JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
21 October 1997 *

In Case T-229/94,

Deutsche Bahn AG, a company incorporated under German law, established in Frankfurt (Germany), represented by Jochim Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented initially by Norbert Lorenz, of its Legal Service, and Géraud de Bergues, a national civil servant on secondment to the Commission, subsequently by Klaus Wiedner, of its Legal Service, acting as Agent, assisted by Heinz-Joachim Freund, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 94/210/EC of 29 March 1994 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (IV/33.941 — HOV-SVZ/MCN, OJ 1994 L 104, p. 34) or, in the alternative, the annulment or reduction of the fine imposed by that decision on the applicant,

* Language of the case: German.

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (First Chamber, Extended Composition),

composed of: A. Saggio, President, A. Kalogeropoulos, V. Tiili, R. M. Moura Ramos and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 28 January 1997,

gives the following

Judgment

Facts

1 On 1 April 1988 the undertakings Deutsche Bundesbahn ('DB', which was succeeded in 1994 by Deutsche Bahn, hereinafter 'the applicant'), the Société Nationale des Chemins de Fer Belges ('SNCB'), Nederlandse Spoorwegen ('NS'), Intercontainer and Transfracht concluded an agreement relating to the setting up of a cooperative network known as the 'Maritime Container Network (MCN)' ('the MCN Agreement').

2 The term 'maritime container' describes a container which is carried essentially by sea, but also requires on-carriage and off-carriage by land. The MCN Agreement relates to carriage by rail of maritime containers to or from Germany which pass through a German, Belgian, or Netherlands port. Among the German ports,

referred to in the MCN Agreement as the 'northern ports', were Hamburg, Bremen and Bremerhaven. The Belgian and Netherlands ports, known as the 'western ports', included Antwerp and Rotterdam.

3 DB, now the applicant in the present case, SNCB and NS are the national railway undertakings operating in Germany, Belgium and the Netherlands respectively. Intercontainer and Transfracht are undertakings which are active in the maritime container transport sector and which purchase, to that end, from railway undertakings, essential railway services such as railway traction services and access to railway infrastructure. Intercontainer is a company incorporated under Belgian law and is a joint subsidiary of 24 European railway undertakings. Transfracht is a company incorporated under German law, 80% of which is owned by DB, and now by the applicant in the present case.

4 Before the MCN Agreement was concluded, the organization of the transport services covered by the agreement was in fact already shared between the five abovementioned undertakings. Under that distribution, which remained unchanged by the MCN Agreement, Transfracht effected the carriage of maritime containers to or from Germany passing through German ports. Intercontainer, for its part, effected the international carriage of maritime containers to or from Germany through Belgian or Netherlands ports. In order to provide a complete service to their clients, Transfracht and Intercontainer were obliged to purchase certain railway services from DB (Transfracht) and from SNCB and NS (Intercontainer), given the statutory monopoly which those companies held, within their own countries, for the provision of railway services, such as the provision of locomotives, drivers and access to railway infrastructure.

5 The MCN Agreement established two coordination structures without legal personality, namely a steering committee and a 'bureau commun'. The members and staff of those two bodies were appointed by Transfracht and by Intercontainer. Among the six members of the Steering Committee there were required to be three

representatives of DB and/or Transfracht, a representative of SNCB and a representative of NS. The Committee was intended to be the MCN's decision-making and supervisory body, while the Bureau Commun functioned as the administrative body. Specifically, the Steering Committee was empowered to take decisions concerning the services and prices to be offered for the transport of maritime containers and the Bureau Commun was responsible for developing and marketing, buying, selling and fixing rates and tariffs on behalf of Transfracht and Intercontainer. Certain other activities, such as invoicing clients, were carried out separately by Transfracht and Intercontainer.

6 Under paragraph 9 of the MCN Agreement, decisions taken by the Steering Committee were to be unanimous.

7 By a complaint of 16 May 1991 Havenondernemersvereniging SVZ ('HOV-SVZ'), an association of undertakings operating in the port of Rotterdam, pointed out to the Commission that the tariffs applied by DB to the carriage of maritime containers to and from Germany via Belgian and Netherlands ports were much higher than those applied to the carriage of maritime containers via the German ports. According to HOV-SVZ, DB's intention was to promote carriage for which it provided all the railway services. It claimed that the practice constituted an abuse of a dominant position prohibited by Article 86 of the EC Treaty. HOV-SVZ also considered that the MCN Agreement infringed Article 85 of the Treaty.

8 On 31 July 1992 the Commission sent a statement of objections to the undertakings bound by the MCN Agreement which, upon receiving it, terminated that agreement. After receiving the statement of objections, DB also acknowledged that it imposed tariffs for carriage via the northern ports which were different from those it applied in respect of transport via the western ports, but it denied that those differences were discriminatory. It pointed out that the tariffs were objec-

tively set and took into account the distance covered, the production costs and the competitive situation of the market.

9 On 25 August 1992 DB's counsel was given the opportunity of consulting DB's file at the Commission and took copies of most of the documents on the file.

10 A hearing took place at the Commission on 15 December 1992. Present at that hearing were representatives of the Commission, DB and Transfracht, SNCB, NS, Intercontainer and seven Member States.

11 On 29 March 1994 the Commission adopted Decision 94/210/EC relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (IV/33.941 — HOV-SVZ/MCN) (OJ 1994 L 104, p. 34, hereinafter 'the Decision'). The decision is based on the EC Treaty and on Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302, 'Regulation No 1017/68').

12 So far as concerns the MCN Agreement's compatibility with the Community rules on competition, the Decision considers that the MCN Agreement had, in breach of Article 85(1) of the Treaty, the object and effect of restricting competition on the market for the inland transport of sea-borne containers between German territory and the ports situated between Antwerp and Hamburg, since it eliminated competition between Intercontainer and Transfracht for the sale of combined transport services to shippers and shipping companies, competition between the railway undertakings for the sale of combined transport services direct to shippers or shipping companies and competition between the railway undertakings on the one hand and Transfracht and Intercontainer on the other, for the sale of transport services to shippers and shipping companies, and since it made access more difficult for new competitors to Transfracht and Intercontainer (paragraphs 76 to 89 of the Decision). In this respect, the Decision adds that the agreement is not covered by

the exception provided for in Article 3 of Regulation No 1017/68, since it is not intended either to apply directly technical improvements or to achieve directly technical cooperation (paragraphs 91 to 98 of the Decision), and that, furthermore, an exemption under Article 5 of Regulation 1017/68 could not be contemplated since the agreement was not found to have improved the quality of the railway transport service or promoted the productivity of the undertakings or technical and economic progress (paragraphs 99 to 103 of the Decision).

13 So far as concerns the compatibility of tariffs applied by DB with the Community rules on competition, the Decision states, first, that, in view of its statutory monopoly, DB held a dominant position on the market for the supply of rail transport services in Germany, and, further, that DB abused that dominant position by acting in such a way that tariffs for carriage between a Belgian or Netherlands port and Germany are appreciably higher than for carriage between points within Germany and the German ports. In that regard, the Decision states that DB controlled not only the level of tariffs charged for carriage of containers to and from northern ports, but also the level of tariffs for carriage to and from the western ports. In the first place, DB, as the compulsory supplier of rail services for the part of the journey performed in Germany, had the power to control the level of the selling tariffs charged by Intercontainer. Secondly, in view of the composition of the Steering Committee and of the fact that the Bureau Commun has its offices on Transfracht's premises, it had the power to block any decision in the context of the MCN Agreement. Thirdly, it had unilaterally introduced outside the framework of the MCN Agreement and shortly after the conclusion thereof a new tariff structure known as 'Kombinierter Ladungsverkehr-Neu' (hereinafter 'the KLV-Neu Structure') which provided for price reductions for journeys to and from northern ports, but not for journeys to and from the western ports (paragraphs 139 to 187 of the Decision).

14 The Decision further holds that the differences noted in the tariffs could not be justified either by the fact that railway transport is subject to fiercer competition from road haulage and inland waterway on journeys via the western ports than on the journeys via the northern ports, or by the fact that the production costs are

greater for the journeys via the western ports than for the journeys via the northern ports. In this regard, the Decision explains that the fiercer competition on the journeys via the western ports could only justify a tariff difference in favour of those routes and that DB has not proved that there is a logical connection between the differences in costs and the differences in tariffs (paragraphs 199 to 234 of the Decision).

15 Finally, the Decision considers it proven that DB infringed Article 86 of the Treaty at least in the period from 1 October 1989 to 31 July 1992 and that a fine should be imposed on DB, taking into account the fact that it did not give any undertaking that it would adjust its tariff practices, that the infringement was committed deliberately and that it is particularly serious, among other reasons because it impeded the development of rail transport, which is an important objective of the Community's transport policy (paragraphs 255 to 263 of the Decision).

16 Article 1 of the Decision finds that DB, SNCB, NS, Intercontainer and Transfracht have infringed the provisions of Article 85 of the Treaty by concluding the MCN Agreement providing for the marketing, by a 'bureau commun', on the basis of tariffs agreed within the Bureau, of all carriage by rail of sea-borne containers to or from Germany via a German, Belgian or Netherlands port. In Article 2 it further finds that DB has infringed the provisions of Article 86 of the Treaty by using its dominant position on the rail transport market in Germany to impose discriminatory tariffs on the market for the inland carriage of sea-borne containers to or from Germany via a German, Belgian or Netherlands port. Finally, in Article 4, it imposes, pursuant to Article 22 of Regulation (EEC) No 1017/68, a fine of ECU 11 million on DB in respect of its infringement of Article 86 of the Treaty (see also paragraphs 255 and 256 of the Decision).

17 The Decision was notified to the applicant on 8 April 1994.

18 By letter of 27 April 1994 counsel for the applicant asked the Commission to be allowed to consult the file on which the Decision was based in order better to protect his client's interests. By letter dated 5 May 1994 the Commission refused that request on the ground that DB had already been permitted to consult the file during the pre-litigation procedure.

Procedure and forms of order sought by the parties

19 It is in those circumstances that the applicant, by application lodged at the Court Registry on 14 June 1994, brought the present action.

20 By letter of 31 August 1994 the applicant sent to the Court of First Instance an expert's report entitled 'Kosten-und Marktanalyse für Containerverkehre in die West-und Nordhäfen ex BRD für den Zietraum 1989-1992 im Auftrag der Deutschen Bahn AG (Analysis of the costs and of the market in respect of container traffic from the FRG in the western and northern ports for the period 1989-1992, requested by Deutsche Bahn AG)'. The Court agreed to include that report in the case-file and, on 15 September 1994, a copy of the report was sent to the defendant.

21 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. In the context of measures of organization of procedure, however, the parties were requested to reply in writing to a number of questions prior to the hearing.

22 At the hearing in open court on 28 January 1997 the parties presented oral argument and replied to the Court's oral questions.

23 The applicant claims that the Court should:

— annul the Decision;

— in the alternative, annul the Decision in so far as it imposes a fine;

— in the further alternative, reduce the amount of the fine;

— order the defendant to pay the costs.

24 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

The claim for annulment of the contested decision

25 In its application the applicant relies essentially on four pleas in law in support of its claim for annulment. The first plea alleges infringement of Article 85 of the Treaty and of the acts adopted by the Council with a view to specifying the scope of Article 85 of the Treaty in the field of the carriage of goods. The second plea alleges infringement of Article 86 of the Treaty. The third and fourth pleas allege infringement of the rights of the defence and breach of the principles of legal certainty and sound administration respectively.

First plea, alleging infringement of Article 85 of the Treaty and acts adopted by the Council with a view to specifying the scope of Article 85 of the Treaty in the field of transport

Arguments of the parties

26 The applicant maintains that the MCN Agreement is a technical agreement within the meaning of Article 3(1)(c) of Regulation No 1017/68 and that therefore it does not fall under the prohibition of restrictive practices laid down in Article 2 of Regulation No 1017/68 and Article 85 of the Treaty. It points out, in this connection, that the purpose of the agreement was to establish cooperation in technical matters such as the setting of timetables, the changing of locomotives and of crews at frontiers and the choice of terminals.

27 In so far as the agreement was intended for the joint fixing of tariffs, the applicant points out that Article 3 of Regulation No 1017/68 as well as Article 4 of Council Decision 82/529/EEC of 19 July 1982 on the fixing of rates for the international carriage of goods by rail (OJ 1982 L 234, p. 5, 'Decision 82/529') and Articles 1 and 4 of Council Recommendation 84/646/EEC of 19 December 1984 on strengthening the cooperation of the national railway companies of the Member States in international passenger and goods transport (OJ 1984 L 333, p. 63, 'Recommendation 84/646') expressly allow the fixing of tariffs jointly between several railway undertakings for the combined transport of goods.

28 In the alternative, the applicant submits that the MCN Agreement should have been exempt from the prohibition of restrictive practices by virtue of Article 5 of Regulation No 1017/68 and that the Decision does not explain the reasons for which no use was made of that provision.

29 In the further alternative, the applicant submits that the Commission's conclusion that the MCN Agreement eliminates competition is flawed since Intercontainer and Transfracht operate on different routes and are therefore not competitors and since the national railway undertakings are likewise not in competition.

30 According to the defendant, Article 3 of Regulation No 1017/68 permits only the conclusion of agreements the exclusive object and effect of which is to apply technical improvements or to achieve technical cooperation. The MCN Agreement exceeded that technical parameter, since it was intended to establish a joint tariff system.

31 In this respect, the defendant states that the authorization, granted by Article 3 of Regulation No 1017/68, for 'the fixing and application of inclusive rates and conditions ... including special competitive rates' does not amount to authorization to collude on prices with the aim of eliminating competition and sharing markets. The same applies to Article 4 of Decision 82/529. That article does not permit railway undertakings to organize jointly the whole of cross-border railway transport of containers, but authorizes only those forms of cooperation which are intended to prevent monopolies in rail haulage and access to the rail infrastructure from impeding the proper functioning of cross-border transport. The defendant observes that the MCN Agreement is not covered by Recommendation 84/646, since the agreement concerned not only three railway undertakings but also two transport operators, whereas the recommendation is addressed only to railway undertakings and, in any event, it is only intended to encourage the forms of cross-border cooperation made necessary by the existence of monopolies.

32 As regards the applicant's argument that the MCN Agreement should have been exempt under Article 5 of Regulation No 1017/68, the defendant states that the conditions for application defined by that provision were not fulfilled because of the major restrictions on competition brought about by the MCN Agreement.

33 Finally, the defendant states that there was genuine competition between DB, SNCB and NS and between Intercontainer and Transfracht, in particular in that DB and Transfracht had an interest in effecting as many transport operations as possible on journeys to the northern ports, while SNCB, NS and Intercontainer had a commercial interest in concentrating traffic towards the west. The defendant refers in that context to 'competition between routes'.

Findings of the Court

34 It should be pointed out, *in limine*, that one of the purposes of the MCN Agreement was to set up a common administration for the fixing of prices and tariffs for the carriage by rail of maritime containers to or from Germany through a Belgian, Netherlands or German port. It is clear from the wording of the agreement itself that it allocated to the Steering Committee the task of 'definition or amendment of the short, medium and long-term business policy concerning the traffic covered by the agreement, and in particular the definition or amendment of the policy on sales and prices' and to the Bureau Commun that of 'buying/price-setting/selling'.

35 The Court considers that that common initiative consisted in 'directly or indirectly fixing prices' within the meaning of Article 85(1)(a) of the Treaty and of Article 2(a) of Regulation No 1017/68. It follows from the case-law that an agreement establishing a common system for fixing prices falls within the scope of those provisions (as regards Article 85(1)(a) of the Treaty, see Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977, paragraphs 18 and 19, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 198; as regards Article 2(a) of Regulation No 1017/68, see Case T-14/93 *Union Internationale des Chemins de Fer* v *Commission* [1995] ECR II-1503, paragraph 50), irrespective of the extent to which the provisions of the agreement had in fact been observed (see Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 15, and *Cementhandelaren* v *Commission*, paragraph 16).

36 The reason for this is that the joint fixing of prices restricts competition, in particular by enabling every participant to predict with a reasonable degree of certainty what the pricing policy pursued by its competitors will be (*Cementhandelaren* v *Commission*, paragraph 21). The MCN Agreement cannot avoid being characterized in those terms. Since each of the undertakings concerned has an obvious commercial interest in as many transport operations as possible being effected on the routes on which it is most active, there is a competitive relationship between DB and NS and between DB and SNCB. Likewise, NS is in competition with SNCB and Transfracht with Intercontainer. Therefore, by establishing a common pricing system, those undertakings have appreciably restricted or even eliminated all competition on prices as referred to in the case-law cited above.

37 The Court considers, furthermore, that, contrary to the applicant's assertions, the MCN Agreement is not covered by the legal exception provided for in Article 3(1)(c) of Regulation No 1017/68 which authorizes 'agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical co-operation by means of ... the organisation and execution of ... transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates'. The introduction of a legal exception for agreements of a purely technical nature cannot amount to an authorization, on the part of the Community legislature, allowing agreements to be concluded whose purpose is the joint fixing of prices. If it were otherwise, any agreement establishing a joint price-fixing system in the railway, road or inland waterway transport sector would have to be regarded as a technical agreement within the meaning of Article 3 of Regulation No 1017/68, and Article 2(a) of that regulation would be rendered nugatory.

38 Furthermore, the independent determination by each economic operator of his commercial policy and in particular of his pricing policy corresponds to the concept inherent in the competition provisions of the Treaty (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 21; Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 121). It follows that the exception provided for in Article 3 of Regulation No 1017/68, and in particular the words 'inclusive rates' and 'competitive rates', must be construed with caution. The Court has

already pointed out that, having regard to the general principle prohibiting agreements restrictive of competition which is laid down in Article 85(1) of the Treaty, provisions of an exempting regulation which derogate from that principle must be strictly construed (Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201, paragraph 48, and Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 37).

39 In view of the foregoing considerations, the Court finds that the term 'inclusive rate' must be understood to mean the 'whole-journey' price, including the various national parts of a transnational journey, and the term 'competitive price', which is linked by the expression 'including' to the abovementioned term 'inclusive rates', must be understood as allowing the various undertakings operating on a single transnational route to fix inclusive rates not only by adding together the tariffs for each of them, but also by incorporating common adjustments to ensure the competitiveness of the transport in question in relation to other modes of transport, without however altogether eliminating the independence of each undertaking with regard to the fixing of its own tariffs in accordance with its competitive interests. However, the MCN Agreement did result in such elimination and exceeded the scope of action permitted by the abovementioned terms, since it entrusted, without restriction, pricing policy and price formation to a joint body and since, furthermore, the inclusive rates for each journey covered by the MCN Agreement were jointly fixed by an undertaking which did not even operate on that journey.

40 It is clear from the foregoing paragraphs that the Commission was right in determining that the MCN Agreement exceeded the framework set down in Article 3(1)(c) of Regulation No 1017/68.

41 That interpretation of Article 3(1)(c) of Regulation No 1017/68 does not conflict with Article 4 of Decision 82/529; on the contrary, it is in conformity with that article. Article 4 of Decision 82/529 authorizes the establishment by railway undertakings of 'tariffs with common scales offering rates for whole journeys', and adds

that 'the rates set out in those tariffs may be independent of those obtained by adding the rates of the national tariffs', the purpose of that independence being to protect the competitive position of railway transport *vis-à-vis* other modes of transport, as stated in the fourth recital in the preamble to Decision 82/529. None the less, Article 4 likewise assumes that the railway undertakings take account of 'their own interest'. As is clear from its second recital, Decision 82/529 accords a definite value to a 'sufficient commercial independence' of the railway undertakings.

42 Recommendation 84/646, which is also relied upon by the applicant, cannot cast doubt on that conclusion. Article 4 of the recommendation again confirms that it is possible to establish inclusive tariffs that are not equal to the sum of the national tariffs and encourages the establishment of joint sales offices with forwarding agents, but does not allow, as the MCN Agreement did, unlimited power in matters of commercial management and price formation to be conferred to such bodies.

43 Finally, the Court considers that, in relation to the MCN Agreement, the Commission was in no way obliged to apply Article 5 of Regulation No 1017/68, which provides that '[T]he prohibition in Article 2 may be declared inapplicable ... to any agreement or category of agreement between undertakings ... which contributes towards ... improving the quality of transport services, or promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation, or increasing the productivity of undertakings, or furthering technical or economic progress ... (without making) ... it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned'. In that regard, it should be stated at the outset that, contrary to the applicant's assertions, the Commission provided reasons for its refusal to exempt the MCN Agreement, by pointing out in paragraphs 99 to 103 of the Decision that it had not been established that the agreement provided technical or economic progress, an improvement in the quality of the railway services or an increase in productivity, whereas it imposed significant restrictions on competition, so that the conditions required by Article 5 of Regulation No 1017/68 were in any event not fulfilled. Furthermore, it must be held that, as is evident from the findings already made by the Court (paragraphs 34 to 40), by declaring Article 2 of Regulation No 1017/68 to

be inapplicable to the MCN Agreement, the Commission made it possible for the undertakings concerned to eliminate competition between themselves.

44 It follows from all the foregoing that the Commission was right to consider that the MCN Agreement was incompatible with the common market. Accordingly, the first plea must be rejected.

The second plea, alleging infringement of Article 86 of the Treaty

45 There are two parts to this plea. The applicant claims, first of all, that DB did not occupy a dominant position within the common market or in a substantial part of it. It maintains, secondly, that the conduct complained of in the Decision did not constitute an abuse.

The first part of the plea, concerning the absence of a dominant position

— Arguments of the parties

46 The applicant considers that the Decision wrongly defines the relevant market and comes to the mistaken conclusion that DB held a dominant position.

47 According to the applicant, the relevant market covers carriage of maritime containers not only by rail, but also by road and inland waterway. In this connection, it relies on the case-law according to which the material definition of the market must include all the services and goods which are interchangeable with each other.

Applying that case-law to the present case, the applicant considers that the definition of the market in which the Commission found that DB held a dominant position contains two errors.

48 First, by limiting the market solely to railway services, the Commission disregarded the fact that Transfracht was a subsidiary of DB and that, since parent and subsidiary companies constitute a single economic entity, the economic activities of DB included, throughout Germany, not only rail transport services such as access to the railway network and the provision of locomotives and drivers but also the other components of carriage by rail of maritime containers.

49 Furthermore, by excluding from the market carriage by road and inland waterway, the Commission disregarded the fact that, for nearly all container-forwarding agents, those modes of transport are interchangeable with carriage by road. Such interchangeability is illustrated in particular by the fact that there is significant competition on prices between rail transport operators, road hauliers and inland waterway transport operators.

50 Considering therefore that the relevant market must cover all the components of carriage by rail of maritime containers and also carriage by road and inland waterway, the applicant claims that the fact that DB held a statutory monopoly within Germany for the provision of rail services was not sufficient to prove that it held a dominant position. It points out that the holding of a statutory monopoly amounts to a dominant position within the meaning of Article 86 of the Treaty only where that monopoly encompasses the whole of the relevant market and where the services concerned are not subject, in that relevant market, to real competition. As a result of competition between road hauliers and inland waterway transport operators, DB held only a 6% share of the container transport market despite its statutory monopoly.

51 The defendant observes that the Court of Justice has repeatedly held that an undertaking which has a statutory monopoly in a Member State is, by virtue of that fact, in a dominant position and that the territory of a Member State over which the monopoly extends must be considered to be a substantial part of the common market within the meaning of Article 86 of the Treaty.

52 The applicant's argument that DB only held a 6% share of the container transport market is based on an altogether different delimitation of the market which is not in conformity with the case-law. The defendant states, in this connection, that the case-law requires that the interchangeability of the provision of services be assessed from the consumer's point of view and according to the characteristics of the services in question and to the structure of supply and demand. From all those points of view, the rail services provided by DB are not shown to be interchangeable with the other services provided in the context of the carriage of maritime containers.

— Findings of the Court

53 In order to establish whether at the material time DB held a dominant position, it is necessary to examine first of all the definition of the market in the services in issue. To that end, it should be borne in mind that the Commission defined the market on which it found the existence of a dominant position as being, materially, that of rail services, which are sold by the railway undertakings to the transport undertakings and which consist essentially in making locomotives available, providing traction therewith and access to the railway infrastructure and, as regards geography, as covering the whole of Germany. Notwithstanding the use in Article 2 of the decision of a wider definition of the actual market ('rail transport'), the delimitation referred to above corresponds to that used in the recitals in the preamble to the Decision and to that understood by the applicant. The Commission moreover confirmed that definition in reply to a question put by the Court before the hearing.

54 So far as concerns the material definition of the market, the Court observes that, in order to be considered the subject of a sufficiently distinct market, it must be possible to distinguish the service or the good in question by virtue of particular characteristics that so differentiate it from other services or other goods that it is only to a small degree interchangeable with those alternatives and affected by competition from them (see the judgments of the Court of Justice in Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraphs 39 and 40, and Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 11 and 12, and of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 64). In that context, the degree of interchangeability between products must be assessed in terms of their objective characteristics, as well as the structure of supply and demand on the market, and competitive conditions (see the judgment of the Court of Justice in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37, and the judgment of the Court of First Instance in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 63).

55 The Court finds that the rail services market constitutes a sub-market distinct from the rail transport market in general. It offers a specific range of services, in particular the provision of locomotives, traction and access to the railway infrastructure which, while admittedly provided according to the demands of the railway transport operators, is in no way interchangeable or in competition with their services. The distinct character of railway services also derives from the demand and supply factors that are specific to those services. On the one hand, it is not possible for transport operators to provide their services if they do not have railway services available to them. On the other hand, the railway undertakings held, at the material time, a statutory monopoly as regards the provision of railway services within their respective countries. Thus, it is not in dispute between the parties that, until 31 December 1992, DB had a statutory monopoly as regards the provision of railway services within Germany.

56 As may be seen from the case-law, a sub-market which has specific characteristics from the point of view of demand and supply and which offers products which occupy an essential and non-interchangeable place in the more general market of

which it forms part must be considered to be a distinct product market (see Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraphs 61 and 62). In the light of that case-law and having regard to the foregoing considerations, the Commission was justified in not taking into consideration, in its material definition of the market, the services provided by the rail transport operators and, even more so, those provided by road hauliers and inland waterway transport operators.

57 Next, it is clear from the case-law that where, as in the present case, the services covered by the sub-market are the subject of a statutory monopoly, placing those seeking the services in a position of economic dependence on the supplier, the existence of a dominant position on a distinct market cannot be denied, even if the services provided under a monopoly are linked to a product which is itself in competition with other products (Case 26/75 *General Motors* v *Commission* [1975] ECR 1367, paragraphs 5 to 10, and Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraphs 3 to 10).

58 So far as concerns the geographic delimitation of the market, it is sufficient to point out that a Member State may constitute, in itself, a substantial part of the common market on which an undertaking may hold a dominant position, in particular where it enjoys a statutory monopoly over that territory (Case 127/73 *BRT* v *Sabam and Fonior* [1974] ECR 313, paragraph 5).

59 It follows from all the foregoing considerations that the first part of the plea must be rejected.

The second part of the plea, that there was no abuse of a dominant position

— Arguments of the parties

60 The applicant claims that even assuming that the Court finds that there was a dominant position, it should still be held that DB did not abuse that position. In so far as the contested decision is based on the level of the tariff for carriage by rail to and from western ports and states that it is higher than that for carriage by rail to and from the northern ports, it is essentially criticizing Intercontainer's tariff practices and not those of DB. In that context, the applicant pointed out at the hearing that the tariffs charged by DB for the provision of its rail services to Intercontainer have always been lower than the tariffs charged by DB to Transfracht and than the tariffs charged by NS to Intercontainer, whereas, in its application, it had stated that it did not deny that the level of its tariffs for traffic via the western ports was higher than that of those charged for traffic via the northern ports (page 25 of the application). The applicant concludes that DB could not be held responsible for the average tariff applied to carriage to and from the western ports being higher compared to the tariffs applied to carriage to and from the northern ports. It observes, moreover, that, for a large number of journeys via the western ports, a major part of the component of the tariff relating to the rail services had nothing to do with DB but concerned the services supplied by NS or SNCB (pages 31 and 32 of the reply).

61 In the same context, the applicant denies that DB blocked, in the context of the MCN Agreement, any reduction of Intercontainer's tariffs and that it had in fact required those tariffs to be maintained. On that point, the applicant points out that, under the MCN Agreement, every price change required unanimity in the Steering Committee, including, therefore, the consent of the other railway companies and Intercontainer, and that it had not been proved that it was DB which had prevented a reduction of the difference between the rail transport tariffs applied on western journeys and those on northern journeys.

62 The applicant adds that, in any event, each of the parties to the MCN Agreement was entitled, under the terms of the agreement, to terminate it. It claims that the parties to the MCN Agreement were therefore in a position to avoid being influenced by DB if they so wished (page 31 of the reply).

63 The applicant then maintains that the difference between the tariffs applied on the western journeys and those applied on the northern journeys were, in any event, objectively justified by a difference in the competitive situation and in costs.

64 In order to illustrate that difference with regard to the competitive situation, the applicant states that, on northern journeys, competition from inland waterways is weak and that competition from road hauliers is limited to German lorries, whereas, on western journeys, inland waterways is the cheapest mode of transport and competition from road hauliers is also very strong. In particular, the tariffs applied by road hauliers and inland waterway transport operators on western journeys were 20 to 40% lower than the tariffs applied by DB/Transfracht on northern journeys. The applicant states that it is not possible for it, as a small competitor on the transport market on western journeys, to cope with such rates and to cover its own costs at the same time. It had been making a loss for years on the western journeys and that loss had become more serious after DB took the step in 1989 and 1991 of bringing the tariffs applied to the western journeys a little closer to those applied to northern journeys. A temporary joint initiative undertaken by DB and NS at the end of 1993 for the purpose of applying the same rates as those of the road hauliers on one of the western journeys also failed completely in that it did not win new customers for carriage by rail.

65 The applicant considers, moreover, that the consequence of the difference between the competitive situation on the western journeys and that on the northern journeys is that the Commission's definition of the market on which DB allegedly abused its dominant position is fundamentally flawed. It states, in this regard, that the Commission defined a market covering the inland transport of sea-borne containers both on western journeys and northern journeys, whereas it is settled

case-law that only geographical areas in which the objective competitive conditions are similar may be considered to constitute a uniform market. The applicant considers that such a flaw in the definition of the market is in itself sufficient to justify annulling the contested decision.

66 So far as concerns transport costs and in particular the costs of rail services, the applicant states that they are not determined exclusively by length of journey but also depend on other factors such as the number and duration of the shunting operations, customs formalities, the time worked by the crews and the length of time during which locomotives and wagons are used. It follows that transport costs can be very different for journeys whose length is identical. In the present case, the differences in the costs arise from the fact that rail traffic is denser on the northern journeys and from the fact that, on western journeys, the crossings by trains of the Belgian and Netherlands borders give rise to costs.

67 In particular, the large volume of transport on the northern journeys enables block trains to be used to transport containers bound for the same destination, such trains not needing therefore to be shunted. Moreover, on northern journeys it is not necessary to change locomotives since DB is responsible for traction over the whole length of the journey. Costs are therefore lower for the northern journeys, which makes it possible to apply lower tariffs to those journeys.

68 Finally, the fact that, with the introduction of the KLV-Neu structure, the DB further reduced costs and, therefore, the rates for rail services on northern journeys makes no difference because, in the Decision, the Commission based its conclusions on a comparison of Intercontainer's tariffs with those of Transfracht and, moreover, the Commission did not prove that the reduction of prices in Germany under the KLV-Neu structure was not economically justified.

69 The defendant points out, *in limine*, that the Court has consistently held that an abuse within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty is committed where an undertaking uses its dominant position in order to apply dissimilar conditions to equivalent transactions with the purpose of placing its own services at an advantage.

70 The defendant states, first of all, that it considered the carriage by Intercontainer of containers from and to the western ports, on the one hand, and the carriage by Transfracht of containers from and to the northern ports, on the other, to be 'equivalent transactions'.

71 The defendant goes on to state that it considered the differences between rates per kilometre charged for Intercontainer's and Transfracht's services to be 'dissimilar conditions'. Those differences ranged from 2 to 77% in respect of the carriage of empty containers and from 4 to 42% in respect of full containers, according to figures supplied by the undertakings concerned on the basis of Intercontainer's tariffs for the carriage of containers to the port of Rotterdam and on the basis of Transfracht's tariffs in respect of carriage to the port of Hamburg, figures which appear in Annexes 3 to 9 to the Decision and which are analysed in paragraphs 162 to 171 thereof. The defendant established those differences on the basis of comparisons whose only variable was the length of journey. It justified this method of comparison by reference to information provided by Transfracht at the hearing, according to which the length of journeys is the decisive criterion.

72 According to the defendant, there is no objective justification for the difference in rates which was found to exist.

73 So far as concerns the competitive situation, the defendant observes that the existence of inter-modal competition which is stronger on the western journeys could account for the tariffs applied by Intercontainer being lower than those applied by Transfracht, but cannot account for a difference in the opposite sense. Furthermore, DB was not in competition with road hauliers and inland waterway transport operators, since its services are by nature rail services and are not therefore,

from the point of view of Intercontainer and Transfracht, interchangeable with the services offered by road hauliers and inland waterway transport operators.

74 So far as concerns production costs, the defendant considers that the applicant has not demonstrated that traffic via the western ports entails higher costs than the traffic via northern ports. In particular, it has not been proved that border crossings significantly increase transport costs, and the data available on the volume of traffic and the type of consignments disclose no logical relation with the transport costs and tariffs. Furthermore, the average price per kilometre charged by DB to Intercontainer is lower than the average price charged by DB to Transfracht and this suggests that the costs of the rail services provided for carriage to and from the western ports are lower than the costs of the rail services provided for carriage to and from the northern ports (pages 38 and 39 of the defence).

75 As to whether the abovementioned differences in tariffs can be attributed to DB, the defendant repeats the analysis which it had already set out in paragraphs 143 to 156 of the Decision, according to which DB had the power to block decisions within the bodies set up by the MCN Agreement and used that agreement in order to prevent a decrease in Intercontainer's tariffs, while applying to the northern journeys a new tariff system unilaterally created by itself. The defendant further states that the dissatisfaction of Intercontainer, NS and SNCB with the attitude adopted by DB within the framework of the MCN Agreement emerges clearly from the minutes of the meetings held by Intercontainer and of the meetings held under the MCN Agreement.

76 The defendant concludes that DB imposed tariff differences and that those differences constitute discrimination. It states that the economic effects of such discrimination are not to be found in the dealings between the rail transport operators and the other transport operators but in the dealings between DB and NS and SNCB and in those between Transfracht and Intercontainer. According to the defendant, it is clear that, in those dealings, DB and Transfracht gained from the abovementioned discriminatory tariffs.

— Findings of the Court

77 It should be pointed out *in limine* that the first paragraph and subparagraph (c) of the second paragraph of Article 8 of Regulation No 1017/68 reproduce the wording of the first paragraph and subparagraph (c) of the second paragraph of Article 86 of the Treaty and prohibit, in so far as trade between Member States may be affected thereby, any abuse of a dominant position within a substantial part of the common market through the application of 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Moreover, none of the recitals in or the provisions of Regulation No 1017/68 confers upon Article 8 of the regulation a purpose which is substantially different from that of Article 86 of the Treaty. Accordingly, by finding that Article 86 of the Treaty and not Article 8 of Regulation No 1017/68 had been infringed, the Commission did not commit an error without which the content of the decision might have been different. The choice of Article 86 of the Treaty as the article of reference in the Decision was not, moreover, criticized by the applicant.

78 It should next be pointed out that the concept of abuse of a dominant position amounts to prohibiting a dominant undertaking from strengthening its position by using methods other than those which come within the scope of competition on the basis of quality (see, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 70). Thus, an undertaking may not apply artificial price differences such as to place its customers at a disadvantage and to distort competition (*Tetra Pak* v *Commission*, cited above, paragraph 160).

79 Furthermore, the existence of an abuse of a dominant position cannot be ruled out by the fact that the undertaking which holds the dominant position has formally entered into an agreement the object of which is the joint fixing of tariffs and which thus falls within the scope of the prohibition of restrictive agreements. The existence of such an agreement does not preclude the possibility that one of the undertakings bound by the agreement might unilaterally impose discriminatory tariffs (see, by analogy, *Ahmed Saeed Flugreisen and Silver Line Reisebüro*, cited above, paragraphs 34 and 37).

80 In the present case the Court finds that several factors enabled the Commission to conclude that, in spite of the MCN Agreement and its primary objective, which was, as the applicant confirmed at the hearing, to lower Intercontainer's tariffs and thus restore the competitive position of rail transport on the western journeys, DB acted unilaterally in a manner which thwarted that objective.

81 First, the Commission had in its possession a set of documents, to which it refers in paragraphs 152 to 154 of the Decision, the existence of which was not disputed by the applicant and the content of which tended to confirm that DB was, in fact, responsible for fixing tariffs within the framework of the MCN Agreement and, accordingly, for maintaining the differences in tariffs. Thus, the minutes of a plenary meeting of Intercontainer's Management Board mention a statement made by a representative of SNCB according to which the Steering Committee 'had been short-circuited by DB'. Likewise, an internal memorandum of Intercontainer states that 'northern port traffic is being handled directly and exclusively by Transfracht and DB without any participation by [the Steering Committee]. In practice, it has in addition emerged that the power of decision-making as regards tariffs does not emanate from [the Steering Committee]'. Finally, certain proposals formulated by DB and recorded in the minutes of a meeting between the representatives of the western ports and DB, SNCB and NS unequivocally imply that DB had the power enabling it to control the level of tariffs both on the western and on the northern journeys. DB in particular proposed during that meeting '[to re-examine] the level of prices ... in the light of the German political context' with a view to obtaining thereby a '50% reduction in the difference on 1 January 1990' and a 'further reduction on 1 July 1990'.

82 There was therefore some evidence to support the Commission's finding to the effect that DB and Transfracht took advantage of their ability to block decisions, acquired by them through the requirement for unanimity in the Steering Committee's decision-making procedure (see paragraph 6 above), in order to prevent a decrease in Intercontainer's tariffs. Contrary to what the applicant maintains, SNCB, NS and Intercontainer were not able to avoid such blocking tactics by

terminating the MCN Agreement. In the first place, termination of the MCN Agreement would not have altered the fact that, for each journey between the port of Antwerp or Rotterdam and a German town, the railway and transport undertakings operating in Belgium and the Netherlands depended on DB's cooperation in order to continue the journey within Germany. Secondly, termination of the agreement would not have altered the fact that DB set, in complete independence, the level of the tariffs for carriage on the northern journeys and that it thus influenced the difference between the tariffs in respect of western journeys and those in respect of northern journeys.

83 In the second place, it is not disputed that DB unilaterally introduced on 1 June 1988, that is to say barely three months after the entry into force of the MCN Agreement, a new tariff structure, namely the KLV-Neu structure. That was confirmed by the applicant in reply to a question put by the Court before the hearing. In that reply, the applicant also confirmed that the KLV-Neu structure led to a decrease in rates which worked only to the benefit of forwarding agents for the carriage by rail of maritime containers passing through German ports, given that that tariff system was based on rationalization measures which, in practice, were applied only to container traffic passing through the northern ports.

84 It follows from the Court's findings in the foregoing paragraphs that the conduct of DB during the period under investigation directly contributed to the maintenance of a difference between the rates per kilometre applicable to carriage via the western ports and those applicable to carriage via the northern ports.

85 At this stage in the Court's reasoning the abovementioned difference in rates per kilometre should be examined in order to ascertain whether it was discriminatory and thus affected the competitive position of certain operators.

86 For the purpose of that examination, the figures appearing in Annexes 3 to 9 to the Decision should be analysed. Those figures show that, apart from Saarbrücken, for

each destination which was substantially nearer to Rotterdam than to Hamburg and in respect of which carriage via Rotterdam was therefore objectively more advantageous, that commercial advantage by comparison with carriage via Hamburg was in each case counterbalanced either by higher total prices for carriage to Rotterdam or by the application of equal total prices. The dissimilar total prices include, for example, those applied to carriage of empty containers between 1 October 1990 and 31 December 1991 (Annex 3) to Duisburg, Bochum, Wuppertal, Mannheim and Karlsruhe. Those total prices result in differences in prices per kilometre of 77.6% (Duisburg), 56.5% (Bochum), 42% (Wuppertal), 16.5% (Mannheim) and 22.6% (Karlsruhe). The equal total prices include, for example, those applied from 1 January 1992 (Annex 7) in respect of the carriage of full containers to Frankfurt, Karlsruhe, Duisburg, Düsseldorf, Wuppertal and Bochum. Those prices result in differences in price per kilometre of 4.6% (Frankfurt), 11.35% (Karlsruhe), 58% (Düsseldorf), 28% (Wuppertal) and 20.9% (Bochum). Furthermore, it appears that, with the sole exception of Saarbrücken, the total prices applied to carriage between Rotterdam and any town in Germany, whether it was nearer to Rotterdam or Hamburg, was not lower than the total prices applied to carriage from or to Hamburg. That was the case, for example, with respect to the KLV prices applied to the carriage of containers as from 1 July 1991 (Annex 9) to Frankfurt (a total price of DM 857 to Rotterdam, as against DM 833 to Hamburg), Düsseldorf (DM 653 as against DM 618) and Mainz (DM 867 as against DM 843), on the one hand (towns closer to Rotterdam than to Hamburg), and to Augsburg (DM 1 456 as against DM 1 415), Munich (DM 1 520 as against DM 1 410) and Regensburg (DM 1 386 as against DM 1 334), on the other hand (towns closer to Hamburg). The Court finds that that practice artificially consolidated a protective system of tariffs for carriage by rail passing through the northern ports and must be regarded as an imposition of dissimilar tariff conditions to the detriment of the competitive position of undertakings operating on the western rail journeys by comparison with those operating on the northern rail journeys.

87 The applicant stated that the differences in price per kilometre were due to the fact that the costs of providing the services were higher on the western journeys than on the northern journeys and to the fact that carriage by rail was subject to stronger inter-modal competition on the western journeys than on the northern journeys.

88 The Court finds, in the first place, that the difference in costs relied on by the applicant was partially created by DB itself. In particular, DB adopted several rationalization measures within the framework of the KLV-Neu tariff structure such as increasing the use of direct and block trains and concentrating on night traffic and on carriage to certain terminals operated on rationalized lines. Those measures enabled costs to be reduced, but only for traffic to and from German ports (see paragraph 83).

89 It should be pointed out, in this respect, that the applicant has not put forward any argument to show that the provision of rail services for the carriage of goods to Belgian and Netherlands ports had necessarily to be excluded from the rationalization measures adopted under the KLV-Neu system and, consequently, from the complete range of the cost-reduction measures taken by DB. In this regard, the argument that the rationalization measures introduced by the KLV-Neu system could not be applied to traffic via the western ports because its volume was small and that it was therefore impossible to assemble direct and block trains is not persuasive. The applicant moreover stated on two occasions, in reply to questions put by the Court at the hearing, that block trains were assembled on the western journeys.

90 In so far as the applicant alleges that certain costs are specific to the western journeys, namely those entailed by locomotive changeover and reassembling of wagons at the border, the Court finds that such costs can represent only a small part of the costs incurred in the provision of the services in question as a whole (every aspect of the provision of locomotives and traction) and cannot therefore justify the price differences noted. It is clear, moreover, from the figures which appear in Annex 15 to the Decision and which are not disputed by the parties that the total tariffs charged by DB and NS to Intercontainer for providing rail services on the journeys linking the German towns to the port of Rotterdam were, on average, lower than the tariff charged by DB to Transfracht for providing rail services on the

northern journeys. Accordingly, the costs directly relating to the services provided by the rail undertakings should logically be lower on the western journeys than those incurred on the northern journeys.

91 Secondly, the Court finds that the greater intensity of competition between rail transport operators, on the one hand, and road hauliers and inland waterway transport operators, on the other, on the western journeys cannot account for the level of tariffs applied by Intercontainer on those journeys being higher than that of the tariffs applied by Transfracht on the northern journeys. Assuming that the more intense nature of inter-modal competition on the western journeys could justify a difference in price, it must be stated that, from a commercial point of view, this could give rise logically only to a difference in favour of the tariffs applied on the western journeys.

92 Inasmuch as the applicant submits that the Commission's definition of the geographical market is undermined by the difference in the competitive situation, it is sufficient to state that the definition of the geographical market does not require the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'similar' or 'sufficiently homogeneous' and, accordingly, only areas in which the objective conditions of competition are 'heterogenous' may not be considered to constitute a uniform market (*United Brands* v *Commission*, cited above, paragraphs 11 and 53, and *Tetra Pak* v *Commission*, cited above, paragraphs 91 and 92). In the present case the greater intensity of inter-modal competition on the western journeys cannot mean that the objective conditions of competition which exist on those journeys are 'heterogenous' by comparison to those existing on the northern journeys.

93 It is clear from the foregoing considerations that the Commission has adduced sufficient evidence to substantiate its conclusions concerning DB's conduct and that it has proved to the requisite legal standard that, by its conduct, DB imposed dissimilar conditions for equivalent services, thus placing the other parties operating

on the western journeys at a disadvantage in competition with itself and its subsidiary Transfracht. Accordingly, the second part of the plea must also be rejected.

94 It follows that the second plea in law must be rejected in its entirety.

95 That conclusion cannot be invalidated by the additional complaint, raised by the applicant in its reply and at the hearing, that the Commission gave inadequate reasons for its conclusions relating to the finding that DB had abused its dominant position and that it thus infringed Article 190 of the Treaty. In this respect, it should be borne in mind that, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. The Court finds that the complaint that Article 190 of the Treaty was infringed constitutes a new plea in law which is not based on matters of law or of fact which have come to light in the course of the procedure, with the result that it could not be raised for the first time in the course of the proceedings.

96 In any event, by analysing in turn 'the key role of DB in the setting of tariffs for the carriage of sea-borne containers from or to Germany' (paragraphs 143 to 156 of the Decision), the 'tariffs of Transfracht and Intercontainer' (paragraphs 162 to 177 of the Decision), the 'position of the undertakings regarding the discriminatory nature of the tariff differences' and in particular the 'position of the DB/Transfracht group' (paragraphs 185 to 190 of the Decision), and the competitive situations and production costs (paragraphs 199 to 248 of the Decision) and by establishing a link between those analyses, the Commission explained in detail in its Decision why it considered DB to have abused its dominant position, thus enabling the Court to exercise its power of review. Similarly, both in its application and during the course of the proceedings, the applicant replied to arguments put forward by the Commission in the Decision with regard to the finding of abuse of a dominant position, which shows that the Decision provided it with the information necessary to enable it to defend its rights. Accordingly, it cannot be held

that the statement of reasons was defective (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, and Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 65).

Third plea, alleging infringement of the rights of the defence

Arguments of the parties

97 The applicant states that it asked the Commission, after notification of the Decision, for permission to consult the file and that the Commission refused its request. It points out that such consultation was essential in order to enable its counsel to prepare its case properly for the pre-litigation procedure. The fact that consultation was authorized during that procedure is not relevant in this respect, since at that time both the undertaking concerned and its counsel were different. In any event, the applicant maintains that it does not have in its possession the copies made by DB's counsel after examining the file.

98 The applicant states furthermore that the German Law of 27 December 1993 for the reorganization of the railways created a new body, the 'Bundeseisenbahnvermögen', as the official successor to DB. It concludes from this that neither its identity or its rights may be assimilated to those of DB. Accordingly, the Commission's refusal to grant access to the file deprived the applicant, which only came into existence in January 1994, of all rights in that respect. That amounts to a breach of the rights of the defence, causing the Decision to be vitiated by a breach of an essential procedural requirement.

99 The Commission's refusal to take account of the change of identity of the undertaking resulted, moreover, in a breach of the obligation to state reasons. On the basis in particular of the case-law of the Court of First Instance, the applicant submits that, where a decision taken in application of Article 85 or 86 of the Treaty imposes a fine on an undertaking which is considered liable for the infringement

committed by another undertaking, it must contain a detailed account of the grounds for holding the undertaking on which the fine is imposed liable for the infringement (Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraphs 26 and 27). However, the contested decision contains no such statement of reasons.

100 The defendant states that the right of access to the file is extinguished once the administrative procedure is closed. As soon as a decision is adopted and notified, the rights of defence of the person to whom it is addressed are protected by the possibility of challenging the decision before the Court.

101 The defendant maintains moreover that, in any event, a change of lawyer cannot have any repercussion on the right of access to the file, since access to the file is a right conferred on the undertaking concerned and not on the individual lawyers engaged by it. The fact that, in this case, the identity of the undertaking itself changed is not relevant either, since the applicant is the successor both in economic and legal terms to DB and, accordingly, its rights and obligations are not distinguishable from the rights and obligations of DB, including the right to consult the file, which DB exercised during the pre-litigation procedure.

Findings of the Court

102 The Court finds that the applicant's request for access to the file was made to the Commission after adoption and notification of the Decision and thus post-dates the Decision; consequently, the legality of the Decision cannot in any circumstances be affected by the Commission's refusal to grant the requested access (see T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraph 30, and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, cited above, paragraph 40).

103 The third plea in law must therefore be rejected.

104 That conclusion cannot be invalidated by the fact that the applicant raised another complaint of a procedural nature alleging that inadequate reasons were given for holding it responsible for the infringement found. That complaint was submitted for the first time in the applicant's reply. Although it was submitted in the context of the arguments on the matter of access to the file, the Court finds that it is substantively different from the matter of access to the file and from the other matters raised in the application and that it must therefore be held to constitute a separate and new plea in law. Since it is not based on matters of law or of fact which have come to light during the procedure, the Court holds that the applicant was not entitled to raise it in the course of the proceedings (see, on a similar point, paragraph 95).

105 In any event, the complaint, formulated by the applicant in its reply, that the statement of reasons was inadequate cannot be upheld. The Commission stated, in paragraph 13 of the Decision, that on 1 January 1994 the applicant became DB's successor. The Court finds that that statement sufficiently explains the reason for which the Commission considered that it was entitled to enjoin the applicant to put an end to the infringement of Article 86 of the Treaty committed by DB and to order it to pay a fine on account of that infringement (Articles 3 and 4 of the Decision). That assessment by the Commission is, moreover, entirely correct in the context of the present case, since it is clear from the German law concerning the reorganization of the railways and creating the Bundeseisenbahnvermögen that the applicant acquired, through the Bundeseisenbahnvermögen, DB's assets to the extent necessary for the provision of railway services and for the operation of the railway infrastructure.

106 The facts of the present case are different, moreover, from those in *AWS Benelux* v *Commission*, cited above, in which the Court held that a detailed account of the grounds for holding the fined undertaking to be responsible for the infringement was necessary because the alleged conduct concerned more than one undertaking. In that case, several undertakings were involved in the administrative procedure,

and this gave rise to complex questions as to responsibility for the infringement when it was finally established. However, in the present case, the infringement for which the Commission imposed a sanction was committed by a single undertaking, DB. The reason for holding the applicant responsible for that infringement could thus be reduced to the mere finding that it was the successor to DB.

Fourth plea, alleging breach of the principles of legal certainty and proper administration

Arguments of the parties

107 The applicant states that the Commission had known for a long time of DB's tariff policy and that it had described that policy on several occasions as conforming to Community law.

108 In that context, the applicant recalls that, by Parliamentary Written Question No 1720/81 of 9 February 1982, the Commission had been asked to say when and how it would put an end to 'the distortion of competition between West German and Netherlands North Sea ports due to the discriminatory rates applied by the German Federal Railways' and that in reply to that question it had stated that 'all the enquiries made into the tariffs or tariff system in question to date have come to the conclusion that there is no discrimination behind the difference between the rates for freight bound for ports in the Netherlands and Germany respectively. The DB has fixed its rates to meet competition, calculating them strictly on the basis of the prevailing market conditions and of its own costs and business interests' (OJ 1982 C 198, p. 2). In its reply to a further Parliamentary Question in 1983, the Commission repeated that definition of its position (answer to Written Question No 664/83, OJ 1983 C 308, p. 13).

109 In 1986, in answer to another parliamentary question, the Commission again confirmed the differences between the prices charged on the German domestic transport market and those charged on the international transport market by replying that '[i]n these distinct, highly competitive markets [Transfracht and Intercontainer] ... charge freight rates which take into account those of competing carriers' and that, accordingly, 'Transfracht's rates ... [cannot] be considered "a form of subsidy that distorts competition"' (answer to Written Question No 911/86, OJ 1987 C 198, p. 6).

110 The applicant states that the contested decision flatly contradicts the stance taken by the Commission before the Parliament, as described above. It considers that, by changing its transport policy so radically and suddenly, without even announcing such a change by a notice in the Official Journal, the Commission seriously infringed the principles of legal certainty and proper administration.

111 The defendant considers that it did not create any expectation on the part of the applicant. On none of the three occasions on which it defined its position before the Parliament, as referred to by the applicant, did it express a definite view on the lawfulness of the tariffs applied by DB in the light of the Community rules on competition: it only pointed out that it did not have, at the time, any information which would enable it to conclude that those rules had been infringed. The defendant adds that it again defined its position before the Parliament, on the same subject, in April 1989 in reply to Written Question No 2172/88 (OJ 1989 C 255, p. 23). On that occasion it had again abstained, for lack of information, from expressing a definite view as to the lawfulness of DB's conduct and it remarked that 'should the interested parties be prepared to inform the Commission of their grounds for considering these tariffs discriminatory, the matter can be investigated with the competent authorities'.

112 The defendant observes, in addition, that the definitions of position referred to above are not relevant to the present case, since they date back to 1982, 1983 and 1986 and from April 1989, whereas the contested decision concerns DB's conduct in the context of the MCN Agreement between 1 October 1989 and 31 July 1992.

Findings of the Court

113 It is settled case-law that the principle of legal certainty aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* v *Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] ECR I-569, paragraph 20). To that end, it is essential that the Community institutions observe the principle that they may not alter measures which they have adopted and which affect the legal and factual situation of persons, so that they may amend those acts only in accordance with the rules on competence and procedure (Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315, paragraph 35, and Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 et T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729, paragraph 73).

114 The Court finds that the Commission's answers to the parliamentary questions referred to by the applicant did not produce binding legal effects and were not such as to affect DB's legal and factual situation. Moreover, the Commission's answers, in so far as they concern DB's tariffs, were formulated with great circumspection. In particular, in Written Question No 1720/81, the Commission added to its assessment of DB's tariff policy the words 'to date' and stressed that it was 'ready and willing to look into the case raised by the Honourable Member, provided it receives fuller details of the routes concerned and the rates and conditions

of carriage which apply'. Accordingly, the contested decision, which is based specifically on such 'fuller details', does not contradict the answers given by the Commission to the Parliament and does not, therefore, modify their scope.

115 It follows that the applicant could neither found a requirement of legal certainty on the definitions of the Commission's position before the Parliament nor claim to have entertained legitimate expectations on the basis of them.

116 Finally, the fact that the Commission made its answers to the Parliament subject to reservations and subsequently, when it was in possession of fuller details as a result of a complaint and of the measures of inquiry adopted in the course of the administrative procedure, took a firmer and more critical line is not incompatible with the requirements of proper administration but constitutes rather an illustration of it.

117 Consequently, the fourth plea must also be rejected.

The alternative claims for annulment or reduction of the fine

Arguments of the parties

118 The applicant considers that the fine imposed upon it offends against the principle of proportionality. That is so, first, because the Commission did not find, for 20 years, that any infringement had been committed in the field of rail transport, even though it was fully aware of the practices of the railway undertakings. According to the applicant, a fine must be annulled, or at least reduced, if the Commission

has hesitated in taking action against alleged distortions of competition (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraphs 51 and 52).

119 The amount of the fine is also out of proportion to the gravity of the alleged infringement. The consequences of infringement which are regarded by the Commission as proven did not, in fact, occur. The tariff practices examined did not entail any loss whatsoever for the undertakings comprised in the complainant association and they did not result, in the market for transport via the western ports in general, in Belgian and Netherlands forwarding agents migrating to other modes of transport. Furthermore, such a move was, even theoretically, hardly possible, since transport by road and inland waterway were already the most heavily used modes of transport in that market.

120 Finally, the applicant criticizes the Commission for having, contrary to its administrative practices in the calculation of fines, calculated the limits set by Article 22(2) of Regulation No 1017/68 on the basis of DB's total turnover (ECU 12.9 thousand million for 1993), and not on the turnover for container traffic (DM 461 million for 1993).

121 The defendant confirms that the contested fine is the first that has been imposed on the basis of Regulation No 1017/68, but it considers that this could not influence the amount fixed. The amount of the fine is fully justified since DB was well aware of the discrimination which it practised and did not show itself willing to bring it to an end.

122 Moreover, DB's conduct had serious consequences. The defendant observes, in that regard, that during the period from 1989 to 1991 the traffic via the northern ports increased by 20% and the traffic via the western ports decreased by 10%.

The defendant admits that the expert's report suggests that the flow of traffic remained more or less constant during the period under investigation, but adds that, even supposing that those calculations are accurate, DB's conduct should still be considered to have prevented carriage of containers by rail from increasing on the western journeys, which constitutes, in itself, a serious infringement of the rules of competition.

123 The defendant further states that, according to the case-law of the Court of First Instance, the Commission is not required to announce that it intends to impose a fine. It also emphasizes that it opened the inquiry as soon as it received a complaint. Finally, it points out that the amount of the fine imposed is within the limits laid down by Article 22 of Regulation No 1017/68.

Findings of the Court

124 It should be pointed out *in limine* that Article 22 of Regulation No 1017/68 enables the Commission to impose a fine for infringement of Article 8 of that regulation. The Court considers that the fact that the Commission found that Article 86 of the Treaty had been infringed rather than Article 8 of Regulation No 1017/68 did not preclude it from imposing a fine under Article 22 of Regulation No 1017/68, since the relevant provisions of Article 8 of Regulation No 1017/68 have the same wording and the same scope as those of Article 86 of the Treaty (see paragraph 77). The choice of Article 22 of Regulation No 1017/68 as the legal basis for imposing the fine was, moreover, not challenged by the applicant.

125 Also *in limine*, it should be pointed out that, pursuant to Article 24 of Regulation No 1017/68, the Court has unlimited jurisdiction within the meaning of Article 172 of the Treaty in proceedings brought against decisions in which the Commission has fixed the amount of a fine or periodic penalty payment.

126 So far as concerns calculation of the fine, the Court finds that the Commission observed the upper limit of 10% indicated in Article 22(2) of Regulation No 1017/68. Under that article the Commission may impose fines of up to 10% of the 'turnover in the preceding business year of each of the undertakings participating in the infringement'. According to settled case-law, it is permissible, in that context, to have regard both to the total turnover of the undertaking and to the turnover accounted for by the services in respect of which the infringement was committed (*Compagnie Maritime Belge Transport and Others* v *Commission*, cited above, paragraph 233). In the light of the information provided by the parties, the fine of ECU 11 million corresponds to less than 0.1% of DB's turnover for 1993 and to less than 5% of DB's turnover in 1993 in respect of container traffic. It follows that the Commission remained in every respect below the limit prescribed by Article 22 of Regulation No 1017/68.

127 As regards the setting of the amount of the fine within the quantitative limits provided for in Article 22 of Regulation No 1017/68, it should be pointed out that fines constitute an instrument of the Commission's competition policy and that that institution must therefore be allowed a margin of discretion when fixing their amount, in order that it may direct the conduct of undertakings towards compliance with the competition rules (*Martinelli*, cited above, paragraph 59, and Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53). Nevertheless, the Court must verify whether the amount of the fine imposed is in proportion to the duration of the infringements and to the other factors capable of affecting the assessment of the gravity of the infringements, such as the influence which the undertaking was able to exert on the market, the profit which it was able to derive from those practices, the volume and the value of the services concerned and the threat that the infringement poses to the objectives of the Community (see Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 129).

128 In the present case, the Court finds that DB could not have been unaware that, by its extent, its duration and its systematic nature, its conduct considerably promoted carriage via the German ports and thus resulted in serious restriction of competition. It follows that the Commission lawfully considered that the infringement had been committed deliberately (see, to this effect, Case T-61/89 *Dansk*

Pelsdyravlerforening v *Commission* [1992] ECR II-1931, paragraph 157). The Commission moreover rightly took account of the relatively long duration (at least two years and ten months) of the infringement, of the fact that DB in no way undertook to change its practices following the forwarding of the statement of objections and of the commercial advantage which DB was able to derive from its infringement.

129 It follows from the foregoing considerations that the Commission had in its possession information which showed that the abuse established was of a very grave nature and that therefore the amount of the fine imposed, and in particular the percentage of the turnover which it represents, is not disproportionate.

130 Contrary to the applicant's assertion, the Commission was not required to fix a more moderate amount because no fines had previously been imposed in the sector concerned. In that regard, it should be pointed out that the unprecedented nature of a decision cannot be pleaded as a ground for a reduction of the fine, provided that the gravity of the abuse of a dominant position and of the resulting restrictions of competition are undisputed (*Tetra Pak* v *Commission*, cited above, paragraph 239; Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraphs 46 to 49). Nor is it open to the applicant to criticize the Commission for having hesitated to take action and for having thus itself contributed to the duration of the infringement. In this respect, it is sufficient to note that the Commission opened an inquiry as soon as it received a complaint regarding the applicant's tariff practices.

131 The Court therefore finds that there are no grounds for annulling or reducing the fine imposed on the applicant.

132 It follows from all the foregoing that the application must be dismissed.

Costs

133 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has asked for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Saggio Kalogeropoulos Tiili

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 21 October 1997.

H. Jung A. Saggio

Registrar President