OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 7 March 1991 *

My Lords,

1. In this case a French bus operator (S. à r. l., Schiocchet hereafter 'Schiocchet') seeks the annulment of a Commission decision addressed to France and Luxembourg settling a dispute between them over the establishment of an international bus service. The decision required the competent Luxembourg authority to authorize a Luxembourg bus operator (Autocars Emile Frisch S. à r. l., hereafter 'Frisch') to introduce a 'special regular service' to convey workers living in Thil and various other villages in Lorraine to a porcelain factory in Luxembourg city operated by a firm trading under the name 'Villeroy et Boch'.

2. The contested decision was adopted under Article 14 of Council Regulation No 517/72 of 28 February 1972 on the introduction of common rules for regular and special regular services by coach and bus between Member States (Official Journal, English Special Edition 1972 (I), p. 143). Under that regulation a bus service of the type in question cannot be operated without an authorization. The decision to grant or refuse an authorization is to be taken by agreement between the Member States in whose territories passengers are to be taken up or set down (Article 13). Where those Member States cannot reach agreement, the dispute may be resolved by the Commission (Article 14).

3. The criteria governing a decision to grant or refuse authorization are laid down in Article 8 of Regulation No 517/72, which provides as follows:

'1. Examination of an application to introduce a regular service or a special regular service shall be for the purpose of establishing that the traffic to which the application relates is not already catered for in a satisfactory manner, both as to quality and as to quantity, by existing passenger transport services.

2. The following, in particular, shall be taken into consideration during the examination referred to in paragraph 1:

(a) the current and foreseeable transport needs which the applicant is planning to meet;

(b) in the case of regular services, the state of the passenger transport market in the areas in question.

* Original language English.

3. During the examination referred to in paragraph 1, consideration may be given to whether an equivalent transport service could be organized by undertakings already operating in the areas concerned.'

4. In the present case Frisch applied for authorization to the Luxembourg authorities on 9 January 1986. The Luxembourg authorities were in favour of granting authorization, but the French authorities were opposed to the service in question, on the ground that it would be detrimental to the interests of Schiocchet and would upset the balance hitherto obtaining between Schiocchet and Frisch (see Annex III to the application). Luxembourg referred the dispute to the Commission, which adopted the contested decision on 7 September 1989 (Decision 89/524/EEC, Official Journal 1989 L 272, p. 18).

5. The Commission based its decision on the grounds *inter alia* that:

The proposed service met the requirements laid down in Article 8 of Regulation No 517/72;

It fulfilled a proven need, since it would provide a service at convenient times for some 50 workers who did not at present have public transport to the Villeroy et Boch factory to arrive for and return from the 6.00 a.m. and 2.00 p.m. shifts;

It would call at certain places that lacked public transport at those times;

The timetable for the service proposed by Frisch was more convenient than that of the service envisaged by Schiocchet for the 6.00 a.m. shift;

Schiocchet did not envisage any service to cater for the 2.00 p.m. shift.

6. Schiocchet lodged its application contesting that decision on 20 November 1989. The Commission makes no challenge to admissibility under Article 173 of the Treaty and I accept that Schiocchet is directly and individually concerned by the contested decision. It may be noted in addition that, since the contested decision was published on 21 September 1989, the application was lodged within the limitation period of two months prescribed by Article 173.

7. Schiocchet makes three submissions:

First, the Commission should have taken a negative decision on Frisch's application because that company has a 'long tradition of illegality', whereas Schiocchet has always complied scrupulously with the applicable legislation. Frisch operated a service for the Villeroy et Boch workers without the authorization required by Regulation No 517/72 between 1970 and 1976. Frisch has continued its 'tradition of illegality' by altering the timetable and itinerary of the service which was the subject of the contested decision without prior authorization, contrary to Article 4(2) of Regulation No 517/72. In particular, the

morning bus now departs at 4.30 a.m. rather than 4.20 a.m. and three of the villages mentioned in the authorization are not in fact served.

Secondly, the Commission should have taken a negative decision because the requirements of Article 8 of Regulation No 517/72 were not satisfied. Article 8(2)(a) requires an examination of 'the current and foreseeable transport needs which the applicant is planning to meet'. The Commission should have realised that the transport needs which Frisch was planning to meet were already satisfied, at least in part, by Schiocchet. Part of the route to be operated by Frisch is already served by Schiocchet, which also takes Villeroy et Boch employees to work. The rest of the route is the subject of applications from Schiocchet for authorization to extend its services. Those applications antedate Frisch's application for permission to set up the contested service.

Thirdly, the contested decision has the effect of ousting Schiocchet from the route in question and places Frisch in a monopoly situation.

8. The parties do not go into the question what margin of appraisal the Commission has when taking a decision under Article 14 of Regulation No 517/72 or to what extent the Court should be willing to review the merits of such a decision. If the decision could be said to involve the evaluation of a complex economic situation, judicial review would be confined to the question whether the Commission committed a manifest error or misuse of power or manifestly exceeded the limits of its power of appraisal: see, for example, Case 29/77 *Roquette* v *France* [1977] ECR 1835. Even if the contested decision did not involve the evaluation of a complex economic situation, there must still be limits to the scope of the judicial review to be exercised by the Court. The Court should not substitute its own appraisal for that of the Commission.

9. I cannot see how Schiocchet can be said to have established that the Commission exceeded the imits of its power of appraisal in deciding that the service proposed by Frisch should be authorized.

10. As regards the first submission, concerning Frisch's 'long tradition of illegality', the Commission rightly points out that the illega ity referred to came to an end on 10 August 1982, when the Commission adopted Decision 82/595/EEC (Official Journal 1982 L 244, p. 32). Since that date the services operated by Frisch have been duly authorized. Alleged illegalities occurring before that date could not be taken into account in the context of a decision taken in 1989. As regards the unauthorized alterations to the service subsequent to the contested decision, the Commission points out that it could not take into account an alleged illegality that had not yet occurred.

11. In any event, the alterations were relatively unimportant and it is questionable whether they needed authorization. Since the service in question is intended specific-

ally for the Villeroy et Boch workers and not for the general public, there would clearly be no point in stopping to pick up passengers in villages where no such workers at present reside. That could well explain why Frisch has decided to exclude three villages from the route. The elimination of three stops perhaps explains why the bus can depart ten minutes later than originally planned. But the service now being provided by Frisch is essentially the same service as that which was authorized by Decision 89/524; its purpose is to ensure that Villeroy et Boch workers who live in a number of specified villages in Lorraine get to work on time in Luxembourg. In the circumstances I question whether minor variations in the timetable and route, such as those that appear to have been made, required prior authorization under Article 4(2) of Regulation No 517/72, which must in any case be construed flexibly and with common sense.

12. The submission based on the terms of Article 8 of Regulation No 517/72 is equally unconvincing. Under Article 8(1) of the regulation the Commission was required to examine whether the traffic to which Frisch's application related was already catered for satisfactorily by existing services. Article 8(2) required particular consideration to be given to the 'current and foreseeable transport needs which the applicant is planning to meet'. As the Commission has pointed out, the services offered by Schiocchet did not cater for the needs of the Villeroy et Boch workers as satisfactorily as those proposed by Frisch because (a) certain villages were not served by Schiocchet and (b) Schiocchet's timetable did not fit in with the working hours of Villeroy et Boch (in particular, Schiocchet provided no service for the afternoon shift).

13. Schiocchet's final submission is that the decision ousts it from the route in question and confers a monopoly on Frisch. The gist of the argument appears to be that the service authorized by the contested decision duplicates, in part, the service operated by Schiocchet and that the competition from Frisch will harm Schiocchet so severely that it will be forced to terminate its service, thus leaving Frisch in a monopoly situation. I do not find that argument convincing for a number of reasons.

14. First, as the Commission points out, it was not required, when examining an application to introduce a special regular service, to have regard to the 'state of the passenger transport market' under Article 8(2)(b) of Regulation No 517/72; it merely had to consider whether the traffic to which the application related was catered for in a satisfactory manner by existing passenger transport services. As I have already stated in connection with the second submission, the Commission gave valid reasons for concluding that that question was to be answered in the negative.

15. Secondly, the service operated by Schiocchet is different from the service to be set up by Frisch inasmuch as (a) it is not restricted to workers at the Villeroy et Boch factory but is intended for the general public and (b) it picks up passengers

somewhat later and is therefore more likely to be of interest to persons who work orthodox hours, rather than shift-workers starting at 6.00 a.m. In the defence the Commission points out that the service operated by Schiocchet arrives in Luxembourg at 6.45 a.m. and is therefore unsuitable for workers whose shift begins at 6.00 a.m. In its reply Schiocchet does not attempt to answer that point directly, but simply refers to attestations annexed to the application from Villeroy et Boch workers who express their satisfaction with Schiocchet's services. It is not clear whether those persons work the 6.00 a.m. shift or not. But if they do, it is difficult to see how they can be satisfied with a service that gets them to work at 6.45 a.m. In the circumstances the Commission cannot be criticized for concluding that the Villeroy et Boch workers manning the 6.00 a.m. and 2.00 p.m. shifts would be best served by a special service that catered for their specific needs by delivering them directly to their place of work at the appropriate time.

16. Even if the effect of the Commission's decision on competition were a factor that should be taken into account, and even if the decision was liable to have the effect of depriving Schiocchet of some of its business, I do not see how so limited a potential effect could suffice to render the decision unlawful.

17. Accordingly, I am of the opinion that the Court should dismiss the application and order the applicant to pay the costs.