin's improvements without bearing either the risk or the financial investment which each party has borne. Such protection of Odin's improvements is necessary to ensure the parties' willingness to allocate the necessary funds to Odin to develop the new product. A similar analysis applies to the ban on disposing of Odin shares without the other party's consent; this is also an expression of the wish of the parties to undertake a particular project with a specifically qualified partner.

Provisions relating to limitations placed on Odin

35. The provisions which relate to Odin's use of the parents' proprietary know-how and the obligation to keep such know-how secret are both necessary to avoid compromising or undermining Odin's purpose and existence. They are a necessary consequence of the parents' desire to limit cooperation to a specific field and a reflection of the legitimate aim to keep know-how secret. Such provisions have in fact been recognised, in Article 2 of Commission (EEC) No 556/89 [[1999] OJ L61/1], as legitimate in the context of know-how licences. Finally, there are no explicit restrictions relating price, quantity or territory imposed on Odin. Consequently in the context of this case the provisions relating to the activities of Odin do not fall within the scope of Article 81(1).

Implicit restrictions

36. The above analysis has shown that neither the establishment of Odin nor any of the detailed provisions fall within the scope of Article 81(1). In fact the individual provisions are seen to be either:

—provisions not restricting competition in the sense of Article 81(1), or
—provisions which in other contexts might restrict competition but which in the context of the present case do not. Since such provisions cannot be disassociated from the creation of Odin without undermining its existence and purpose and since the creation of Odin does not fall within the scope of Article 81(1), these specific provisions also fall outside the scope of Article 81(1).

A final examination of any implicit or inevitable anti-competitive consequences is however necessary, particularly as a result of the new potential competition that may be created between Metal Box and Odin if this latter's new product is commercially successful. As explained above there are no explicit provisions limiting competition between Metal Box and Odin and in particular there is no geographical division of the EEC. As has been stated, Elopak in particular has no incentive to limit Odin's output or the geographical scope of its sales. Neither is there any reason to suppose that Metal Box will use its co-control in Odin in a manner incompatible with Article 81(1). In a case such as the one under consideration there can be no implicit anti-competitive impact on the activities of the parents outside the joint venture because not only were the parties not even potential competitors at the creation of Odin but also neither party could have realistically developed the new product without the full and active participation of its partner. Finally, any dangers of implicit anti-competitive effects stemming from the potential competition created between Metal Box and Odin are further mitigated by the facility with which a break-up sale of Odin can be brought about and the wide post-term use possibilities for all parties that this implies (see point 11 above).

Conclusions

37. Consequently, it may be concluded that the agreements between Metal Box and Elopak to establish Odin and the associated agreements and transfers of technology described in this Decision do not have as their object or effect any appreciable prevention, restriction or distortion of competition within the common market within the meaning of

Article 81(1). It is not therefore necessary to examine whether trade between Member States may be affected. Consequently there are no grounds, on the basis of the facts in the Commission's possession, for action on its part under Article 81(1). The Commission can therefore grant the agreements in question a negative clearance under Article 2 of Regulation No 17,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, the Commission has no grounds for action to Article 81(1) of the Treaty in respect of the agreements for the creation of; and associated with the creation of, Odin Development Ltd by Elopak A/S, Elopak Ltd and Metal Box plc.

Article 2

This Decision is addressed to: ...

Done at Brussels, 13 July 1990.

For the Commission
Leon BRITTAN
Vice-President

Notes and questions on the Decision in *Odin*

1. (The fourth 'having regard' at the beginning of the excerpt from the decision). Note that the notice under Art 19(3) was published in August 1987, but the Decision was adopted four years later. Does this indicate that the Decision was controversial and that the Competition Department had to wait for someone to change jobs?
2. (Point 2) Since replaced (11.3.2 below).
3. (Point 21). Would this prevent Reg 2659/2000 (11.3.2 below) from applying?
4. Can you distinguish *Odin* from *BBC Brown Boveri/NGK* [1988] OJ L301/68, [1989] 4 CMLR 610? Do you think that all officials thought along the lines of *Odin*?
5. Has the Commission ever cleared exclusive rights in connection with a joint venture before?
6. How can you be sure of convincing a technically unqualified Commission official, NCA or court that the parties are not potential competitors? See how carefully this decision went into the various possible arguments.
7. (Point 22). Note that control was joint.
8. (Point 23). Do you think that most agreements for joint R&D will affect the whole of the common market?
9. (Points. 24–25). Note that the Commission no longer insists that any firm sufficiently interested in a project to enter into a joint venture is a potential competitor.
10. Note the various possible objections to joint ventures and the ways they are met: (Points 24–25). Actual or potential competitors.

be required if they were to develop and produce an MPV individually on the proposed basis with separate annual sales which they project as between 80 000 and 90 000 MPVs each. The minimum number of units for production of a MPV based on the concept described above to become economically viable was estimated by the companies concerned as being in excess of 110 000 annually. This figure, although always depending on the particular circumstances of each case, corresponds to statements of competitors in a similar case concerning the MPV segment currently being investigated by the Commission. Taking into account the investment required by either company for separate development and production of an MPV as well as the unit production necessary for profitability, it could not be expected that the companies, acting on their own, would achieve a reasonable return in view of their anticipated sales and with regard to the low volume of the MPV segment in comparison with other market segments. Even if the companies were to achieve their sales targets, the joint project is not expected to make profits for several years, despite its economics of scale and considerable financial aid from the Portuguese government.

The Commission went on to explain how each of the other conditions for exemption was fulfilled, and added at points 39–40 that the joint venture would not strengthen a dominant position contrary to Article 82, as alleged by Matra. It granted an exemption.

Notes and questions on the Decision in *Ford/Volkswagen*

1. (Point 31). What was the minimum efficient scale at which MPVs could be made? Was there sufficient demand for Ford and Volkswagen each to enter the market separately (point 14)? Given that each was to have cars produced with different engines and to different designs, did the joint venture eliminate any competition that was possible, even if each was a potential competitor? Should the Commission look to whether each is a potential competitor if neither would enter after the other published plans to do so?
2. (Points 11, 14 *et seq.*). What is the difference between a relevant market and a relevant segment or sub-market? Should the difference matter? Is a segment a product for which the cross elasticities are too high for the markets to be separate?
3. (Points 19 and 21). Does the joint venture fall within Art 81(l) because each firm is capable of entering the MPV segment, although demand would not be large enough to warrant a second entry, or because of the 'group effect' or both?
4. (Point 23). Are social factors relevant to competition? They were not mentioned in Art 2 of the Treaty before its amendment at Maastricht.
5. In view of the benefits to motorists spelled out under Art 81(3) and the large minimum efficient scale in relation to the expected increase in demand, should the agreement have been cleared?
6. Mr H-P von Steophasius refers to the decision in *Ford/Volkswagen* and says: 'Here the Commission was forced to grant an exemption under Article 81(3) to avoid a prohibition announced by the [Federal Cartel Office] under paragraph 1 [of the German Cartel Law]. That was an exceptional case' (PJ Slot and A McDonnell (eds) *Procedure and Enforcement in EC and US Competition Law—Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law* (Sweet & Maxwell, 1993) chapter 5 at p. 33).
7. Had the Commission cleared the joint venture as not infringing Art 81(1) would the German prohibition have been valid? Would it have been easy for the Directorate General for Competition to have let the German authorities forbid a joint venture for which it had approved a Portuguese state aid conditionally on its not being found contrary to Art 81? Do you think that the exemption might have been politically determined? These questions were implicitly raised in Matra's appeal against the exemption but not addressed by the CFI (T–17/93), Judgment of 15 July 1994 [1994] ECR–2595.
8. Do you think that the Commission was sensible to discourage the national authorities from enforcing national competition law and so relieving the Commission of part of its burden?

11.2.5 *European Night Services and Others v Commission* (T–374, 375, 384 and 388/94) 15 September 1998, [1998] ECR II–3141, [1998] 5 CMLR 718, [1998] CEC 955, appeal from Commission decision, 21 September 1994, OJ 1994, L259/20, [1995] 5 CMLR 76, [1998] CEC 955

European Night Services ('ENS') is a company formed by four dominant national railway undertakings, British Rail, Deutsche Bundesbahn, Nederlandse Spoorwegen and Société Nationale des Chemins de Fer Français, to provide overnight passenger services between the UK and Continental Europe through the Channel Tunnel. The parent companies agreed to provide services to their joint venture, including traction over their networks, locomotives and train crews.

The Commission found that the agreement infringed Art 81(1) and granted an exemption for a period of eight years under Reg 1017/68 (transport by rail, [1968] OJ Spec Ed 302, CMR 2815) subject to conditions that the parents grant to any other international grouping of railway operators paths under the English Channel, special locomotives for very fast trains capable of running over the tracks of different parents and the Channel Tunnel as well as the crew to drive these locomotives.

The CFI treated the decision like a boxer's punch ball. It quashed it for failure to make a proper analysis on many grounds, although any one of them would have sufficed. On some points it went further and found the Commission's findings to be manifest error.

11.2.5.1 Judgment of CFI in *ENS*

9. The first agreement notified concerned the formation, by the four railway undertakings mentioned above—BR, SNCF, DB and NS—either directly or through subsidiaries owned by them, of ENS, a company established in the United Kingdom whose business was to consist of providing and operating overnight passenger rail services between points in the United Kingdom and the Continent through the Channel Tunnel, on the following four routes: London–Amsterdam, London–Frankfurt/Dortmund, Glasgow/Swansea–Paris and Glasgow/Plymouth–Brussels.

10. By letter of 15 October 1997, however, ENS informed the Court that the rail services to and from Brussels had been abandoned in December 1994, that the London–Frankfurt/Dortmund route had been replaced by London–Cologne in August 1996 and that the only routes now envisaged were London–Amsterdam/Cologne.

11. On 9 May 1994, European Passenger Services Ltd ('EPS'), which was a subsidiary of BR when the ENS agreements were notified, was transferred by BR to the public authorities in the United Kingdom and now ranks as a railway undertaking within the meaning of Article 3 of Directive 91/440, in the same way as SNCF, DB and NS (all hereinafter referred to, including EPS, as 'the railway undertakings concerned' or 'the parent

undertakings'). At the same time, BR's holding in ENS was transferred to EPS. By letter of 25 September 1997, ENS and EPS informed the Court that EPS's name had been changed to Eurostar (UK) Ltd ('EUKL') and requested that any reference to EPS be deemed to refer to EUKL and vice versa. They further announced that the holding of the United Kingdom public authorities in EPS had been transferred to London & Continental Railways on 31 May 1996. In the United Kingdom, virtually all of the railway track and associated infrastructure, previously owned by BR, is now owned by Railtrack, the railway infrastructure manager.

12. The second group of agreements notified comprised the operating agreements concluded by ENS with the railway undertakings concerned and with SNCB, under which each of them agreed to provide ENS with certain services, including traction over its network (locomotive, train crew and path), cleaning services on board, servicing of equipment and passenger-handling services. EPS and SNCF further agreed to provide traction through the Channel Tunnel.

13. In order to operate the night passenger services, the railway undertakings concerned have procured, through ENS, specialised rolling stock suitable for running on the different rail systems and through the Channel Tunnel, financed through long-term leasing arrangements over 20 years, extended to 25 years in January 1996, at a total cost of UKL 136.7 million, increased to UKL 158 million in January 1996, including the contract price, estimated spares costs, variations, deliveries, commissioning and testing and project team costs.

14. In the notification, ENS and the railway undertakings concerned stated that, on the market for the service in question, in competition with air, coach, ferry and car transport, ENS could achieve an overall market share of some 2.4% of the business segment and 5% of the leisure segment. Even if that market were defined more narrowly, taking account only of the routes concerned, ENS's overall market shares would remain insignificant. None of the railway undertakings concerned could operate alone a comparable service on the routes served by ENS, nor was there any indication that any other group had expressed an interest in, or could derive any profit from, the same activity. The notifying parties further gave the assurance that the ENS agreements did not create any barriers to entry additional to those already in place for any other undertakings wishing to provide similar services, which could constitute international groupings' within the meaning of Article 3 of Directive 91/440; such groupings would thus gain access to railway infrastructures—train-paths on the relevant lines—and would have no difficulty in finding qualified staff and suitable rolling stock. ...

The contested decision

18. On 21 September 1994 the Commission adopted Decision 94/663/EC relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.600—*Night Services*) [[1994] OJ L 259/20], hereinafter 'the decision' or 'the contested decision'). It is based on Regulation No 1017/68, in particular on Article 5 thereof, under which the prohibition of restrictive practices laid down in Article 2, in terms almost identical to those of Article 81(1) of the Treaty, may be declared inapplicable with retroactive effect to certain agreements between undertakings.

19. The decision distinguishes two relevant service markets: the market for the transport of business travellers, for whom scheduled air travel, high-speed rail travel and the rail services to be operated by ENS are interchangeable modes of transport (point 26),

and the market for the transport of leisure travellers, for whom substitute services may include economy-class air travel, train, coach and possibly private motor car (point 27).

20. Contrary to what the notifying parties had maintained, the Commission states that the geographic market does not include the whole of the United Kingdom, France, Germany and the Benelux countries, but is confined to the four routes actually to be served by ENS, namely London–Amsterdam, London–Frankfurt/Dortmund, Paris–Glasgow/Swansea and Brussels–Glasgow/Plymouth (point 29).

21. The decision goes on, referring to the 1993 Commission notice of 16 February 1993 concerning the assessment of cooperative joint ventures pursuant to Article 81 of the EEC Treaty (OJ 1993 C 43, p. 2; hereinafter the 1993 communication'), to find that ENS is a cooperative joint venture (points 30 to 37). It states that ENS's parent undertakings are not withdrawing permanently from the relevant market, since their technical and financial resources could easily enable them to set up an international grouping within the meaning of Article 3 of Directive 91/440 and to provide overnight passenger transport services. Furthermore, they continue to operate primarily on a market upstream from ENS's market, namely the market in necessary rail services which the railway undertakings sell to transport operators such as ENS. The ENS joint venture thus forms an agreement caught by Article 81 of the EC Treaty, as do the operating agreements between it and each of its parent undertakings and SNCB.

22. The decision then notes the restrictions of competition arising out of the ENS agreements (points 38 to 53).

23. First, those agreements have eliminated or appreciably restricted, as between ENS's parent undertakings, the scope for competition provided by Article 10 of Directive 91/440 (points 38 to 45). Both existing and new railway undertakings, including subsidiaries of existing ones, are entitled to the rights of access conferred by that provision, and Member States may enact domestic legislation which is more generous in the access it allows to infrastructure. Thus, for example, DB or NS would be entitled to form an international grouping with a railway undertaking in the United Kingdom to operate international transport services through the Channel Tunnel. Similarly, any of ENS's parent undertakings could itself take on the role of transport operator', or set up a subsidiary specialising as a transport operator', and provide international transport services by buying the necessary rail services from the railway undertakings concerned.

24. Second, given the commercial strength of the parent undertakings, the formation of ENS might impede access to the market by transport operators in a position to compete with it (points 46 to 48). ENS's parent undertakings 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. In view of ENS's direct access to those services and of its special relationship with its parent undertakings, other operators could be placed at a disadvantage in competition for necessary rail services. Account also has to be taken of the fact that BR and SNCF control a significant proportion of available paths for international trains through the Channel Tunnel, by virtue of the usage contract concluded with Eurotunnel.

25. Finally, those restrictions of competition are enhanced by the fact that ENS forms part of a network of joint ventures between the parent undertakings. BR/EPS, SNCF, DB and NS take 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 Services Ltd ('ACI'), 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 (points 49 to 52).

26. However, according to the decision, the agreements in issue, although they do not fall within the exception for technical agreements under Article 3 of Regulation No 1017/68, since they do not have as their sole object and sole effect to apply technical improvements or to achieve technical cooperation within the meaning of that article (points 55 to 58), do meet the conditions laid down by Article 5 of that regulation and Article 53(1) of the EEA Agreement (points 59 to 70). The formation of ENS is likely to favour economic progress by, inter alia, providing competition between modes of transport, and users will benefit directly from the new services offered. The restrictions found to exist are, moreover, indispensable in view of the fact that the services involved are completely new, entailing substantial financial risks which could be borne by a single undertaking only with great difficulty. Subject, therefore, to the imposition of a condition to ensure the presence on the market of rail transport operators competing with ENS, the formation of ENS does not eliminate all competition on the relevant market.

27. The decision therefore declares Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement inapplicable to the ENS agreements for a period of eight years, ending on 31 December 2002 (Article 1 of the decision) and subjects that exemption to the condition ('the condition imposed') 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 2 of the decision).

...

The CFI went on to decide various procedural questions.

Substance

81. In the pleas in law and arguments which they put forward, the applicants submit that the contested decision should be annulled for, in substance, four reasons: (a) none of the constituent elements of the conduct prohibited by Article 81(1) of the Treaty is established in the present case, since the ENS agreements do not restrict competition, and the decision is therefore vitiated by inaccurate and incomplete assessment of the facts, manifest error in law and a failure to state reasons; (b) in its application of the rules on competition, the Commission exceeded the limits of the regulatory framework laid down by Directive 91/440; (c) the Commission imposed disproportionate conditions on its granting of the exemption; and (d) the duration of the exemption granted for the notified agreements (eight years) is too short. Finally, in Case T–384/94, SNCF submits in addition that the contested decision should be annulled because the Commission considered that the ENS agreements did not qualify for the exception for technical agreements under Article 3 of Regulation No 1017/68.

The first plea: inaccurate and incomplete assessment of the facts, manifest error in law and/or breach of the obligation to provide an adequate statement of reasons for the contested decision in so far as the Commission concluded that the creation of ENS had as its object and effect the restriction of competition

82. This plea falls in two parts: first, that the relevant market was wrongly defined and that the ENS agreements have no appreciable effect on trade between Member States and, second, that those agreements have no restrictive effect on competition.

...

First part: definition of the relevant market and absence of any appreciable effect of the ENS agreements on trade between Member States

Findings of the Court

90. First of all, it must be noted that, in order to assess the effects of the ENS agreements on competition and on trade between Member States, the Commission defined two relevant service markets in the decision: the market for the transport of business travellers, for whom scheduled air travel and high-speed rail travel are interchangeable modes of transport (the intermodal' market for business travel), and the market for the transport of leisure travellers, for whom substitute services may include economy-class air travel, train, coach and possibly private motor car (the intermodal' market for leisure travel) (see points 26 and 27 of the decision).

91. The Commission went on to consider, referring to Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reiseburo v Zentrale zur Bekampfung unlauteren Wettbewerbs* [1989] ECR 803, that the relevant geographical market should be confined to the routes actually to be served by ENS (points 28 and 29 of the decision), namely:

—London–Amsterdam,
—London–Frankfurt/Dortmund,
—Paris–Glasgow/Swansea and
—Brussels–Glasgow/Plymouth.

92. As that definition of the geographical market has not been challenged by the applicants, it follows that the ENS agreements fell to be assessed solely on the basis of the four separate geographical markets listed above and solely in the context of an intermodal market comprising various modes of transport such as rail, air, coach and motor car. On that basis, therefore, it is necessary to examine whether the Commission correctly evaluated ENS's market shares in order to arrive at the conclusion that the ENS agreements would have an appreciable effect on trade between Member States, bearing in mind that, according to the applicants' notification, those market shares would not exceed the critical threshold of 5% and would, in any event, be insignificant.

93. It is to be noted here that the contested decision makes no reference to the market shares of ENS or of any other operators competing with ENS and also present on the various intermodal markets taken by the Commission as the relevant markets for the purposes of applying Article 81(1) of the Treaty. Consequently, even if—contrary to the applicants' submission—the ENS agreements were to restrict competition, the Court is not in a position, in the absence of any such data concerning the analysis of the relevant market in the contested decision, to make any finding as to whether the supposed restrictions on competition have an appreciable effect on trade between Member States and are

thus caught by Article 81(1) of the Treaty, having regard, in particular, to the intermodal competition which is, according to the decision itself, a feature of the two service markets in question.

94. It was not until the stage of the proceedings before the Court that the Commission first referred to the notification submitted by the parties in support of its contention that even on the basis of the conservative—and by nature therefore restrictive—forecasts of ENS which are based on a narrower definition of the market, the Night Services' share of the business segment of the market is 7%, and 8% in the case of the leisure segment of the market'. It was also during the written procedure that it first asserted that ENS's market share should be calculated, for the business segment, in relation to early morning and late evening flights rather than by reference to all the flights available round the clock on a given route and is thus in fact much larger.

95. It is settled law that whilst, in stating the reasons for the decisions which it takes to enforce the rules on competition, the Commission is not required to discuss all the issues of fact and law and the considerations which have led it to adopt its decision, it is none the less required under Article 253 of the Treaty to set out at least the facts and considerations having decisive importance in the context of the decision in order to make clear to the Court and the persons concerned the circumstances in which it has applied the Treaty (Case C–360/92P *Publishers Association v Commission* [1995] ECR I–23, paragraph 39, Case T–290/94 *Kaysersberg v Commission* [1997] ECR II–2137, paragraph 150, and Joined Cases T–369/94 and T–85/95 *DIR International Film and Others v Commission* [1998] ECR II–357, paragraph 117). It is also clear from the case-law that, other than in exceptional circumstances, the statement of reasons must be contained in the decision itself, and it is not sufficient for it to be explained subsequently for the first time before the Court (Case T–61/89 *Dansk Pelsdyravlerforening v Commission* [1992] ECR II–1931, paragraph 131, Case T–230/94 *Farrugia v Commission* [1996] ECR II–195, paragraph 36, and Case T–16/91 RV *Rendo and Others v Commission* [1996] ECR II–1827, paragraph 45).

96. It follows from the abovementioned case-law that when a Commission decision applying Article 81(1) of the Treaty suffers from serious omissions, such as the absence of any reference to the market shares of the undertakings concerned, the Commission may not remedy that defect by adducing for the first time before the Court figures and other analytical data from which it may be concluded that the essential elements of a situation in which Article 81(1) applies are in fact present unless none of the parties had challenged the analytical data in question during the prior administrative procedure.

97. Here, according to the estimates put forward by the applicants in the notification, ENS's market shares were not expected to exceed 4%, and it was only on the basis of a narrower market definition that they might reach 7% for the business travel market and 8% for the leisure travel market (see point 2.1.2 of the summary of the notification), without even then having an appreciable effect on competition. It is thus clear that, as regards the effect of the ENS agreements on trade between Member States, the applicants and the Commission were starting from different premisses, the applicants considering that the agreements did not have an appreciable effect on intra-Community trade. The Commission was thus required to provide an adequate statement of its reasons for finding that the ENS agreements had an appreciable effect on trade between Member States.

98. Furthermore, even on the assumption that the Commission may adduce figures and other analytical data for the first time before the Court in order to show that its decision was well founded, the conclusions which it draws from the notification (see paragraph 94 above) are incorrect. According to Table 17 on page 26 of the notification,

ENS's market shares for the business travel segment were to be under 5% on all the routes concerned:

—London–Amsterdam: 3%
—London–Frankfurt/Dortmund: 3%
—Paris–Glasgow/Swansea: 4%
—Brussels–Glasgow/Plymouth: 1%.

99. Again according to Table 17 in the notification, ENS's market share in the leisure travel segment was expected to exceed 5% on only two of the four routes to be served by it, without on any route exceeding the 8% threshold put forward by the Commission:

—London–Amsterdam: 7%
—London–Frankfurt/Dortmund: 6%
—Paris–Glasgow/Swansea: 4%
—Brussels–Glasgow/Plymouth: 4%.

100. It is further stated in the notification that ENS's market shares in the leisure travel segment were likely to remain fixed or even, in view of its limited possibilities for increasing capacity, to fall as the market as a whole grew. Whilst it is true, as has been pointed out above, that the Commission was not required to discuss all the issues of fact and law raised during the course of the administrative procedure prior to the adoption of the contested decision, this latter consideration put forward by the notifying parties was an essential part of their argument that the ENS agreements had an insignificant effect on trade between Member States. It is thus not possible to conclude, as the Commission maintains, that according to the notification ENS's market share on the leisure travel segment was 8%, or even that it exceeded 5%.

101. It must be noted here that whilst at points 2.1.2 of the summary of the notification and II.4.C.5.2(d) of the notification itself the parties stated, inter alia, that ENS's market share might reach 7% in the business travel segment and 8% in the leisure travel segment, they nevertheless made it clear that those shares would only apply in the context of a narrower definition of the market, based on city to city flows and excluding residual competition from cars and coaches. Moreover, those estimates put forward by the parties related to average shares of an overall geographical market and not to the four routes actually to be served by ENS and specifically regarded by the Commission as the different relevant geographical markets within which the ENS agreements fell to be assessed. Consequently, since the contested decision defined the relevant markets by reference not to city to city flows but to flows involving more than one destination (for example, from Paris to Glasgow and Swansea), since it did not exclude residual competition from cars and coaches from its definition of the market and since it did not assess the effects of the ENS agreements on the basis of an overall geographical market but on that of the four routes actually to be served by ENS, the Commission was not entitled to rely on the abovementioned market shares of 7% and 8%.

102. In any event, even if, as noted above, ENS's share of the tourist travel market was in fact likely to exceed 5% on certain routes, attaining 7% on the London–Amsterdam route and 6% on the London–Frankfurt/Dortmund route (see paragraph 94 above), it must be borne in mind that, according to the case-law, an agreement may fall outside the prohibition in Article 81(1) of the Treaty if it has only an insignificant effect on the market, taking into account the weak position which the parties concerned have on the

product or service market in question (Case 5/69 *Volk v Vervaecke* [1969] ECR 295, paragraph 7). With regard to the quantitative effect on the market, the Commission has argued that, in accordance with its notice on agreements of minor importance, cited above, Article 81(1) applies to an agreement when the market share of the parties to the agreement amounts to 5%. However, the mere fact that that threshold may be reached and even exceeded does not make it possible to conclude with certainty that an agreement is caught by Article 81(1) of the Treaty. Point 3 of that notice itself states that the quantitative definition of 'appreciable' given by the Commission is, however, no absolute yardstick 'and that in individual cases ... agreements between undertakings which exceed these limits may . . . have only a negligible effect on trade between Member States or on competition, and are therefore not caught by Article 81(1)' (see also *Langnese-Iglo*, cited above, paragraph 98). It is noteworthy, moreover, if only as an indication, that that analysis is corroborated by the Commission's 1997 notice on agreements of minor importance ([1997] OJ C372/13) replacing the notice of 3 September 1986, cited above, according to which even agreements which are not of minor importance can escape the prohibition on agreements on account of their exclusively favourable impact on competition.

103. That being so, where, as in the present case, horizontal agreements between undertakings reach or only very slightly exceed the 5% threshold regarded by the Commission itself as critical and such as to justify application of Article 81(1) of the Treaty, the Commission must provide an adequate statement of its reasons for considering such agreements to be caught by the prohibition in Article 81(1) of the Treaty. Its obligation to do so is all the more imperative here, where, as the applicants stated in their notification, ENS has to operate on markets largely dominated by other modes of transport, such as air transport, and where, on the assumption of an increase in demand on the relevant markets and having regard to the limited possibilities for ENS to increase its capacity, its market shares will either fall or remain stable. In addition, such a statement of reasons is necessary in the present instance in view of the fact that, as the Court of Justice held at paragraph 86 of its Judgment in *Musique Diffusion Française*, cited above, an agreement is capable of exercising an appreciable influence on the pattern of trade between Member States even where the market shares of the undertakings concerned do not exceed 3%, provided that those market shares exceed those of most of their competitors.

104. There is, however, no such statement of reasons in the present case.

105. It must be concluded from the foregoing that the contested decision does not contain a sufficient statement of reasons to enable the Court to make a ruling on the shares held by ENS on the various relevant markets and, consequently, on whether the ENS agreements have an appreciable effect on trade between Member States, and the decision must therefore be annulled on that ground.

...

Second part: assessment of the restrictive effects of the ENS agreements on competition

Findings of the Court

135. According to the contested decision, the ENS agreements have effects restricting existing and potential competition (a) among the parent undertakings, (b) between the parent undertakings and ENS and (c) *vis-à-vis* third parties; furthermore (d), those

restrictions are aggravated by the presence of a network of joint ventures set up by the parent undertakings.

136. Before any examination of the parties' arguments as to whether the Commission's analysis as regards restrictions of competition was correct, it must be borne in mind that in assessing an agreement under Article 81(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (judgments in *Delimitis*, cited above, *Gottrup-Klim*, cited above, paragraph 31, Case C–399/93 *Oude Luttikhuis and Others v Verenigde Cooperatieve Melkindustrie* [1995] ECR I–4515, paragraph 10, and Case T–77/94 *VGB and Others v Commission* [1997] ECR II–759, paragraph 140), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T–148/89 *Trefilunion v Commission* [1995] ECR II–1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 81(1).

137. It must also be stressed that the examination of conditions of competition is based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to penetrate the relevant market and compete with the undertakings already established (*Delimitis*, cited above, paragraph 21). Furthermore, according to the Commission notice of 1993 concerning the assessment of cooperative joint ventures pursuant to Article 81 of the Treaty: The assumption of potential competitive circumstances presupposes that each parent alone is in a position to fulfil the tasks assigned to the joint venture and that it does not forfeit its capabilities to do so by the creation of the joint venture. An economically realistic approach is necessary in the assessment of any particular case (point 18).

138. It is in the light of those considerations, therefore, that it is necessary to examine whether the Commission's assessment of the restrictive effects of the ENS agreements was correct.

—Restrictions on competition among the parent undertakings

139. It is clear from the documents before the Court that, prior to the adoption of Directive 91/440, the railway undertakings in the Member States were neither actually nor potentially in competition with each other because most Member States provided for exclusive rights precluding, de jure or de facto, both the provision of international passenger services and access to the infrastructure (the national rail networks). Prior to the adoption of that directive, as the parties have stressed, the only basis on which such services were provided in the Community was that of the traditional cooperation agreements between the railway undertakings operating on the various networks concerned. However, following the adoption of Directive 91/440, conditions of competition on the market for rail transport changed and the railway undertakings operating on their national networks became to a certain extent potential competitors for international passenger services, provided that they formed international groupings' with other railway

undertakings established in other Member States for the purpose of providing international transport services between those Member States (Articles 3 and 10 of the directive).

140. It would appear from the Commission's arguments that the possibility of providing international services via international groupings is open not only to existing railway undertakings but also to new railway undertakings, including subsidiaries of existing railway undertakings, and that it was on the basis of that premiss that the Commission considered that the ENS agreements restricted competition among the parent undertakings inasmuch as (a) each of the parties to those agreements could form an international grouping either with an undertaking established in the United Kingdom or with its own subsidiary there and thus compete with ENS, (b) each of those parties could set up a subsidiary specialising as a 'transport operator' and buy from those parties the same necessary rail services as they sold to ENS and (c) each railway undertaking could itself take on the role of transport operator and provide international night passenger services by buying the necessary rail services from the railway undertakings concerned.

141. With regard to the possibility for each of the parties to the ENS agreements to form an international grouping either with a railway undertaking in the United Kingdom or with its own subsidiary there and thus compete with ENS, it must first of all be borne in mind that since, in accordance with Article 10 of Directive 91/440, an international route may be served only by an international grouping formed by the railway undertakings established in each of the countries concerned, the only obligatory trading partners' for the constitution of such an international grouping on each route are necessarily the railway undertakings established in each Member State concerned. As the applicants have pointed out, with regard to the example of the London–Amsterdam route, the only obligatory trading partners at the material time were NS and EPS; the fact that SNCF and DB were also members of the grouping could thus have no effect on existing competition since, in the context created by Directive 91/440, neither of those two railway undertakings could compete with EPS and NS on that route. The situation is the same for each of the three other routes actually to be served by ENS (see paragraph 9 above). Consequently, the fact that the four routes in question are operated jointly by EPS, DB, SNCF and NS cannot have the effect of an appreciable restriction of existing competition among the parent undertakings.

142. As regards the view that potential competition is restricted by the fact that each of the parent undertakings could set up subsidiaries in the Member States of the other parent undertakings and form, either with its own subsidiaries or with other railway undertakings established in the other Member States concerned, international groupings in direct competition with ENS, the Court considers this to be a hypothesis unsupported by any evidence or any analysis of the structures of the relevant market from which it might be concluded that it represented a real, concrete possibility. There is no indication either in the contested decision or in the documents before the Court that there are any railway undertakings with subsidiaries in other Member States having themselves the status of railway undertakings, such as to demonstrate any actual exercise of the right to freedom of establishment on the market for rail transport in the Community.

143. It should be stressed here that, as a measure of organisation of the procedure, the Court requested the Commission to indicate whether any railway undertakings established in the Member States had subsidiaries in other Member States having the status of railway undertakings within the meaning of Directive 91/440 and, if so, to specify which railway undertakings had been set up since the entry into force of Directive 91/440. In its answer, the Commission admitted that it had no knowledge of other subsidiaries set up by ENS's parent undertakings either before or after the adoption of Directive 91/440, reiterating, however, its view that the right of establishment is conferred directly on any interested railway undertaking by Article 43 of the Treaty.

144. The Court considers that the Commission's argument in this regard, to the effect that there is in theory no legal obstacle precluding railway undertakings from exercising their right of establishment in a Member State other than that in which they have their registered office, fails to take account of the economic context and characteristics of the relevant market as they appear from the documents in the case and is thus not sufficient, without further support, to establish the existence of restrictions of potential competition among the parent undertakings or between them and ENS.

145. As the applicants have explained at length in their pleadings, it would be unrealistic, given the novelty and the specific features of the night rail services in question, for the parent undertakings to set up other subsidiaries in other Member States having the status of railway undertakings for the sole purpose of forming a new joint venture to compete with ENS. The prohibitive cost of the investment required for such services through the Channel Tunnel and the fact that there are no economies of scale in the operation of a single route, as opposed to the four routes to be operated together by ENS, show how unrealistic potential competition is among the parent undertakings and between them and ENS. It is, moreover, clear from the documents before the Court that, following the publication in the Official Journal of the European Communities of the Commission's notice inviting interested parties to submit their observations on the ENS agreements as summarised in that notice, no third parties took any steps during the administrative procedure to submit observations as a potential competitor capable of being affected or concerned by the implementation of the ENS agreements (see paragraph 17 above). Finally, it may also be seriously questioned whether ENS has any existing or potential competitors in this context in view of the fact that, as the Commission acknowledged in its answers to the written questions put by the Court, no subsidiaries have yet been set up in other Member States by any Community railway undertakings, whether before or after the adoption of Directive 91/440.

146. On the basis of the foregoing considerations, the Commission's finding that the ENS agreements are such as appreciably to restrict existing and/or potential competition among the parent undertakings and between them and ENS must be held to be vitiated by inadequate reasoning and/or error of assessment.

147. As regards the view that competition among the parent undertakings is restricted because each of the railway undertakings participating in the ENS agreements could either set up a subsidiary specialising as a transport operator or itself take on the role of transport operator and compete with ENS by buying the same necessary rail services, the Court considers that the Commission's assessment is here again based on an analysis of the market which does not correspond to the real situation. The Commission takes as its starting-point the assumption that in the market for rail passenger services there is in addition to railway undertakings another category of economic operators—transport operators—providing the same services as railway undertakings—passenger transport—but by buying or hiring necessary rail services—locomotives, crews and access to infrastructure—from those undertakings. ENS, being, according to the decision, a transport operator, could thus be exposed to competition either from specialised subsidiaries set up by railway undertakings as transport operators or by those undertakings themselves acting directly on the market as transport operators, and its creation therefore restricts the parties' freedom to operate individually as transport operators on the relevant market.

148. However, the Commission's assessment in that regard cannot be examined without first answering the question whether international passenger services are provided not only by international groupings as provided for in Directive 91/440 but also by transport operators. As that question is raised, in substance, by the applicants in the context of their second plea in law, it will therefore be examined in that context (see paragraphs 161 to 189 below).

—Restrictions on competition vis-à-vis third parties

149. The contested decision stresses that third-party access to the relevant markets is likely to be impeded by the existence of a special relationship between ENS and its parent undertakings, placing other operators at a disadvantage in competition for the necessary rail services provided by the parent undertakings, and by the Channel Tunnel usage agreement entered into by BR, SNCF and Eurotunnel, which allows BR and SNCF to retain a significant proportion—75%—of the path capacity reserved for international train services.

150. With regard, first, to the special relationship between ENS and the railway undertakings concerned, it must be noted that the Commission's analysis is based on the premiss that the market for rail passenger transport is split into two parts: an upstream market in the provision of necessary rail services (train paths, special locomotives and train crews) and a downstream market in passenger transport, on which transport operators such as ENS operate alongside railway undertakings. According to the decision, the parent undertakings could abuse their dominant position on the upstream market by refusing to provide necessary rail services to third parties competing with ENS on the downstream market.

151. Here again, however, the Commission's assessment cannot be examined without first answering the question whether there are also, in addition to international groupings, transport operators on the relevant markets, which will be examined in the context of the second plea in law, and the question whether the services provided to ENS by the parent undertakings may be categorised as necessary or essential facilities', which falls within the scope of the third plea and must therefore be examined in that context (see paragraphs 190 to 221 below).

152. As regards, second, any restrictive effects arising out of the Channel Tunnel usage agreement, it must be borne in mind that the Commission's decision exempting that agreement from the prohibition in Article 81(1) of the Treaty ('the Eurotunnel decision') was annulled by judgment of the Court of First Instance of 22 October 1996 in Joined Cases T–79/95 and T–80/95 *SNCF and British Railways v Commission* [1996] ECR II–1491, on the ground that the Commission had made a factual error in its interpretation of the provisions of that agreement governing the allocation of train paths in the tunnel as between SNCF and BR on the one hand and Eurotunnel on the other.

153. As a measure of organisation of the procedure, the Court requested the parties to state their position on the relevance of that judgment for the present case. In its answer, the Commission considered that it was irrelevant for the appraisal of the legality of the contested decision, point 47 of which indicates that even if BR and SNCF did not hold all the available paths for international trains they would still control a significant proportion of them. The applicants, however, took the view that the judgment confirms that access to the Channel Tunnel is not closed and that the Commission incorrectly assessed the restrictive effects of the tunnel usage agreement *vis-à-vis* third parties.

154. The Court considers that, since the Commission specifically took the Eurotunnel agreement' as its basis in order to demonstrate in the contested decision that SNCF's and BR's allegedly privileged access to train paths in the tunnel placed undertakings competing with ENS at a competitive disadvantage, and since the Eurotunnel decision has been annulled by the Court of First Instance on the ground that it contained an error of fact in the interpretation of the provisions of the agreement relating to the allocation of train paths, the Commission cannot derive any valid argument from it with regard to the assessment of the ENS agreements.

—Aggravation of the restrictive effects on competition caused by the presence of a network of joint ventures

155. With regard, finally, to the alleged aggravation of the restriction of competition caused by the presence of networks of joint ventures (points 49 to 53 of the decision), it should first be noted that, according to the Commission's 1993 communication, special attention must be paid to the presence of networks of joint ventures set up by the same parents, by one parent with different partners or by different partners in parallel (point 17 of the communication). In particular, networks of joint ventures can restrict competition where competing parents set up several joint ventures for complementary products which they themselves intend to process or for non-complementary products which they themselves distribute, thus increasing the extent and intensity of the restriction of competition. Those considerations are also valid for the service sector (point 29 of the communication).

156. In the contested decision, the Commission considered that to be the case in the present instance, inasmuch as BR/EPS, SNCF, DB and NS were taking part to varying degrees in a network of joint ventures for the transport of both goods and passengers, in particular through the Channel Tunnel. It referred to the joint venture ACI, set up by, *inter alia*, BR and SNCF to provide combined transport of goods (Commission Decision 94/594/EC of 27 July 1994 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.518— ACI) ([1994] OJ L 224/28, hereinafter 'the ACI decision')), and Autocare Europe, to which BR and SNCB are parties, which provides rail transport for motor vehicles. In its pleadings, the Commission referred for the first time in addition to the joint venture Intercontainer, set up by 26 railway undertakings, including BR and SNCF, and also operating on the market for combined transport of goods.

157. The contested decision does not, however, specify what joint ventures set up by the parent undertakings concern passenger transport services. As a measure of organisation of the procedure, the Court requested the Commission to specify the joint ventures operating on the passenger transport market in which, according to point 51 of the contested decision, ENS's parent undertakings are participating. In its answer, the Commission stated that it had no knowledge of any other joint ventures of ENS's parent undertakings for passenger transport. It noted, however, that SNCF, SNCB and BR (subsequently to the latter's privatisation, London & Continental Railways Ltd) jointly take part in Eurostar for passenger transport between the United Kingdom and the Continent', although it did not assert that point 51 was in fact implicitly referring to Eurostar. The Court therefore considers that, as regards the alleged presence of a network of joint ventures set up by the parent undertakings, the contested decision is vitiated by an absence of reasoning.

158. As regards the participation of the parent undertakings in joint ventures for combined transport of goods, it follows from point 29 of the Commission's 1993 communication that when parent undertakings set up joint ventures for non-complementary services, competition may be restricted when those non-complementary services are marketed by the parent undertakings themselves.

159. There is no indication in the contested decision that the parent undertakings themselves market the services provided by ACI, Intercontainer and Autocare. As a measure of organisation of the procedure, the Court requested the applicants to specify whether the transport services provided by ACI, Intercontainer and Autocare were marketed by them or by another undertaking. From their answers it appears that none of the parent undertakings markets or sells services provided by any of those three undertakings. In any event, even if they did market those services, the contested decision does not explain how the participation of some or all of the parent undertakings in a network of joint ventures operating on markets different from that of ENS would restrict competition among them at the level of the creation of ENS. Consequently, the Commission's assessment of the aggravating effects on the restrictions of competition caused by the presence of a network of joint ventures does not contain a sufficient statement of reasons.

160. It follows from the foregoing that, as regards the assessment of the restrictions of competition arising out of the ENS agreements, the contested decision is vitiated by an absence or insufficiency of reasoning.

...

The CFI then construed the directive.

3. The third plea: the condition imposed in Article 2 of the contested decision is disproportionate and unnecessary

Arguments of the parties

190. EPS, ENS and SNCF submit that in requiring the notifying parties to supply to other international groupings or transport operators the same necessary rail services as they supply to ENS, the Commission has misapplied the essential facilities' doctrine, inasmuch as, with the exception of the provision of train paths, which is required by Directive 91/440 under certain conditions, none of the services supplied to ENS can meet the criteria for the application of that doctrine. NS adds that such an obligation has the effect not merely of undermining the railway undertakings' efforts in setting up international groupings but also of obliging them to share the benefits of their cooperation with third parties without those third parties having to bear any of the commercial risks involved. In NS's submission, the economic effect of obliging the railway undertakings to make necessary services available to transport operators on terms which they cannot freely decide amounts, moreover, to an expropriation. ...

The third plea: the condition imposed in Article 2 of the contested decision is disproportionate and unnecessary

Findings of the Court

205. According to point 79 of the contested decision, the aim of the condition

imposed in Article 2 of that decision is that of preventing the restrictions of competition from going beyond what is 'indispensable'.

206. However, as the Court has concluded from its examination of the first and second pleas in law, the Commission must be regarded as not having made a correct and adequate assessment in the contested decision of the economic and legal context in which the ENS agreements were concluded. It has thus not been demonstrated that those agreements restrict competition within the meaning of Article 81(1) of the Treaty and that they therefore need to be exempted under Article 81(3). Consequently, since the contested decision did not contain the relevant analytical data concerning the structure and operation of the market on which ENS operates, the degree of competition prevailing on that market or, therefore, the nature and extent of the alleged restrictions on competition, the Commission was not in a position to assess whether the condition imposed by Article 2 of the contested decision was or was not indispensable for the purpose of granting a possible exemption under Article 81(3) of the Treaty.

207. However, even if the Commission had made an adequate and correct assessment of the restrictions of competition in question, it would be necessary to consider whether it was a proper application of Article 81(3) to impose on the notifying parties the condition that train paths, locomotives and crews must be supplied to third parties on the same terms as to ENS, on the ground that they are necessary or that they constitute essential facilities, as discussed by the parties in their pleadings and at the hearing.

208. In that regard, it follows from the case-law on the application of Article 82 of the Treaty that a product or service cannot be considered necessary or essential unless there is no real or potential substitute (Joined Cases C–241/91P and C–242/91P *RTE and ITP v Commission* (*Magill*) [1995] ECR I–743, paragraphs 53 and 54, and Case T–504/93 *Tiércé Ladbroke v Commission* [1997] ECR II–923, paragraph 131).

209. Consequently, with regard to an agreement such as that in the present case, setting up a joint venture, which falls within Article 81(1) of the Treaty, the Court considers that neither the parent undertakings nor the joint venture thus set up may be regarded as being in possession of infrastructure, products or services which are necessary' or essential' for entry to the relevant market unless such infrastructure, products or services are not interchangeable' and unless, by reason of their special characteristics—in particular the prohibitive cost of and/or time reasonably required for reproducing them—there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market.

210. The question whether the Commission could validly regard the supply of (a) train paths, (b) locomotives and (c) crews to ENS by its parent undertakings as necessary or essential services which had to be made available to third parties on the same terms as to ENS and whether, in so doing, it provided a valid statement of reasons for its decision must be examined in the light of the above considerations and by analogy with the case-law cited in paragraph 208 above. Finally, that examination will also serve as the basis for determining whether the Commission made a correct analysis of the alleged restrictions of competition with regard to third parties arising out of the special relationship between the parent undertakings and ENS (see paragraph 151 above).

211. With regard, first, to train paths, whilst it is true that Article 2 of the contested decision requires the notifying undertakings to supply train paths to any international grouping of railway undertakings', it has none the less been held that the operative part of a decision must be read in the light of the terms of its preamble, which provide its basis—in the present case, point 81 of the contested decision. Point 81 states that 'the notifying undertakings should not ... 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'. That obligation is thus imposed by the contested decision only in cases where the third party is not an international grouping but, as the Commission contends, a transport operator such as ENS. However, as has been held above, ENS is not a transport operator but an international grouping within the meaning of Directive 91/440. Moreover, transport operators as a category play no role on the market for rail passenger services as that market actually functions at present. Consequently, there are no grounds for the condition imposed in so far as it seeks to oblige those parent undertakings already in possession of train paths to supply paths to third parties operating on the market as transport operators, since it is based on false premises.

212. With regard, second, to the supply of locomotives, as pointed out above, locomotives cannot be regarded as necessary or essential facilities unless they are essential for ENS's competitors, in the sense that without them they would be unable either to penetrate the relevant market or to continue operating on it. However, since the decision defined the relevant market as the market for the transport of business travellers and the market for the transport of leisure travellers, both of which are intermodal, and since ENS's market share does not exceed 7% to 8% according to the Commission, or 5% according to the notification of the parties, on either of those intermodal markets, it cannot be accepted that a possible refusal by the notifying undertakings to supply ENS's competitors with special locomotives for the Channel Tunnel could have the effect of excluding such competitors from the relevant market as thus defined. It has not been demonstrated that an undertaking having such a small market share can be in a position to exert any influence whatever on the functioning or structure of the market in question.

213. Only if the market under consideration were the completely different, intramodal, market for business and leisure travel by rail, on which the railway undertakings currently hold a dominant position, could a refusal to supply locomotives possibly have an effect on competition. However, it was not that intramodal market which was finally considered relevant by the Commission, but the intermodal market (see points 17 to 27 of the contested decision). The first time that the Commission referred to the intramodal market for rail services as a segment of the intermodal market for business and leisure travel, in justification of the obligation imposed on the notifying undertakings to supply locomotives to ENS's competitors, was during the written procedure before the Court. Whilst it cannot be denied that the effects of an agreement may be analysed both with regard to a principal market and with regard to a segment thereof, both the distinction between the principal market and its segment or segments and the reasons for drawing such a distinction must nevertheless be stated clearly and unambiguously in any decision applying Article 81(1) of the Treaty, which is not the case here.

214. Even if it may be assumed that the Commission's explanations given in that regard in its pleadings do not in fact involve a redefinition of the relevant market as defined in points 17 to 27 of the contested decision but seek, rather, to provide further clarification of that definition, its assessment is still vitiated by a failure to state the reasons on which it is based.

215. As the applicants have argued, the contested decision does not contain any analysis demonstrating that the locomotives in question are necessary or essential. More specifically, it is not possible to conclude from reading the contested decision that third parties cannot obtain them either directly from manufacturers or indirectly by renting them from other undertakings. Nor has any correspondence between the Commission and third parties, demonstrating that the locomotives in question cannot be obtained on

the market, been produced before the Court. As the applicants have stated, any undertaking wishing to operate the same rail services as ENS through the Channel Tunnel may freely purchase or rent the locomotives in question on the market. It is clear, moreover, from the papers before the Court that the contracts for the supply of locomotives entered into between the notifying undertakings and ENS do not involve any exclusivity in favour of ENS, and that each of the notifying undertakings is thus free to supply the same locomotives to third parties and not only to ENS.

216. It must further be pointed out in that regard that the Commission has not denied that third parties may freely purchase or rent the locomotives in question on the market; it has merely asserted that the possibility is in fact purely theoretical and that only the notifying undertakings actually possess such locomotives. That argument cannot, however, be accepted. The fact that the notifying undertakings have been the first to acquire the locomotives in question on the market does not mean that they are alone in being able to do so.

217. Consequently, the Commission's assessment of the necessary or essential nature of the special locomotives designed for the Channel Tunnel and, thus, the obligation imposed on the parent undertakings to supply such locomotives to third parties are vitiated by an absence or, at the very least, an insufficiency of reasoning.

218. For the same reasons, the obligation imposed on the parent undertakings also to supply train crews for special locomotives for the Channel Tunnel to third parties is similarly vitiated by an absence or an insufficiency of reasoning.

219. Consequently, the contested decision is vitiated by an absence or, at the very least, an insufficiency of reasoning in so far as it requires the applicants to supply to third parties in competition with ENS the same 'necessary services' as it supplies to ENS.

220. It further follows from the foregoing that the Commission's analysis of the restrictions of competition *vis-à-vis* third parties as a result of the special relationship between ENS and its parent companies is also unfounded (see paragraphs 150 and 151 above). Since, as demonstrated above, ENS is not a transport operator, the market for rail services can in fact be split into only two service markets: an integrated market for passenger services on which only railway undertakings and international groupings of railway undertakings operate, and a market for access to and management of railway infrastructure, controlled by infrastructure managers within the meaning of Directive 91/440 (see paragraphs 1 to 6, under 'Legal background', above). It must be added that the argument raised by the Commission at the hearing that, according to paragraph 55 of the judgment of the Court of First Instance of 21 October 1997 in Case T–229/94 *Deutsche Bahn v Commission* [1997] ECR II–1689, the rail services market constitutes a sub-market distinct from the rail transport market in general is unfounded, since the Court's finding in that case related solely to the rail transport market in relation to combined transport of goods. Restrictions of competition with regard to third parties should therefore have been analysed on the two markets mentioned above.

221. As regards, first, access to infrastructure (train paths), it is true that access for third parties may in principle be hindered when it is controlled by competitors; nevertheless, the obligation of railway undertakings which are also infrastructure managers to grant such access on fair and non-discriminatory terms to international groupings competing with ENS is explicitly provided for and guaranteed by Directive 91/440. The ENS agreements therefore cannot, by definition, impede access to infrastructure by third parties. As regards the supply to ENS of special locomotives and crew for the Channel Tunnel, the mere fact of its benefiting from such a service could impede access by third parties to the downstream market only if such locomotives and crew were to be regarded

as essential facilities. Since, for the reasons set out above (see paragraphs 210 to 215), they cannot be categorised as such, the fact that they are to be supplied to ENS under the operating agreements for night rail services cannot be regarded as restricting competition *vis-à-vis* third parties. That aspect of the Commission's analysis of restrictions of competition *vis-à-vis* third parties is therefore also unfounded (see paragraphs 150 and 151 above).

4. The fourth plea: insufficient duration of the exemption granted

...

Findings of the Court

229. As the Court has concluded from its examination of the first and second pleas in law, the Commission must be regarded as not having made a correct and adequate assessment in the contested decision of the economic and legal context in which the ENS agreements were concluded. It has thus not been demonstrated that those agreements restrict competition within the meaning of Article 81(1) of the Treaty and that they therefore need to be exempted under Article 81(3). Consequently, the Commission was not in a position to assess the appropriate duration for any exemption to be granted under that provision.

230. However, even if it is assumed that the Commission's assessment of the restrictions on competition in the contested decision was adequate and correct, the Court considers that the duration of an exemption granted under Article 81(3) of the Treaty—or, as here, Article 5 of Regulation No 1017/68—and Article 53(3) of the EEA Agreement must be sufficient to enable the beneficiaries to achieve the benefits justifying such exemption, namely, in the present case, the contribution to economic progress and the benefits to consumers provided by the introduction of new high-quality transport services, as stated in points 59 to 61 of the contested decision. Since, moreover, such progress and benefits cannot be achieved without considerable investment, the length of time required to ensure a proper return on that investment is necessarily an essential factor to be taken into account when determining the duration of an exemption, particularly in a case such as the present, where it is undisputed that the services in question are completely new, involve major investments and substantial financial risks and require the pooling of know-how by the participating undertakings (see points 63, 64 and 75 of the decision).

231. The consideration set out in point 73 of the decision, that 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, cannot, therefore, be regarded as decisive, on its own, for determining the duration of the exemption, without also taking account of the length of time necessary to enable the parties to achieve a satisfactory return on their investment.

232. However, the contested decision does not contain any detailed assessment of the length of time required to achieve a return on the investments in question under conditions of legal certainty, in the light, in particular, of the fact that the parties have entered into financial commitments covering a period of 20 years for the purchase of the special rolling stock. The Commission's statement at point 76 of the decision that, in connection with the combined transport of goods, some railways had informed it that a period of five years was needed in order to set up the new services and ensure their viability is irrelevant since it concerns a joint venture operating, as noted above (see paragraphs 185 to 187) on a different market from that on which ENS operates.

233. As regards the Commission's conclusion at point 75 of the contested decision, that the scale of investment cannot be allowed to become a decisive factor in determining the duration of the exemption because there is no necessary link between the joint acquisition of plant and machinery and the commercial use to which it is to be put, it must be held that there is nothing in the decision to explain why there is no necessary link between the acquisition and the use of such equipment, given that the rolling stock in question was acquired, and the financial commitments relating thereto were entered into, exclusively in the context of the agreements notified. In any event, the Commission has not challenged the applicants' assertion that other possibilities for the use of the rolling stock in question are extremely limited.

234. Consequently, the Commission's decision to limit the duration of the exemption granted for the ENS agreements is in any event vitiated by an absence of reasoning.

Notes and questions on the Judgment in *ENS*

1. (Points 10, 13, 26 and 145). Was the investment (a) large or small and (b) risky or safe?
2. (*ODIN*). What are the standard objections to joint ventures on grounds of competition?
3. (Point 20). Should the geographic market be confined to the four routes? From the demand side, that may be right: most passengers want to travel between specific places although there may be flexibility in choosing the routes. From the supply side, however, the trains and crews can move. The tracks cannot, although the parents had tracks serving many city pairs, and paths could have been negotiated with other railway undertakings. Should the Commission pay more attention to the supply side of the market? See points 90 *et seq*.
4. (Point 21). What are the criteria for deciding whether a joint venture falls within the Merger Regulation, at 10.2 above.
5. (Point 24). Is the Commission assuming that to become a first mover in a new kind of service restricts competition by putting off potential competitors? Should it?
6. (Point 92). Remember that the CFI can raise of its own motion only points of procedure, not of substance: *Metropole III*, point 4, 1.4.2.4 above.
7. (Point 95). Is the Commission's margin of discretion wide or narrow?
8. (Point 102). Note that the CFI cites the case law of the ECJ rather than the more precise formulation in the Commission's Notice on Minor Agreements. Why was the expected market share relevant? Did the CFI consider the Commission had rightly found a market share exceeding 5%. If not, did it have to consider the Notice on Minor Agreements? Is that Notice binding on anyone? What is the status of Commission guidelines? Was the agreement vertical, horizontal or conglomerate?
9. (Point 136). Is there a distinction between restrictions that automatically infringe Art 81(1), and those that the Commission must establish are anti-competitive in their economic context? Explain.
10. (Point 137). Is a joint venture with a large initial market share inevitably contrary to Art 81(1)? Should potential competition be considered when defining the market, or when appraising the market power of a firm within the market as defined? Consider the Notice on Horizontal Restraints Guidelines on the applicability of Art 81 to horizontal co-operation, OJ 2001, C3/2, [2001] 4 CMLR 819 (11.3 below).