

COMMISSION DECISION

of 27 August 2003

relating to a proceeding pursuant to Article 82 of the EC Treaty of (COMP/37.685 GVG/FS)

(notified under document number C(2003) 3057)

(Only the Italian text is authentic)

(2004/33/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the final report of the hearing officer in this case ⁽⁵⁾,

Having regard to the Treaty establishing the European Community,

Whereas:

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Articles 3 and 15(2) thereof,

A. INTRODUCTION

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway ⁽³⁾,

- (1) This case was initiated by a complaint from the German railway undertaking Georg Verkehrsorganisation GmbH (hereinafter 'GVG') against Ferrovie dello Stato SpA (hereinafter 'FS'), the Italian national railway carrier. GVG complained that since 1995 FS had been refusing to provide access to the Italian infrastructure, to enter into negotiations for the formation of an international grouping and to provide traction. This prevented GVG from providing an international rail passenger service from various points in Germany via Basle to Milan.

Having regard to the complaint lodged on 25 October 1999 by the limited company Georg Verkehrsorganisation GmbH, acting under Article 10 of Regulation (EEC) No 1017/68, alleging that Article 82 of the EC Treaty had been infringed,

- (2) The Commission has come to the conclusion that by denying GVG access to the services in question, which are necessary for carrying out its business, FS has abused its dominant position within the meaning of Article 82 of the EC Treaty and Article 8 of Regulation (EEC) No 1017/68. Following the initiation of the Commission's investigation, FS has given undertakings to the Commission that the abuse will be terminated and will not be repeated.

Having regard to the Commission decision of 21 June 2001 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Article 26 of Regulation (EEC) No 1017/68, read in conjunction with Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearings of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ⁽⁴⁾,

B. THE PARTIES

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions and the Advisory Committee on Restrictive Practices and Monopolies in the Transport Industry,

- (3) GVG is a German railway undertaking which has been operating international rail passenger services on the basis of a national authorisation since March 1992. On 31 March 1995 it obtained from the Transport Ministry of the *Land* of Hessen a licence compatible with Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings ⁽⁶⁾ to operate passenger rail

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62. Although the Regulation was repealed by Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1), it continues to apply to decisions adopted prior to 1 May 2004.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ L 175, 23.7.1968, p. 1. The Regulation was last amended by Regulation (EC) No 1/2003, which applies, however, only from 1 May 2004.

⁽⁴⁾ OJ L 354, 30.12.1998, p. 18.

⁽⁵⁾ OJ C 12, 16.1.2004.

⁽⁶⁾ OJ L 143, 27.6.1995, p. 70.

transport services. In 2000 GVG formed an international grouping with the Swedish State railways providing services between Malmö and Prague and Malmö and Berlin. In 2001 it operated more than 200 trains per year in the international passenger long-distance market from Germany to other European countries (Austria, France, Sweden, and eastern Europe).

- (4) FS is the major Italian railway operator and a State-owned enterprise. During the 1990s, FS went through a restructuring process. On 22 December 1992, the company was established as the public limited company 'Ferrovie dello Stato — Società di Trasporti e Servizi per Azioni' (FS SpA) under the supervision of the Ministry of the Treasury. On 4 March 1996, FS established separate business units for the network, rolling stock and traction, passengers and other activities. On 27 July 1998, these business units were transformed into free-standing divisions: the infrastructure division (FS Infrastruttura), the division for passenger transport (FS Passeggeri) and the division for freight transport (FS Cargo).
- (5) On 13 July 2001, FS accomplished a restructuring process creating FS Holding SpA. FS Holding controls two companies:
- (6) Rete Ferroviaria Italiana SpA (RFI), which operates the network infrastructure on the basis of a 60-year management contract granted by the Transport Minister on 31 October 2000 (Decree No 138T); and
- (7) Trenitalia SpA (Trenitalia), which carries on transport business on the basis of a licence to provide rail services granted by the Transport Minister on 23 May 2000 in accordance with Presidential Decrees No 277 of 8 July 1998 and No 146 of 16 March 1999.

C. THE SERVICE CONCERNED BY THE DECISION

1. AN INTERNATIONAL RAIL PASSENGER TRANSPORT SERVICE BETWEEN GERMANY AND MILAN

- (8) GVG wants to provide an international passenger service from Germany to Milan and back. Its intention is to feed passengers originating in different cities in Germany, i.e. Karlsruhe, Koblenz and Mannheim, into Basle. It then proposes a non-stop ('Sprinter') rail link

that would operate twice a day from Basle to Milan via Domodossola. Some of these passengers would continue their journey from Milan. Similarly, the train from Milan to Basle would take local passengers as well as beyond passengers (fed into Milan by existing FS trains). GVG wishes to cater in particular for business customers by offering a Basle-Milan connection which is up to one hour faster than existing links. Unlike GVG's non-stop service, the former operate with up to 14 stops between Basle and Milan. GVG also envisages providing additional services on the train.

- (9) The attractiveness of such a service depends considerably on the time schedule. Arrival and departure times in Basle have to be well connected with Deutsche Bahn AG (hereinafter 'DB') Intercity trains which would provide feeder services for beyond traffic. Similar interconnection has to be ensured for beyond traffic in Milan. Moreover, the trains should depart with a sufficient time difference. The train paths envisaged by GVG would allow its trains to depart with a time difference of about two hours. In addition, in order to ensure the shortest possible travelling time, there has to be a good connection at Domodossola. The train paths requested by GVG in 1998 can be taken by way of illustration ⁽⁷⁾. They would allow for the services as set out in the table below and a seven/eight-minute stop in Basle Bad to catch the Intercity to/from Germany ⁽⁸⁾:

| Basel Bad | Domodossola | | Milan | Travelling time |
|--------------|-------------|-----------|--------------|-----------------|
| | Arrival | Departure | Arrival | |
| 12.45 | 15.50 | 15.58 | 17.08 | 4.23 |
| 14.45 | 17.50 | 17.58 | 19.08 | 4.23 |
| Milan | Domodossola | | Basel Bad | |
| Departure | Arrival | Departure | Arrival | |
| 07.50 | 09.01 | 09.09 | 12.13 | 4.23 |
| 09.50 | 11.01 | 11.09 | 14.13 | 4.23 |

⁽⁷⁾ Schedules have been adapted several times according to the train paths offered by Schweizer Bundesbahn.

⁽⁸⁾ The Intercity from Germany arrives at 12.38 and 14.38 in Basle. Northbound, the Intercity leaves Basle at 12.21 and 14.21. In order to change trains in Basle, passengers would have seven or eight minutes respectively.

- (10) FS and the Swiss railway undertaking Schweizer Bundesbahn (hereinafter 'SBB') provide a cooperative rail passenger transport service from Basle to Milan. They operate seven trains daily via Chiasso⁽⁹⁾ and three trains a day via Domodossola⁽¹⁰⁾. Apart from that, the Italian-Swiss undertaking Cisalpino, in which FS holds 50 % (the other half being shared between SBB and the Swiss BLS Lötschbergbahn (hereinafter 'BLS')) operates one daily service via Domodossola⁽¹¹⁾. These services are not provided on the basis of a public service obligation or under a public service contract⁽¹²⁾.

2. REQUIREMENTS FOR THE SERVICE

2.1. LICENCE

- (11) In order to provide a cross-border rail transport service, a railway undertaking first needs a licence. The conditions for granting licences to railway undertakings in the European Union have been harmonised by Directive 95/18/EC, which was transposed in Italy by Decree No 146/1999 with a two-year delay on 23 July 1999.

2.2. INTERNATIONAL GROUPING

- (12) At the present stage in EU rail liberalisation, the only way a railway undertaking from one Member State can obtain access to the rail passenger transport market of another Member State for the provision of international passenger transport services is by entering into an 'international grouping'. An international grouping is defined by Council Directive 91/440/EEC of 29 July

⁽⁹⁾ In 1998, the travelling time of these connections was five hours, 40 minutes. Today it is five hours, 21 minutes. These trains arrive in the 'Basle Bad' railway station.

⁽¹⁰⁾ The trains via Domodossola arrive in the Basle 'SBB' railway station. Passengers who wish to travel to Germany have to transfer to the 'Basle Bad' railway station, from where trains leave to Germany. The travelling time for one of these trains is five hours, two minutes while the others take five hours, 21 minutes. In addition, there is the transfer time of about 30 minutes to Basle Bad.

⁽¹¹⁾ The Cisalpino arrives in the Basle 'SBB' station. The travelling time of the Cisalpino is four hours, 31 minutes. In addition, there is the transfer time of about 30 minutes to Basle Bad. For a comparison of travelling time between the Cisalpino and GVG's planned train, see section F(3).

⁽¹²⁾ As referred to in Article 2 of Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of public service in transport by rail, road and inland waterway (OJ L 156, 28.6.1969, p. 1), as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

1991 on the development of the Community's railways⁽¹³⁾ as an association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States. According to Article 10(1) of Directive 91/440/EEC, international groupings must be granted access and transit rights in the Member States of their constituent railway undertakings as well as transit rights in other Member States. As shown in recital 128, it is the Commission's view that Article 10(1) of Directive 91/440/EEC has direct effect.

- (13) Directive 91/440/EEC was implemented in Italy only after a five-year delay by Decree No 277/1998, which entered into force on 8 July 1998. However, even before the transposition of Directive 91/440/EEC, there was no legal obstacle under Italian law for FS to enter into an international grouping with a railway undertaking of another EU Member State for the purpose of providing international rail services⁽¹⁴⁾.

2.3. ACCESS TO INFRASTRUCTURE

- (14) The railway undertaking also needs to be provided with infrastructure capacity, i.e. a certain time slot on the tracks of the railway networks on which it wishes to provide the cross-border service. Access to the infrastructure includes a number of different services and actions that take place at different points in time. In particular the following elements are important: information regarding the availability of train paths and related prices; the handling of requests for capacity; the permission to use track capacity; train control, including signalling, regulation and the provision of information on train movement; access to refuelling facilities; access to passenger stations; access to marshalling yards; access to storage sidings; and access to maintenance and other technical facilities⁽¹⁵⁾.

- (15) Some of these services need to be made available to a railway undertaking before it takes a formal decision to

⁽¹³⁾ OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2001/12/EC (OJ L 75, 15.3.2001, p. 1), which had to be implemented by 15 March 2003.

⁽¹⁴⁾ For instance, in November 1996 FS set up an international grouping with Swedish State railways SJ.

⁽¹⁵⁾ A list of such services is also provided in Annex II to Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L 75, 15.3.2001, p. 29).

start a service. This holds in particular for the provision of all relevant technical information concerning the allocation of train paths, the reservation of a particular train path and information concerning infrastructure tariffs. Only on the basis of such information and the reservation of the necessary train path can the potential entrant establish a business plan. Based on the latter, the potential entrant takes its entry decision, which, if it is positive, then leads to a start of negotiations with potential partners.

- (16) By contrast, some other infrastructure services, for instance access to refuelling facilities or passenger stations, may only become necessary after negotiations with partners are finalised and the operation of the planned service begins.
- (17) Council Directive 95/19/EC of 19 June 1995 on the allocation of railway infrastructure capacity and the charging of infrastructure fees ⁽¹⁶⁾ defines the principles and procedures to be applied in that regard. It was transposed in Italy by Decree No 146/1999 with a two-year delay on 23 July 1999. According to Article 3 of the Directive, Member States must designate an allocation body which has to ensure that railway infrastructure capacity is allocated on a fair and non-discriminatory basis. It also has to ensure that the allocation procedure allows effective use of the infrastructure.
- (18) Article 3 of Decree No 146/1999 provides that the use of the railway infrastructure, already regulated by Presidential Decree No 277/1998, is to be granted on condition that each railway undertaking proves that it possesses a licence and a safety certificate and that it has concluded the necessary administrative, technical and financial agreements with regard to the allocation of capacity. The infrastructure manager is to issue the safety certificate.
- (19) Pursuant to Decree No 277/1998, FS (RFI) has been assigned the task of the infrastructure manager and the role of the allocation body. According to Article 4 of Decree No 277/1998, the infrastructure manager is responsible for monitoring the circulation of rolling stock and for the maintenance of the railway infrastructure.
- (20) Before the entry into force of Decree No 277/98, FS had an exclusive concession to operate the Italian railway

infrastructure and to provide rail transport services on the basis of Article 1 read in conjunction with Article 2 of Decree No 225-T of 26 November 1993 ⁽¹⁷⁾. On that basis, in cooperation with the Ministry of Transport, FS was itself responsible for defining the conditions of access to the railway infrastructure ⁽¹⁸⁾.

- (21) Already before Directives 95/18/EC and 95/19/EC were transposed in Italian law, as the infrastructure manager, FS was entitled on the basis of Article 8 of Decree No 277/98 to grant access to the network, either directly or through an international grouping, and to issue safety certificates to other railway companies.

2.4. ACCESS TO INTERNATIONAL TRAIN PATHS

- (22) The provision of international rail transport services requires the coordination of train paths on the national railway networks. Such coordination is carried out by European railway companies in the working groups of Forum Train Europe (hereinafter 'FTE'). During such meetings, railway companies discuss the time schedules of services to ensure that rolling stock and infrastructure capacity are available. Three meetings a year are organised on a regular basis ⁽¹⁹⁾. Railway companies wishing to provide international services make requests for train paths to the respective allocation bodies. Train paths are reserved on a temporary basis. If they are not taken up within a certain period of time the reservation is cancelled and a new request has to be made during the following FTE meeting. Before the train path can actually be used for a particular service, the allocation body has to verify whether the necessary technical and safety requirements for the rolling stock are fulfilled.
- (23) Until 1998, only national railway undertakings were permitted to participate in the FTE meetings. As a result, as a private railway undertaking GVG was prevented from participating directly in the slot allocation process for international train paths. It could

⁽¹⁷⁾ Italian Official Gazette No 283, 2.12.1993. In addition, according to Legislative Decree No 422/1997, regional and local governments have the right to licence local and regional railway companies operating their own networks.

⁽¹⁸⁾ Article 16 of Decree No 225-T of 26 November 1993 (Italian Official Gazette No 283, 2.12.1993).

⁽¹⁹⁾ During the FTE A at the beginning of the year, railway undertakings communicate the needed rail paths and slots. After this meeting, railway undertakings develop draft plans and studies to find possible solutions to the various requests. During the FTE B, which usually takes place in May, requests are made and schedules are fixed. The last meeting, called FTE C, takes usually place in December. During this meeting infrastructure managers harmonise their various schedules.

⁽¹⁶⁾ OJ L 143, 27.6.1995, p. 75. Directive 95/19/EC was repealed, with effect from 14 March 2001, by Directive 2001/14/EC, which had to be implemented by 15 March 2003.

only become a member of FTE on 1 April 1998. Until then it had to make its requests for train paths in other EU Member States through the German national railway undertaking, DB.

2.5. SAFETY CERTIFICATE

- (24) Pursuant to Article 11 of Directive 95/19/EC, the railway undertakings in the international grouping must have a safety certificate to ensure safe service on the routes concerned. In order to obtain the safety certificate, the undertaking must comply with relevant regulations under national law. In Italy, according to Article 5 of Decree No 277/98⁽²⁰⁾, the Ministry of Transport determines the relevant standards and regulations on the basis of a proposal made by the infrastructure manager. As the infrastructure manager, FS (RFI) grants the safety certificate to railway undertakings and international groupings.

2.6. TRACTION

- (25) In order to be able to provide a rail transport service, a railway undertaking needs to have traction — i.e. a locomotive and a driver — to move the train on the network⁽²¹⁾.
- (26) At this stage in the process of liberalising the rail transport sector in the EU, there are a number of technical, legal and economic barriers to the provision of traction for international rail transport services. For a century and a half, European railways have developed within national boundaries. Each national railway has adopted its own technical and administrative standards according to national requirements. As a result, there are 15 different national signalling systems and five different systems for electricity supply (voltage). National systems differ in their operating procedures, length of passing tracks, safety systems, driver training and route knowledge. The fact that different technical standards continue to exist has prevented interoperability in the European market for rail services. Therefore, unless they are equipped with multiple technology, locomotives have to be changed at borders. Similar barriers also exist for drivers, who need route knowledge, a national licence and language skills. To provide traction for

international services by itself, a railway undertaking would have to set up separate locomotive and driver pools in every Member State where it wishes to operate.

D. BACKGROUND

- (27) Nothing in Italian legislation before or since the transposition of the relevant Community legislation prevented FS from granting access to the railway infrastructure or from setting up an international grouping with or providing traction services to a railway undertaking established in another Member State. On the contrary, several provisions of Italian law imply that FS should be proactive in the provision of access to the infrastructure. For instance, according to Article 5 of Decree No 277/98, as the infrastructure manager, FS (RFI) has to offer rail transport undertakings access to the network with a view to using its capacity to the maximum.
- (28) On 17 January 1992, GVG wrote to FS to request information on the costs of access to the Italian rail network for the purpose of providing a passenger transport service, infrastructure access costs and traction costs. The Commission has no confirmation of any reply from FS to this letter. Since 1995, GVG submitted bids to FS for a train path⁽²²⁾ between Domodossola and Milan and related information as well as for the formation of an international grouping via DB in the FTE⁽²³⁾. Similarly, GVG requested SBB to offer train paths between Basle and Domodossola.
- (29) As of June 1996, SBB offered GVG the requested train paths on Swiss territory. By way of comparison, on 28 January 1997, DB informed GVG in writing that 'in spite of concerted attempts made by SBB' no response could be obtained from FS⁽²⁴⁾. DB Geschäftsbereich Netz (DB Netz) has confirmed that between 1995 and 1997 its staff had discussions with FS and SBB during three FTE sessions concerning GVG's project⁽²⁵⁾. DB furthermore confirms that during the discussions it had with FS between 1995 and 1997, it had informed FS that GVG intended to carry out this train service on the

⁽²²⁾ FTE minutes distinguish between an offer of a train path ('réception annonce de sillons') and a request for a train path ('commande de sillon'). The purpose of the former is to inform the infrastructure manager about the interest in providing a particular service. On this basis the infrastructure manager then investigates the availability of the requested train path. If it is available, the train path may then be requested.

⁽²³⁾ Letter from GVG to DB of 5 September 1995; request made by DB to FS in September 1995. By letter of 11 September 1996, DB repeated its request on behalf of GVG.

⁽²⁴⁾ Letter from DB to GVG of 28 January 1997.

⁽²⁵⁾ Reply to a request for information on 26 February 2002.

⁽²⁰⁾ As amended by Article 7 of Decree No 146/1999.

⁽²¹⁾ See judgment of the Court of First Instance in Case T-229/94 *Deutsche Bahn AG v Commission* [1997] ECR II-1689.

basis of Directive 91/440/EEC and to set up an international grouping on the basis of that Directive.

- (30) After GVG joined FTE on 1 April 1998, it was able to make its own requests. Since that date, GVG had contacts with FS concerning its requests during all FTE meetings. At least since December 1998, GVG also requested FS to provide traction for its planned rail passenger service ⁽²⁶⁾.
- (31) On 27 November 1998, FS replied for the first time in writing, pointing out that it would provide information (on timetables, infrastructure charges, etc.) only after GVG had presented documents showing that it had entered into an international grouping, that it possessed a safety certificate in Italy and that it had a licence in conformity with Directive 95/18/EC ⁽²⁷⁾.
- (32) According to the minutes of an FTE meeting on 20 August 1999, GVG, FS, SBB and BLS met to discuss GVG's project. It is noted that GVG made a bid for a train path ⁽²⁸⁾ and asked for the formation of an international grouping between FS and GVG on the basis of Directive 91/440/EEC. This request was then repeated by GVG during all subsequent FTE meetings.
- (33) On 25 October 1999 ⁽²⁹⁾, GVG lodged its complaint with the Commission, arguing that FS had abused its dominant position by not providing the requested information regarding access to the network and by not entering into an international grouping. Thereafter, GVG continued to make requests to FS regarding traction and the formation of an international grouping. It also continued requesting a train path and related information during various meetings of the FTE.
- (34) On 2 and 3 December 1999, GVG wrote to FS complaining that at all FTE meetings in the past five years it had asked FS to enter into an international grouping in order to operate its train from Basle to Milan without having received any reply from FS. GVG also reiterated its request for information regarding the train path from FS (Infrastruttura).
- (35) On 27 October 2000, FS published the network information manual that sets out the criteria, procedures, conditions and fees for access to the Italian railway network. On 13 December 2000, FS offered train paths to GVG without, however, specifying the price to be paid for them. GVG refused the paths because they would not have allowed it to provide the service as envisaged and they did not permit connection with train paths already offered by SBB ⁽³⁰⁾.
- (36) During the FTE A meeting (see footnote 19) in January 2002, FS provided GVG with information for the first time, including the price for a train path between Domodossola and Milan. However, given the fact that at that point FS did not offer a particular train path, the price was an estimate and therefore no more than indicative.
- (37) In its defence, FS has argued that it was not obliged to respond to GVG's requests since they were unclear, and since they related only to train paths and occasionally to traction but not to the establishment of an international grouping.
- (38) It should, however, be noted that GVG had written to FS already in 1992 informing the latter about its interest in operating an international passenger transport service and requesting related information. FS's assertions conflict with DB's confirmation to the Commission that between 1995 and 1997 its staff had discussions with FS and SBB during three FTE sessions concerning GVG's project, that it had informed FS that GVG wanted to carry out this train service on the basis of Directive 91/440/EEC and that GVG requested to enter into an international grouping. Moreover, a DB report on the FTE meeting in La Rochelle in 1996 remarks that GVG requested train paths from SBB, BLS, FS and SNCF. SBB, BLS and SNCF replied to the requests ⁽³¹⁾. The report notes that, with regard to GVG's project for a train on

⁽²⁶⁾ Letter from GVG to FS of 12 December 1998.

⁽²⁷⁾ Letter from FS to GVG of 27 November 1998. It is noted that FS did not inform GVG that FS itself was responsible for granting such a safety certificate.

⁽²⁸⁾ In its FTE requests, GVG never got beyond the first step, i.e. the bid for the train path in order to find out whether it is available.

⁽²⁹⁾ The complaint was sent to FS by fax on 29 October 1999.

⁽³⁰⁾ FS offered two train paths from Milan to Domodossola with the schedules 7.15—8.45 and 12.05—13.35. In the opposite direction it offered only one train path from Domodossola to Milan at 20.45—22.15. As there was only one return train path offered, instead of operating two trains a day, GVG could have operated only one. In addition, the early departure time on one train in Basle and the late arrival time in Milan would have made the service unattractive for any beyond traffic. Finally, as the schedule offered by FS was different from the one requested, the train paths did not allow for connection at Domodossola. GVG claimed that SBB could not offer connecting train paths for the ones offered by FS.

⁽³¹⁾ DB Netz, internal report of 20 January 1997.

the Basle-Milan route, SBB was responsible for coordinating with FS. In spite of repeated requests made by SBB, no reply was forthcoming from FS. Thus, among the various railway companies to which GVG made requests, only FS did not react. In addition, FS's view was not shared by SBB, which on the basis of GVG's bid entered into negotiations with GVG and provided a train path as well as related information from 1996 onwards.

international grouping agreement and agreed on the terms of the traction contract.

E. COMPLAINT AND SUBSEQUENT PROCEDURE

(39) It is also noted that even during the period between August 1999 and August 2002, during which FS has acknowledged that it was aware of GVG's requests, it did not enter into negotiations for the conclusion of a traction or an international grouping contract.

(43) On 25 October 1999, GVG lodged its complaint against FS arguing that the latter had abused its dominant position by refusing to grant GVG access to the Italian railway market.

(40) It is therefore concluded that since September 1995 FS knew of GVG's firm intention to provide an international passenger service from Basle to Milan on the basis of Directive 91/440/EEC and that at least since August 1999 it was informed of GVG's request to enter into an international grouping with FS. GVG repeated this request in writing to FS, in its complaint to the Commission and at all FTE meetings. Furthermore, FS has been aware at least since December 1998 that GVG wanted it to provide traction for this service.

(44) On 22 June 2001, the Commission sent a statement of objections to FS. At this preliminary stage, the Commission had come to the conclusion that FS had abused its dominant position on the upstream markets. It had prevented GVG from gaining access to the infrastructure by refusing to provide information to GVG and it had refused to provide traction. Finally, FS had abused its dominant position by refusing to enter into an international grouping with GVG. By doing so, FS had eliminated all competition on the downstream market of passenger transport by rail.

(41) During the FTE B meeting on 16 May 2002, FS (RFI) undertook to provide GVG with a reply to its request for train paths. On 24 July 2002 FS (RFI) offered specific train paths to GVG between Domodossola and Milan. However, by that time SBB had withdrawn its offer for the corresponding train paths between Basle and Domodossola as they had been taken up for another rail transport service. During the FTE A meeting on 23 January 2003, FS (RFI), GVG, SBB and DB further discussed GVG's project ⁽³²⁾. GVG entered a new request for train paths on this route. However, so far FS (RFI) and SBB have not been able to make a suitable offer.

(45) Following FS's written reply to the statement of objections, on 30 October 2001 a hearing took place. While recognising that in principle it could have provided technical information to GVG, FS argued that due to its internal reorganisation it was not yet ready to do so. As Directive 91/440/EEC had started a process of gradual liberalisation, the application of competition rules to the sector should have been temporarily suspended until the process of restructuring national railway companies was completed. FS furthermore argued that GVG did not depend on FS for the provision of traction and that no obligation existed for FS to enter into an international grouping.

(42) On 2 August 2002 FS (Trenitalia) expressed its willingness to enter into an international grouping with GVG and to provide traction to the latter. On 27 June 2003, FS (Trenitalia) and GVG signed an

(46) Following the hearing, the Commission undertook further fact-finding in order to verify the assertions made by both parties during the hearing.

⁽³²⁾ The minutes mention the exact train paths requested by GVG between Basle and Domodossola and Domodossola and Milan, and that GVG would need connections with trains coming from Germany to Basle.

(47) On 6 December 2002, FS offered the commitments attached to this Decision. FS (Trenitalia) offers to enter into international grouping agreements with other EU railway companies under the condition that the latter have a licence in accordance with Directive 95/18/EC and that they present a reasonable project for the

operation of rail transport services in Italy⁽³³⁾. As discussed in more detail in recitals 160 and 161, it has also offered to provide traction services on the Italian network to railway companies providing international passenger services.

Basle to Milan, i.e. the Domodossola-Milan segment. Trains originating in Basle may also pass via Chiasso and via France. However, these other routes do not offer an alternative for GVG, as they would mean a longer travelling time. In any case, as FS (RFI) operates the only long-distance rail network in Italy any other possible connection between Basle and Milan would also imply that GVG has to rent network capacity from FS (RFI).

F. RELEVANT MARKETS

1. THE RELEVANT UPSTREAM MARKETS

- (48) Two upstream markets can be identified: the market for access to the infrastructure and the traction market.

1.1. MARKET FOR ACCESS TO THE INFRASTRUCTURE

The product market

- (49) The Court of First Instance has considered that there is 'a market for access to and management of railway infrastructure'⁽³⁴⁾. In addition, EU directives, as transposed into Italian law, have established to whom and under what conditions infrastructure capacity can be sold. Directive 91/440/EEC establishes a right of access to the infrastructure for international groupings. In Italy, FS (RFI) sells network capacity to transport service providers such as FS (Trenitalia), Cisalpino, Rail Traction Company (hereinafter 'RTC') and Ferrovie Nord Milano SpA (hereinafter 'FNME'). It follows that providing access to the railway infrastructure is a discrete market capable of separate delineation.

The geographic market

- (50) In order to provide its rail passenger service from German cities, as mentioned above, to Milan via Basle, GVG needs access to the Italian network between Domodossola and Milan. Thus, from the demand side, the relevant geographic market is an intercity railway path in Italy which is connected to the Swiss railway network and which allows GVG to run its train from

1.2. TRACTION MARKET

The product market

- (51) Traction is defined as the provision of a locomotive and driver. This includes the ancillary service of a locomotive and driver back-up. In principle, traction can either be provided in-house, i.e. by GVG or its partner in the international grouping using their own personnel and locomotives, or traction can be rented from other railway companies.
- (52) The provision of traction is linked to a specific rail transport service on the downstream market. In this case it is a passenger rail transport service from Basle to Milan via Domodossola. As the traction is provided with a view to carrying out this particular transport service, certain requirements have to be fulfilled by the traction supplier. In particular, the traction supplier has to provide a locomotive at a certain location (here: Milan/Domodossola), at a certain point in time (before the departure of the train) and for a certain time period (until the specific transport service is terminated). In the case of a scheduled train service, such as GVG's planned service between Basle and Milan, traction has to be provided on a regular basis (daily). The locomotive has to meet certain quality requirements (such as minimum speed) and it has to be fully operational. In this particular case, GVG requires an electric locomotive capable of speeds of at least 160 km/hour.
- (53) A contract for traction must, if it is to be meaningful, include whatever back-up is necessary to ensure reasonable certainty in terms of punctuality, reliability and continuity of the service. Such back-up would need to include the maintenance and repair of the locomotive as well as the provision of a replacement locomotive, if necessary. With regard to the driver, the traction supplier has to ensure that the driver has the necessary licence and the route knowledge for the specific service.

⁽³³⁾ As stated in recital 71, an international grouping can take many forms, including a loose agreement that only confers traffic rights to the grouping members.

⁽³⁴⁾ Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission* [1998] ECR II-3141 ('the ENS judgment'), paragraph 220.

As in the case of the locomotive, the driver has to be provided at a certain location, a certain point in time and for a specified duration. A back-up requirement exists also for the driver.

- (54) The market for traction is different from the market for the renting or purchasing of locomotives. Traction services can only be provided by railway companies, as they have a licence to do so. Locomotives can be rented or purchased from railway companies or from manufacturers. The renting or purchasing of a locomotive is not a substitute for traction as it concerns only the provision of rolling stock. Traction instead includes also the provision of a driver, maintenance and repair services and the back-up. These additional elements are necessary to ensure the continuity of a scheduled passenger transport service.

- (56) Similarly, based on UIC rules, FS (Trenitalia) regularly provides traction services to foreign railway companies. It provides traction, for instance, to SNCF for passenger transport from Milan and Turin to Lyon⁽³⁸⁾. On 13 different routes between Germany and Italy, DB regularly operates train services with its 'Autoreisezug'. FS (Trenitalia) provides traction and ancillary services to DB on the Italian network for a price of [...] (*) and wagon. According to the contract between the parties, such services comprise a volume of at least [...] per year. In 2000 and 2001, FS (Trenitalia) provided traction for the Overnight Express which operated six nights a week between Amsterdam and Milan. The Overnight Express was a combined passenger/freight train which consisted of approximately five passenger wagons and seven freight wagons⁽³⁹⁾. FS (Trenitalia) also provides traction services to private wagon owners in Italy and to Intercontainer and European Rail Shuttle for international container transport services to Milan. In May 2001, FS (Trenitalia) provided traction to GVG for a passenger transport service from Chiasso to Monte Carlo.

The geographic market

- (55) In recent years, a readily identifiable traction market has developed in various Member States. In the UK, for instance, British freight train operators EWS, Freightliner, GB Railfreight and DRS provide Network Rail with traction for infrastructure trains. In Germany, DB and other private railway operators provide traction on a commercial basis to each other and to 'private wagon owners' for passenger transport, and DB has provided traction to the GVG/SJ international grouping. On the basis of bilateral agreements and International Union of Railways (UIC) rules⁽³⁵⁾, national railway companies provide each other with traction for cross-border and 'penetration' services⁽³⁶⁾. SNCF provides traction services on the French railway network for international passenger charter services of foreign railway companies and private wagon owners, and to DB for its 'Autoreisezug'⁽³⁷⁾ on routes from Germany to Avignon, Fréjus, Narbonne and Bordeaux. Société Nationale des Chemins de Fer Belges (SNCB) provides traction on the Belgian railway network for the passenger night train operated between Paris and Amsterdam by SNCF and Nederlandse Spoorwegen (NS).

- (57) In all EU Member States, the locomotive has to comply with national technical standards and the crew (driver) needs special qualifications/training to be permitted to drive on the national railway network. For this particular service, neither the locomotive nor the crew of railway undertakings of another Member State can be used to provide traction in Italy. As a result, GVG can only rent traction from an undertaking that operates in Italy, i.e. which has locomotives and drivers that fulfil Italian technical criteria.
- (58) Further, in order to provide back-up, the traction provider needs to be able to call upon a pool of locomotives at reasonably short notice in the event of technical failure. This means that the pool has to be sufficiently close to the Domodossola-Milan route, otherwise the time and cost incurred in providing the replacement locomotive will be disproportionate. The relevant geographic market is therefore confined to the region of Milan.

⁽³⁵⁾ UIC fiche 471-1 specifies the rules for cross-border traffic.

⁽³⁶⁾ CFL, DB, NS, SNCB and SNCF for instance have concluded a multilateral agreement for cross-border services. A price list annexed to this multilateral agreement provides detailed prices for traction and prices for personnel (drivers and others). Prices vary according to the locomotive used, and whether it is a passenger or a freight transport service.

⁽³⁷⁾ The 'Autoreisezug' transports simultaneously passengers and their cars.

(*) Parts of this text have been omitted to ensure that confidential information is not disclosed. These parts are enclosed in square brackets.

⁽³⁸⁾ The 'ETR 460'.

⁽³⁹⁾ The transport of goods was focused on express cargo, i.e. goods that need to be delivered in a relatively short time (time-critical delivery), such as flowers, express mail, spare parts and air cargo.

3. INTERNATIONAL RAIL PASSENGER TRANSPORT MARKET

The product market

- (59) In air transport decisions, supported by case-law, the Commission has developed the point-of-origin/point-of-destination (O & D) pairs approach⁽⁴⁰⁾ for passenger transport services. This principle applies irrespective of the transport mode chosen by the individual passenger. GVG proposes to provide a rail passenger service from several German cities like Karlsruhe, Koblenz and Mannheim to Milan via Basle. Each of these routes can therefore be considered to be a relevant market on its own.
- (60) In transport, under certain conditions passengers may consider air travel, high-speed rail travel, coach and car travel to be interchangeable modes of transport. This depends on the concrete characteristics of the service, for instance the travelling time. In this particular case, other transport modes such as car, coach or air transport, do not offer an alternative from the customer's point of view for the planned rail transport service for the reasons set out in recitals 61 to 67⁽⁴¹⁾.
- (61) GVG's proposed 'Sprinter' service from German cities to Milan via Basle is directed toward business customers from Germany. The main advantage for the latter would arise from the shorter travelling time, since GVG's point-to-point service aims to be at least one hour faster than existing trains. GVG also plans to provide additional services for business customers on the train. For such customers, car and coach transport do not offer a valid alternative. For traffic between Karlsruhe, Koblenz and Mannheim to Milan, there is no scheduled coach service.
- (62) In its written reply to the statement of objections, FS argued that the overall journey time of GVG's planned service would be more or less identical to the service operated by Cisalpino and not much shorter than that of traditional services, *inter alia* because the particular line does not allow a speed of 160 km/h to be exceeded. GVG's planned train would therefore not offer a new service for the customer. This assertion is not correct, as GVG's service is addressed mainly to passengers who are fed into Basle from Germany. For a comparison of travelling time for this group of passengers between GVG's train and existing connections it is important to consider two elements. The first element is the travelling time between Basle and Milan and the second element the interconnection with feeder trains from and to places in Germany.
- (63) GVG's schedule, as set out in recital 9, does not require the train to operate at a higher speed than 160 km/h. The shorter travelling time of GVG's service in comparison with traditional services results in particular from the fact that GVG's planned train is a non-stop service. Existing trains operate with 14 stops between Basle and Milan. GVG's planned schedule furthermore saves time in comparison with existing connections due to a shorter stop in Domodossola for the exchange of locomotives.
- (64) In comparison with the Cisalpino, for passengers from and to places in Germany, the main advantage of the planned GVG train is the interconnection in Basle. The Cisalpino operates in Basle from the 'Basle SBB' railway station. Trains from Germany arrive in the Basle Bad railway station. Cisalpino passengers therefore have to transfer from one railway station to the other, which takes about 30 minutes. By way of contrast, GVG's train would operate directly into Basle Bad where, as set out in recital 9, passengers would have a connecting Intercity train to Germany within seven to eight minutes. More importantly, Cisalpino's departure time in Basle of 6.17 is too early for passengers who start the journey in cities like Koblenz, Karlsruhe or Mannheim. Such passengers would have to come to Basle the day before to catch the Cisalpino in the morning. Similarly, the Cisalpino from Milan arrives in Basle only at 21.44. The only possible connection is then a regional train from Basle Bad at 23.33 (which is slower than the Intercity train). As a result, for passengers taking the Cisalpino the overall travelling time to Germany would be almost three hours longer than with the planned GVG train.
- (65) GVG's train offers a transport service that, if at all, is comparable only to a car transport service provided by a chauffeur. Car travel cannot be considered to be a transport service if the passenger drives the car himself. Moreover, the quality of transport differs considerably between the two transport modes⁽⁴²⁾. Trains enable congestion problems on the road to be avoided. It is possible to work on the train while it is difficult to do so in a car even if one has a driver. In addition, the

⁽⁴⁰⁾ See, for example, Commission Decision 2002/746/EC of 5 July 2002 Austrian Airlines/Lufthansa (OJ L 242, 10.9.2002, p. 25).

⁽⁴¹⁾ To consider only rail transport as the relevant downstream market is in line with the case-law of the Community Courts as established in Case T-229/94 *Deutsche Bahn* (see footnote 21), paragraph 56. In this judgment, the Court pointed out that 'the Commission was justified in not taking into consideration, in its material definition of the market, the services provided by [...] road hauliers and inland waterway transport operators.' See also Commission Decision 94/210/EC in Case IV/33.941 *HOV-SVZ/MCN* (OJ L 104, 23.4.1994, p. 34).

⁽⁴²⁾ On all of the three routes discussed here, i.e. from Karlsruhe, Koblenz and Mannheim to Milan, one would have to drive more than 1 000 km for a return trip. The estimated travelling time of the car journey would be considerably longer than the train connection planned by GVG.

estimated travelling cost would be significantly higher for the use of the car ⁽⁴³⁾. On the other hand, the car offers more flexibility than the train, as regards the departure time and mobility after arrival. Thus, with regard to the present route, car and rail transport offer substantially different quality elements and therefore cannot be considered to be close substitutes on this market.

- (66) Similarly, there are considerable quality differences between travelling by train and by aircraft. GVG aims to feed passengers into Basle from cities in Germany which either do not have an airport nearby or where no direct flights to Milan are available. If they wish to fly, passengers from such a place of origin would first have to travel to the airport. Thereafter they have to take the aircraft while changing to a bus or train to travel from Malpensa airport to the city centre of Milan ⁽⁴⁴⁾. The frequent changes between the bus and the plane and the need to check in and to pass through controls at the airport cause numerous disruptions which prevent the traveller from working while travelling.
- (67) In the case of point-to-point traffic between Basle and Milan, a price comparison demonstrates that transport by air and rail belong to different markets. A return ticket on the Cisalpino in the first and second class cost EUR 310 and EUR 194 respectively. On the same day, the corresponding price for a business class and economy class ticket on a direct flight offered by Swiss amounted to EUR 811,87 and EUR 749,14 respectively ⁽⁴⁵⁾. Thus, air transport is at least about 2,6 times more expensive than existing train connections. On the other hand, in most cases the estimated travelling time of air transport is significantly shorter than the travelling time by train. In this particular case, between Basle and Milan the Cisalpino takes about four hours, 30 minutes. By way of comparison, if one takes into account the time needed to travel to and from the airport as well as check-in, air travel between the two cities may take about three hours ⁽⁴⁶⁾. Thus, from the standpoint of the passenger, in this case train and air transport services cannot be regarded as substitutable due to their different characteristics, prices and intended use.

⁽⁴³⁾ For instance, even without a chauffeur, on the basis of GVG's envisaged prices and a cost per kilometre of EUR 0,22 for travelling by car, travelling from Koblenz to Milan and back by car would cost about 37 % more than travelling by train with GVG's proposed service. The cost difference would increase significantly if one adds a chauffeur for the car journey.

⁽⁴⁴⁾ For passengers from Karlsruhe, Koblenz and Mannheim, there are no convenient flights available to Milan-Linate. The only possible flights would be from Frankfurt. This, however, increases the travelling time to the airport in Germany. In addition, the only flights from Frankfurt to Milan-Linate depart too early in the morning (at 7.45 and 8.25) or in the evening (at 18.50). Such connections are not comparable with GVG's proposed time schedule. In the case of Koblenz, the passenger would leave at 10.47, in the case of Mannheim at 12.44 and in the case of Karlsruhe at 13.06.

⁽⁴⁵⁾ Prices applicable on 13 May 2003.

⁽⁴⁶⁾ The flight time between Basle and Milan is one hour 10 minutes.

The geographic market

- (68) It follows that for the relevant bundle of routes from Germany to Italy, i.e. Karlsruhe, Koblenz and Mannheim to Milan, transport by rail is not interchangeable from the customer's point of view and, as a result, the relevant downstream market in this case is rail passenger transport between the abovementioned German cities and Milan.

Access to the market

- (69) As set out in recital 12, a particularity of the European rail passenger market is the legal requirement to form an international grouping for the provision of international passenger rail services. Article 10(1) of Directive 91/440/EEC establishes access and transit rights for international groupings to provide international rail transport services. Article 10(3) requires that such international groupings conclude the necessary administrative, technical and financial agreements with the infrastructure managers with a view to regulating traffic control and safety issues.
- (70) Only after having concluded an international grouping with a railway undertaking established in Italy can GVG provide its service from Germany to Milan. Like access to the infrastructure, conclusion of the international grouping agreement is therefore a precondition for entering the market. However, while access to the infrastructure is to be provided by infrastructure managers, the international grouping agreement is to be concluded with railway undertakings which provide transport services. As argued by FS in its written reply to the statement of objections ⁽⁴⁷⁾, it is therefore considered that the formation of an international grouping relates to the passenger rail transport market.
- (71) It follows from the judgment of the Court of First Instance in the ENS case ⁽⁴⁸⁾ that there is no specific mandatory form for an international grouping ⁽⁴⁹⁾. In particular, an international grouping does not have to take the form of a traditional joint operation agreement in the railway sector. It also follows from that judgment that it is not unusual for railway undertakings to enter into agreements solely aimed at conferring a contractual

⁽⁴⁷⁾ Ferrovie dello Stato SpA, Trenitalia SpA, Rete Ferroviaria Italiana. SpA: Observations submitted pursuant to Article 19 of Regulation No 17 in the proceedings relating to Case COMP/37.685 GVG/FS, p. 60.

⁽⁴⁸⁾ See footnote 34. Paragraph 182 of the judgment.

⁽⁴⁹⁾ See also the Communication from the Commission 'Towards an integrated European railway area' (COM/2002/18 final, 23.1.2002), Annex II.

right of access to the railway infrastructure in the other railway undertaking's Member State, without necessarily also entering into other commercial agreements concerning the joint operation of services⁽⁵⁰⁾. Such agreements also fall under the definition of 'international grouping' as they constitute an 'association of at least two railway undertakings established in different Member States for the purpose of providing international transport services between Member States'. The concept of an international grouping is therefore anything between a fully fledged commercial agreement under which the parties share risk more or less equally and an agreement under which parties only confer access rights to each other pursuant to Directive 91/440/EEC⁽⁵¹⁾ without bearing any commercial risk.

G. DOMINANCE

1. FS AS AN UNDERTAKING

- (72) Until July 2001, FS was a single undertaking responsible for the operation of the railway infrastructure and the provision of transport services.
- (73) On 13 July 2001 FS accomplished a restructuring process to become a holding company. Within this holding company, as legally independent subsidiaries, FS (Trenitalia) is responsible for transport services, rolling stock and traction, and FS (RFI) is responsible for the operation of the infrastructure.
- (74) There has been a clear continuity of behaviour on the part of FS and its subsidiaries before and after separate entities were established in July 2001. As set out in recitals 30 to 40, at least since December 1998 and since August 1999 FS and its subsidiaries have been aware of GVG's request to enter into negotiations as

regards traction and an international grouping contract respectively. Until August 2002, neither before nor after the restructuring did FS or its subsidiary Trenitalia enter into such negotiations. Similarly, for the period between September 1995 and July 2002, neither FS nor its subsidiary RFI offered specific train paths to GVG. Moreover, the FS holding company and the FS subsidiaries have taken an identical position on this case. While the statement of objections issued on 22 June 2001 was addressed to FS, a joint written response was provided by FS and its subsidiaries Trenitalia and RFI on 16 October 2001.

- (75) Thereafter, in relation to this case, FS (Trenitalia) has dealt with all issues related to traction and the international grouping while FS (RFI) has been responsible for issues related to the access to infrastructure. FS has not argued that it is not responsible for actions taken by its subsidiaries with regard to this case.

- (76) Also after the restructuring, FS can be considered to be one undertaking within the meaning of the EC Treaty. The FS holding company holds 100 % of the shares of its subsidiaries Trenitalia and RFI. Moreover, a joint economic interest exists between the holding company and its subsidiaries. All three undertakings operate in the same industrial sector and action taken by one subsidiary can have an important effect on the performance of the other subsidiary, thereby affecting the profitability of the FS holding company as a whole. On the one hand, FS (Trenitalia) is by far the most important customer of FS (RFI). On the other hand, as the infrastructure manager, FS (RFI) plays an important role in deciding whether and to what extent potential competitors of FS (Trenitalia) gain access to the infrastructure and therefore whether they can enter the market. As the holding company and its subsidiaries are all owned by one and the same shareholder, the latter has an interest in ensuring that behaviour within the FS holding company is sufficiently coordinated.

⁽⁵⁰⁾ ENS judgment (see footnote 34), paragraph 188.

⁽⁵¹⁾ GVG has already formed two such international groupings with SJ, the Swedish national railway carrier and the Austrian Graz-Köflacher Eisenbahn. Both groupings have been in place for more than two years and have been notified to the respective national authorities. In both cases, the agreement ensured that the parties obtained the respective traffic rights. In both cases, no further obligation initially arose from the agreement. In the case of the agreement between GVG and Graz-Köflacher Eisenbahn each company carries out its own international services between Austria and Germany. Only if requested by the partner, the companies may also provide additional assistance to each other on an ad hoc basis. This, however, is not part of the international grouping contract itself. Also in the case of the agreement between GVG and SJ, the initial grouping contract only conferred traffic rights. However, the companies subsequently decided to deepen their cooperation.

- (77) Such coordination is ensured mainly vertically, as the FS holding company owns the entire share capital of RFI and Trenitalia. It is in a position to exert a decisive influence on RFI's and Trenitalia's policy. According to FS's annual report 2001, the FS holding company is responsible for setting strategic policy and management direction for its subsidiaries such as RFI and Trenitalia. It is ultimately responsible to the shareholder for the group's success⁽⁵²⁾. There is a consolidated annual balance sheet which aggregates the profits/losses of its various subsidiaries.

⁽⁵²⁾ Ferrovie dello Stato SpA '[...] jointly responsible towards the shareholder for the reorganisation of the Group [...]'].

(78) As the holding company is responsible for the definition and implementation of the undertaking's overall policy, it can be held liable for the behaviour of its subsidiaries RFI and Trenitalia. As stated by the Court of Justice in *Stora* ⁽⁵³⁾: 'On several occasions the Court of Justice has held that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of its conduct being imputed to the parent company, especially where the subsidiary does not independently decide its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company' ⁽⁵⁴⁾.

(79) The fact that RFI and Trenitalia both belong to the same holding structure gives them common interests as a consequence of which they cannot be seen as 'legally, administratively and structurally' unrelated to each other ⁽⁵⁵⁾.

(80) FS is an undertaking within the meaning of Article 82. It provides rail transport services on a commercial basis. In addition, FS has been assigned certain regulatory functions in its role as the infrastructure manager and allocation body. Due to this role, FS (RFI) acts as the supplier of infrastructure capacity on the market for access to the infrastructure. This is a commercial activity. Moreover, as the infrastructure manager and allocation body, FS determines the procedures and conditions under which suppliers of rail transport services carry out their activities. Thus, the provision of rail infrastructure facilities by FS contributes to the performance of a range of services of an economic nature and so forms part of its economic activity ⁽⁵⁶⁾. Consequently, FS is an undertaking within the meaning of Article 82 of the EC Treaty also when exercising its infrastructure management and allocation functions.

⁽⁵³⁾ Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, paragraph 23.

⁽⁵⁴⁾ See in particular: Case 48/69 *ICI v Commission* [1972] ECR 619, paragraphs 132 and 133, Case 52/69 *Geigy v Commission* [1972] ECR 787, paragraph 44, and Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 15.

⁽⁵⁵⁾ See Commission Decision 2002/344/EC of 23 October 2001 on the lack of exhaustive and independent scrutiny of the scales of charges and technical conditions applied by La Poste to mail preparation firms for access to its reserved services (OJ L 120, 7.5.2002, p. 19), point 79. See also Commission Decisions 94/19/EC *Sea Containers v Stena Sealink* (OJ L 15, 18.1.1994, p. 8) and 94/119/EC *Port of Rødby* (OJ L 55, 26.2.1994, p. 52) and the judgment of the Court of Justice in Case C-242/95 *GT Link/DSB* [1997] ECR I-4449, in which the Commission and the Court considered the behaviour of companies exploiting infrastructure in relation to their subsidiaries active in the provision of services on this infrastructure.

⁽⁵⁶⁾ Judgment of the Court of First Instance in Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, paragraph 120.

(81) It is therefore concluded that FS is liable for the behaviour of its subsidiaries FS (RFI) and FS (Trenitalia) also after the restructuring.

2. DOMINANCE ON THE RELEVANT UPSTREAM MARKETS

2.1. DOMINANCE ON THE MARKET FOR ACCESS TO INFRASTRUCTURE

(82) FS has a statutory monopoly to operate the Italian railway infrastructure. In addition, in its role as the infrastructure manager and the allocation body, FS (RFI, formerly *Infrastruttura*, see recital 4 of this Decision) is responsible for establishing and maintaining the Italian railway infrastructure and assigning train paths to railway operators in Italy in return for a fee. Therefore, in view of its position, only FS can sell train paths on the Italian railway network to GVG in order to enable the latter to operate on the Domodossola-Milan route.

(83) The Court of Justice has held ⁽⁵⁷⁾ that Article 82 applies to an undertaking holding a dominant position on a particular market even where that position is due not to the activity of that undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

(84) There is no alternative infrastructure which GVG could use to provide the planned rail passenger transport service. Apart from FS, there are regional railways that operate local networks assigned to them via a concession. These regional railway companies can grant access to such local and regional networks. However, regional railways only operate on specific connections, occasionally using sections of the FS network as connecting track. Regional networks do not have intercity links. It would therefore not be possible for GVG to provide its service by using local and regional railway networks in Italy.

(85) FS is dominant on the entire Italian intercity railway infrastructure. This includes the Domodossola-Milan segment.

⁽⁵⁷⁾ Case 311/84 *Télémarketing* [1985] ECR 3261.

2.2. DOMINANCE ON THE TRACTION MARKET

- (86) In this particular case, traction requires an electric locomotive that can operate at a speed of at least 160 km/hour and which has type approval to operate on the Italian network. A further prerequisite for safety certification is that the drivers need the necessary language skills and the route knowledge for the Domodossola-Milan sector.
- (87) In principle, to operate on the Domodossola-Milan route, GVG could either obtain traction from an Italian railway undertaking or it could provide traction by itself. In the latter case it would have to set up its own locomotive and driver pool in Italy or shop around for the different elements, i.e. the locomotive, the driver and the back-up, from various sources.
- (91) In the light of the foregoing, it can be concluded that for the time being only FS could provide the right sort of traction to GVG on the Domodossola-Milan route. It is therefore clearly dominant on the traction market.

2.2.2. *Traction being provided by GVG itself*

- (88) Apart from FS, other railway companies offering long-distance services in Italy are restricted to freight transport. The small new entrants into the Italian railway market, like RTC and FNME (see recital 49), are the only Italian railway companies which, on the basis of their own locomotive pools, could in principle provide traction to GVG. However, according to the Commission's investigation, they are not equipped to provide traction services for GVG's planned service. To the extent that they have suitable locomotives at all, they lack the necessary spare capacity to provide such a service ⁽⁵⁸⁾.
- (89) No non-Italian railway undertaking is in a position to provide traction to GVG. SNCF owns 60 BB 36 000 locomotives which have the necessary type approval to operate in Italy. However, these locomotives do not fulfil the technical requirements for GVG's services as they are only authorised for freight transport services and for a maximum speed of 120 km/h. SNCF also does not have drivers who could operate on the Italian railway network and have the necessary route knowledge.
- (90) By way of contrast, as stated in recital 56, FS has already provided traction services to SNCF, DB and GVG. It has sufficient spare capacity to provide traction for GVG's planned service ⁽⁵⁹⁾.
- (92) The Commission has investigated whether GVG could provide traction by itself on the basis of renting locomotives, drivers and back-up or by purchasing locomotives.

2.2.1. *Traction provided by other railway operators*2.2.2.1. *Renting of locomotives, drivers and back-up*

- (93) On the basis of the market investigation, it can be concluded that neither FNME and RTC nor manufacturers like Alstom, Bombardier, Finmeccanica, Siemens and Skoda are equipped to provide suitable locomotives or drivers for rent. Thus, the renting of a locomotive is not a feasible alternative for GVG.
- (94) If GVG wished to rent locomotives from a supplier, it would in addition have to rent drivers from Italian railway companies. For the time being, drivers with the necessary Italian licence and route knowledge could only be rented from FS.
- (95) Hiring and training its own staff does not seem feasible for the planned international rail service. Due to language problems and different training requirements, GVG would find it difficult to employ German drivers in Italy. Italian drivers on the other hand could hardly be employed outside Italy. Thus, GVG would have to set up its own pool of Italian drivers. It would also have to set up a driver back-up service. In Italy, the domestic long-distance passenger transport market and cabotage is not liberalised. GVG would therefore not be able to use these drivers for a number of different services, in particular for train services in open competition within Italy. It would therefore be highly uneconomic to set up an Italian driver pool only for the purpose of providing an international rail service from Basle to Milan. This

⁽⁵⁸⁾ Reply to requests for information by RTC and FNME dated 20 February 2002 and 8 March 2002 respectively.

⁽⁵⁹⁾ As identified by FS in its letter to the Commission dated 6 December 2002.

impediment applies to any railway undertaking which wishes to provide international passenger transport services into Italy, irrespective of its size.

- (96) Finally, it is not possible to rent a back-up service for the locomotives needed by GVG on the Domodossola-Milan route.
- (97) It is therefore concluded that providing traction by itself on the Domodossola-Milan route by renting locomotives, drivers and back-up is not an alternative for GVG to obtaining traction from FS.

2.2.2.2. Purchase of locomotives

- (98) In order to provide traction by itself on the basis of its own locomotives and drivers on the Italian segment of the Basle-Milan route, GVG would have to make an investment in a dedicated locomotive and driver pool in Italy. As set out above, the lack of interoperability and different type approval procedures prevent GVG from using locomotives approved in other Member States on the Italian network.
- (99) For its planned service to operate twice a day between Basle and Milan, GVG would need two Italian locomotives to operate on the Domodossola-Milan segment. With a distance of 250 km, operation on this route would bind 1/6 of the capacity of a locomotive. Finally, GVG would need a third locomotive for the back-up. Operating on the basis of three locomotives is not economic since one third of locomotive capacity is bound by the back-up. This generates high fixed costs. Bearing in mind the sometimes considerable variation in reliability of locomotives, it is not unreasonable to envisage that a locomotive pool should comprise at least 10 units. In that case one locomotive would provide the back-up for nine locomotives in operation, which means that about 1/10 of the locomotive capacity would be bound by the back-up⁽⁶⁰⁾. Thus, in order to operate at the minimum efficient scale, GVG should be able to make use of a locomotive pool of at least eight to 10 locomotives, which cannot be envisaged.
- (100) Moreover, at this stage in the liberalisation of the European rail sector, as an undertaking substantially

owned and controlled by nationals of another Member State, GVG is not permitted to operate cabotage or purely domestic services in free competition within Italy under current Italian legislation. Thus, GVG could not use the 5/6 spare capacity of the two locomotives to operate domestic rail services within Italy. In such a situation, if it acquired three locomotives for its planned service, GVG could use only one ninth of its overall Italian locomotive capacity. This would make an investment in Italian locomotives completely uneconomic. This reasoning applies to any potential entrant, irrespective of its size.

- (101) In order to provide domestic rail services in Italy, GVG would therefore first have to set up its own Italian subsidiary. Apart from the driver and the locomotive pool, in order to obtain a licence and a safety certificate, GVG's Italian subsidiary would in addition also have to acquire rolling stock (wagons) suitable for passenger transport. As a result, GVG main business would become the provision of domestic rail services in Italy. An investment on such a scale would not be proportionate for any entrant wanting to operate only on one international route into Italy. Moreover, at the present stage in the liberalisation of the Italian railway market, even if it had carried out such an investment, such an entrant would not be able to make any efficient use of it. As the domestic long-distance passenger market has not yet been liberalised in Italy, GVG's Italian subsidiary would not be in a position to enter this market⁽⁶¹⁾.
- (102) Moreover, if it wished to provide traction on the basis of its own locomotives and drivers, any railway undertaking which specialises in providing international rail passenger services in the EU would have to set up multiple subsidiaries in the various Member States. On the basis of the current state of the European rail transport market this would be a disproportionate requirement for railway undertakings making use of the free movement of services and therefore not an economically viable option.

⁽⁶⁰⁾ On average, European national railway companies keep one locomotive in reserve as a back-up for eight to 10 locomotives in operation. Some private railway companies manage to operate even with considerably lower back-up capacity.

⁽⁶¹⁾ To the extent that such services are open for tender, GVG's Italian subsidiary could only provide regional passenger transport services in Italy. This market, however, differs considerably from the long-distance market as it requires different locomotives and different route knowledge for drivers.

- (103) Finally, even if one considered that such an investment was economically viable, the market investigation has shown that it is at least doubtful whether GVG could acquire suitable locomotives.
- (104) For the time being, there is no market for second-hand locomotives in Italy. There may be the possibility of acquiring second-hand locomotives in eastern Europe ⁽⁶²⁾. However, by FS's own admission, including the conversion costs such a locomotive would cost about EUR 1,4 million, to which must be added type approval costs of, according to Bombardier, between several hundred thousand euro and up to EUR 1,5 million. Such an investment seems not to be justified given that there would be significant difficulties in obtaining spare parts and repair services at reasonably short notice for such a locomotive.
- (105) In principle, it is possible to purchase new locomotives that are suitable for operating GVG's service on the Italian market ⁽⁶³⁾. However, the Commission's market investigation has shown that a number of economic, legal and technical barriers rule out this option. As pointed out by the Union of European Railway Industries (UNIFE), Italian technical specifications are very specific to the requirements of the national network. Locomotives would have to be custom-made and the price would vary greatly depending on the size of the order, delivery time, etc. As GVG would only purchase a small number of locomotives, it would face a considerably higher price than the national flag railway undertaking, which makes large orders. Some uncertainty exists whether manufacturers would produce such a small quantity of tailor-made locomotives at all. For locomotives that could be used for GVG's service, estimates of the delivery time are between 18 and 36 months.
- (106) With one exception, manufacturers are not in a position to provide back-up services. Bombardier would be prepared to do so within 24 hours; however, the price would be close to the price of renting a second locomotive. This, however, is not economically viable as the back-up should not bind more than 1/10 of the locomotive pool's capacity.
- (107) In terms of yield, GVG would need about 190 passengers per train ⁽⁶⁴⁾ (i.e. 752 passengers per day) to cover the entry cost if it decided to acquire new locomotives to operate the train. Buying second-hand locomotives would require about 80 passengers per train to achieve cost coverage for traction only. This does not seem to be feasible on the basis of existing passenger numbers. Cisalpino's existing Basle-Milan service yields no more than 35 point-to-point passengers per train.
- (108) Finally, even if it were economically viable for GVG to acquire locomotives for operation and back-up for the Italian market, GVG would still depend on FS as regards the provision of drivers and maintenance and repair services.
- (109) It is therefore concluded that, in particular due to the lack of interoperability of locomotives, the absence of liberalisation of the Italian long-distance passenger rail market and the prohibition of cabotage, an investment by GVG, or any other railway undertaking, in locomotives solely for the purpose of operating on the Domodossola-Milan route would be prohibitively expensive and would not make any commercial sense. Due to these impediments, certain markets, such as the leasing or rental of locomotives and the hiring of drivers, are still in their infancy, which means that GVG depends on FS providing traction for the planned transport service from Basle to Milan.
- ⁽⁶²⁾ Rail Traction Company (RTC) and Ferrovie Nord Milano (FNME) assert that in principle it is possible to use foreign locomotives in Italy. However, owing to the 10-12-month lead time for type approval, RTC has chosen not to do so. FNME has imported a locomotive from Skoda but it is used for freight services only and is not suitable for GVG's planned passenger service. Skoda does not offer locomotives suitable for GVG's service.
- ⁽⁶³⁾ With a view to establishing whether employing a new locomotive is an option for GVG, there is no need to distinguish between the purchasing and leasing of a new locomotive. The difference between the two arises only with regard to the financing. Leasing is a means of financing an investment. The leasing price is based on the cost of acquisition, the cost of financing and additional expenses. Thus, the sale price of the locomotive determines both the cost of purchasing and the cost of leasing. Moreover, the leasing market in Italy is still in its infancy.
- ⁽⁶⁴⁾ Based on a model which FS (Trenitalia) developed internally to evaluate the economic viability of its own operations, Lexecon has developed a simulation model for FS, to verify whether GVG could provide its planned service from Basle to Milan by acquiring its own locomotives. On the assumption that GVG acquires two new locomotives at a price of EUR 3,5 million, runs four trains a day and carries on average 188 passengers per train, the simulation shows that the discounted value of the net cash flows are sufficient to cover the initial entry costs.

2.2.3. Conclusion

- (110) Until April 2001, FS had a *de jure* monopoly for the provision of traction on the Italian rail infrastructure⁽⁶⁵⁾. Since then, FS has a *de facto* monopoly for the provision of traction for passenger services on the Domodossola-Milan route. Moreover, at the present stage in the liberalisation of the EU railway sector, GVG cannot provide traction by itself on this route, and FS is the only source for traction on the Domodossola-Milan route for the provision of an international passenger rail transport service between Basle and Milan.
- (111) It can therefore be concluded that FS is dominant on the relevant traction market and that in order to operate its planned service, it is indispensable for GVG to obtain traction from FS.

3. DOMINANCE ON THE MARKET FOR RAIL PASSENGER TRANSPORT

- (112) On the routes that belong to the relevant market, as defined above, only FS is present on the Italian segment (via its cooperation with SBB and Cisalpino). FS is therefore dominant on the market for rail passenger transport between Domodossola and Milan.
- (113) There are considerable entry barriers in this market. Apart from the need to obtain access to the infrastructure and ancillary services, the railway undertaking needs rolling stock and personnel complying with different national technical and administrative standards, as different systems for signalling, electricity supply and safety apply. Finally, in order to carry out such a rail passenger transport service from Germany to Milan, any rail operator has to enter into an international grouping.

⁽⁶⁵⁾ Until 8 July 1998, FS had a statutory monopoly to provide traction on the Italian railway network. Since then, in principle, other railway companies have the right to provide traction in Italy, provided that they have a licence and that they have obtained a safety certificate. However, until May 2000 the Minister of Transport had not defined the criteria for granting a safety certificate. As under Italian law the definition of these criteria is necessary to grant a safety certificate, until May 2000 no undertaking could enter the Italian traction market. Consequently, until May 2000 FS had a *de jure* monopoly to provide traction in Italy. While thereafter some companies were licensed, safety certificates were issued only after April 2001.

- (114) So far, FS is the only undertaking with a licence to provide intercity rail passenger transport in Italy. While since May 2000 the Italian Ministry of Transport and Navigation has granted several licences to other railway undertakings, these companies cannot operate long-distance passenger rail transport services as this market has not been liberalised in Italy yet. Moreover, in order to enter into an international grouping with GVG, such railway companies would need a safety certificate to operate passenger transport services on the Domodossola-Milan route⁽⁶⁶⁾. In order to obtain such a safety certificate, any railway undertaking would first have to obtain the suitable rolling stock (which is then certified). So far, only FS has obtained a safety certificate to operate passenger rail transport services between Domodossola and Milan⁽⁶⁷⁾. FS is therefore so far the only Italian railway undertaking that can enter into an international grouping with GVG for the particular service that the latter wants to provide.

4. DOMINANCE IN A SUBSTANTIAL PART OF THE COMMON MARKET

- (115) Where a Member State has granted a statutory monopoly to an undertaking on a certain part of its territory, according to the case-law of the Court of Justice⁽⁶⁸⁾, this territory constitutes a substantial part of the common market. As regards the infrastructure, according to Decree No 225-T of 26 November 1993, FS still has a statutory monopoly. Thus, the market for access to the Italian infrastructure can be considered to be a substantial part of the common market.
- (116) The relevant traction market and the downstream market for passenger rail transport are also a substantial part of the common market. Until 8 July 1998, Decree No 225-T granted FS a statutory monopoly with regard to traction and the provision of rail passenger services. In addition, the relevant market is a substantial part of the common market since the relevant geographic

⁽⁶⁶⁾ A safety certificate is granted for a particular route and for freight or passenger services. In May 2003, 26 companies had received a railway licence in Italy, while six companies were in possession of the safety certificate.

⁽⁶⁷⁾ The main private railway operators in Italy are Rail Traction Company (RTC) and Ferrovie Nord Milano Esercizio (FNME). RTC has obtained a licence to provide passenger and freight services in Italy. Its safety certificate, however, is limited to the Verona-Brenner and Verona-Mantua route and to freight services. FNME has obtained a licence to provide passenger and freight services in Italy. It has also obtained a safety certificate to operate on the Milan-Domodossola route. However, this safety certificate is limited to freight transport only.

⁽⁶⁸⁾ Case C-323/93 *La Crespelle* [1994] ECR I-5077, paragraph 17; Case C-41/90 *Hoefner and Elser* [1991] ECR I-1979.

market includes several Member States ⁽⁶⁹⁾. In this case the Domodossola-Milan segment is part of the relevant downstream market for international rail passenger services from Germany into Italy. It is a vital route for rail transport, which connects northern and southern Europe. As such it is part of the trans-European rail network (TERN).

conditions for an essential facility, as established by the CFI in its *ENS* ⁽⁷²⁾ decision, i.e. the indispensability of the facility and, if access is not granted, the elimination of all competition from the other operator ⁽⁷³⁾. For any competitor it would be unfeasible to duplicate FS's long-distance railway network because of the prohibitive cost of such an investment and the impossibility of getting the right of way.

H. ABUSE OF A DOMINANT POSITION

(117) FS has committed several abuses of its dominant position in the relevant upstream and downstream markets which have had the effect of foreclosing competition in international rail passenger transport on a number of routes from German cities to Milan via Basle.

(118) It is recalled that nothing in Italian law as described in recital 13 of this Decision prevents FS from providing information, entering into an international grouping ⁽⁷⁰⁾ with, or granting a safety certificate, granting access to infrastructure and providing traction to a licensed railway undertaking established in another Member State.

(121) Restricting access to the railway network constitutes an abuse of a dominant position if it excludes a potential competitor from the market. In its decision in the *Port of Rødby* case, the Commission concluded that an undertaking that owns or manages and uses itself an essential facility, i.e. a facility or infrastructure without which its competitors are unable to offer their services to customers, and refuses them access to such facility, is abusing its dominant position ⁽⁷⁴⁾.

(122) In its judgment in the *Télémarketing* case ⁽⁷⁵⁾, the Court ruled that 'an abuse within the meaning of Article 86 [now 82] of the EC Treaty is committed where, without objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking'.

1. ABUSE ON THE RELEVANT UPSTREAM MARKETS

1.1. REFUSAL TO GRANT ACCESS TO THE ITALIAN INFRASTRUCTURE

(119) FS holds a monopoly as the allocation body that has been designated by the Italian State to decide upon requests for infrastructure capacity on the Italian railway network. In this capacity, FS is responsible for assigning train paths to railway operators in Italy.

(120) In line with the Court of First Instance's *Aéroports de Paris* ruling ⁽⁷¹⁾, the railway infrastructure can be considered an essential facility. It fulfils the two main

(123) As pointed out in the Commission notice on the application of competition rules to access agreements in the telecommunications sector ⁽⁷⁶⁾, a refusal to give access to facilities may be prohibited pursuant to Article 82 if the refusal is made by an undertaking which is dominant because of its control of facilities. An undue, inexplicable or unjustified delay in responding to a request for access to an essential infrastructure may also constitute an abuse.

⁽⁶⁹⁾ Judgments of the Court of Justice in Cases C-40/75 *Suiker Unie* [1975] ECR 1663, paragraph 375, and C-27/76 *United Brands*, [1978] ECR 207, paragraphs 45, 56 and 57.

⁽⁷⁰⁾ In 1996, FS entered into an international grouping with SJ Rail.

⁽⁷¹⁾ See footnote 56. Paragraph 122 of the judgment. The Court of First Instance confirmed the Commission's Decision and found that the airport facilities of the Paris airports can be considered an essential facility. Their use is indispensable to the provision of various services, in particular ground handling. Similarly, gaining access to the infrastructure in Italy is essential for GVG for the provision of international rail passenger services from German cities to Milan.

⁽⁷²⁾ See footnote 34. Paragraph 209 of the judgment.

⁽⁷³⁾ In *European Night Services (ENS)*, the Court of First Instance (CFI) stated that an infrastructure, products or services are only essential if such infrastructure, products or services are not interchangeable and if, by reason of their special characteristics — in particular the prohibitive cost of and/or time reasonably required for reproducing them — there are no viable alternatives available to potential competitors, which are thereby excluded from the market (see footnote 34. Paragraph 209 of the judgment).

⁽⁷⁴⁾ Decision 94/119/EC *Port of Rødby* (see footnote 55).

⁽⁷⁵⁾ See footnote 57. Paragraph 27 of the judgment.

⁽⁷⁶⁾ OJ C 265, 22.8.1998, p. 2, point 83 and Case 85/76 *Hoffman-La Roche* [1979] ECR 461.

- (124) FS has made use of its power as allocation body to deny GVG, a potential competitor in the market for rail passenger transport services, train paths on the Domodossola-Milan route. It has both withheld from GVG information necessary to enable GVG to prepare an adequate business plan and it has effectively denied access to GVG without objective justification. It has thus prevented GVG from entering the market for the provision of rail passenger transport services on this route. In deciding to retain for itself the market for the provision of cross-border rail passenger transport services, FS has extended its dominant position on the market for the access to infrastructure to this neighbouring but separate market. In Decision 98/190/EC in the *FAG-Flughafen Frankfurt* case ⁽⁷⁷⁾, the Commission concluded that an infringement of Article 86 (now 82) arose as soon as FAG's monopoly on the ramp-handling services market was maintained by a refusal on its part to authorise self-handling or third-party handling. The fact that FAG already held a dominant position on the ramp-handling market prior to committing the infringement could not justify FAG's decision to reserve for itself the market by denying ramp access to potential competitors.
- (125) In the circumstances of the present case, an allocation body verifiably independent of any railway undertaking would certainly have actively considered all possible means, in terms of availability of time slots and other practical and technical issues, of granting GVG access to the infrastructure on fair and non-discriminatory terms. However, experience with previous cases suggests that an allocation body that is also active in the market for providing services on its own infrastructure is likely to prefer an arrangement which will minimise inconvenience to itself, especially in relation to its own operations as a user ⁽⁷⁸⁾.
- (126) Directive 91/440/EEC does not explicitly mention the right of access to technical information regarding access to infrastructure for railway companies that have not yet formed an international grouping. The Commission, however, rejects FS's argument that such information can only be provided and a train path can only be reserved after the applicant has entered into an international grouping. Directive 91/440/EEC does not prejudice the application of the competition rules of the EC Treaty. The allocation body cannot require the establishment of an international grouping before even providing information relating to prices of train paths and their availability, since that may have the effect of preventing market entry. Such information is necessary to enable the entrant to establish a business plan and to judge whether the planned service would be economically viable.
- (127) FS was in a position to provide such information and give advice on related issues of access to infrastructure. Before the entry into force of Decree No 146/1999, FS (Infrastruttura ⁽⁷⁹⁾) was entitled pursuant to Article 8(5) of Decree No 277/1998 to issue a (temporary) safety certificate in accordance with Directive 95/19/EC. At that stage, as the infrastructure manager, instead of refusing to provide the requested information on the grounds that GVG did not have a safety certificate ⁽⁸⁰⁾, FS (Infrastruttura) should have taken a proactive approach. For instance, in line with its obligations as the infrastructure manager, FS should have informed GVG that it is FS (Infrastruttura) itself which grants the safety certificate and advised it of what is required to obtain such a certificate.
- (128) In addition, the Commission considers that Article 10(1) of Directive 91/440/EEC has direct effect. According to the relevant case-law of the Court of Justice, a provision may have direct effect if the obligation imposed on the Member States is sufficiently clear and precise, unconditional and does not leave any margin of discretion in its implementation ⁽⁸¹⁾.
- (129) Article 10(1) of Directive 91/440/EEC is a provision that clearly indicates that international groupings have the right to obtain access to infrastructure. Such a provision in itself does not require any further implementation from Member States and can thus be considered sufficiently clear and precise in accordance with the abovementioned case-law.
- (130) Railway undertakings such as GVG could rely directly on this provision to request from FS information necessary to enter into meaningful negotiations with railway undertakings established in Italy with a view to setting up an international grouping. Article 10(1) could therefore be invoked by GVG since the entry into force

⁽⁷⁷⁾ OJ L 72, 11.3.1998, p. 30, recital 98.

⁽⁷⁸⁾ Decision 94/19/EC in *Sea Containers v Stena Sealink* (see footnote 55), recital 75.

⁽⁷⁹⁾ The predecessor of FS (RFI). See recital 4 of this Decision.

⁽⁸⁰⁾ In its letter to GVG of 27 November 1998, FS pointed out that it would provide information on train paths and infrastructure charges only after GVG had presented documents showing that it had entered into an international grouping and that it possessed a safety certificate in Italy.

⁽⁸¹⁾ Cases C-287/98 *Linster* [2000] ECR I-6917, C-8/81 *Becker* [1982] ECR 53 and 28/67 *Molkerei-Zentrale* [1968] ECR 211.

of Directive 91/440/EEC on 1 January 1993. GVG had the right to form an international grouping with a view to providing an international rail passenger transport service to Milan. Hence, it was entitled to request information from FS regarding train paths and prices with a view to obtaining access to the Italian infrastructure.

- (131) It is concluded that during the period at least from September 1995 ⁽⁸²⁾ until July 2002, FS refused to provide the necessary information for access to the Italian railway infrastructure to GVG without any objective justification and thereby prevented GVG from entering the market in international rail passenger transport in breach of Article 82 of the EC Treaty.

1.2. REFUSAL TO PROVIDE TRACTION

- (132) Recital 51 states that traction consists in the provision of a locomotive, a driver and ancillary services such as the back-up. There is a market for traction services, as such services are provided on a commercial basis in most Member States. Recitals 55 and 56 provide examples showing that FS is and has been active on the traction market. For instance, FS provides regular traction services to SNCF from Milan and Turin to Lyon and to DB for its international 'Autoreisezug' on 13 different routes between Germany and Italy. On one occasion it also provided traction services to GVG for a rail passenger transit service. None of these rail transport services are competing with transport services provided by FS.
- (133) As set out in recitals 86 to 109, the Commission has extensively examined whether GVG (or any other railway undertaking from another Member State) would have alternatives to renting traction from FS (Trenitalia) on the Italian segment of the planned passenger transport service between Basle and Milan. This examination has shown that there were no such commercially viable alternatives available to GVG or any other non-Italian railway undertaking. Therefore, in order to be able to provide an international rail passenger service between Germany and Milan, it is indispensable that GVG obtains traction from FS on the Italian railway network.
- (134) As FS has not responded to GVG's requests for traction, since December 1998 it has effectively refused to provide traction services to GVG for this particular service. FS's refusal was not justified by any objective

reason. For instance, FS does not lack spare capacity for traction services, there are no safety reasons preventing FS from providing traction to GVG, FS could obtain an adequate remuneration for the provision of such services and it does not operate under public service obligations which prevent it from providing traction services to GVG.

- (135) No lack of spare capacity: Following the hearing, FS Trenitalia argued that it did not have spare locomotive capacity to provide traction services to GVG. However, after further investigation, FS Trenitalia finally declared by letter of 18 December 2002 that it had quantified its spare capacity for the supply of such traction services at one million km per year.
- (136) No safety reasons: Once it has ensured traction and it has formed an international grouping, GVG would still have to obtain a safety certificate for the planned passenger transport service in Italy. This is therefore a separate and consecutive step. As the safety certificate is issued by the infrastructure manager, it is not the responsibility of FS (Trenitalia) to judge whether GVG fulfils the necessary safety requirements. A refusal to provide traction could therefore not be justified on the grounds of safety concerns.
- (137) Adequate remuneration: FS has a right to adequate remuneration under normal commercial terms.
- (138) No public service obligations: Finally, FS is under no explicit obligation to provide a public service the financial equilibrium of which could be jeopardised by the services that GVG intends to provide (see recitals 154 and 155).
- (139) GVG's planned service between Basle and Milan competes with the Cisalpino, which is a joint venture of FS and SBB. This has been confirmed by FS's reply to the statement of objections. FS considers that GVG's planned service would have damaged its existing traffic on the Basle-Milan route ⁽⁸³⁾.
- (140) FS has therefore refused to provide traction to a potential competitor in a neighbouring market to the market for traction. FS is dominant not only in the latter (upstream) market but also in the downstream

⁽⁸²⁾ GVG's first request to FS dates back to 1992.

⁽⁸³⁾ This is acknowledged by FS in its reply to the statement of objections, points 89 and 107.

market for rail passenger transport. On the downstream market, there is no competition. By refusing to provide traction to GVG, FS is preventing a potential competitor from entering this market. It is thereby preserving its monopoly position on this separate downstream market by eliminating potential competition on that market ⁽⁸⁴⁾.

(141) The Court has consistently held that the extension of a monopoly in a given market to a neighbouring market, without objective justification, is prohibited pursuant to Article 82 ⁽⁸⁵⁾. In *Télémarketing* ⁽⁸⁶⁾, the Court found that an abuse of Article 82 is committed where an undertaking holding a dominant position on a particular market reserves to itself, without any objective necessity, an ancillary activity which might be carried out by another undertaking and if it thereby eliminates all competition from such an undertaking. This applies even where the dominant position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition in that market ⁽⁸⁷⁾.

(142) The Commission found in Decision 98/190/EC in the *FAG-Flughafen Frankfurt* case ⁽⁸⁸⁾ that Frankfurt Airport had abused its dominant position in breach of Article 82 of the EC Treaty by denying, without objective justification, potential competitors access to the market for the provision of ramp-handling services at Frankfurt Airport. This market was considered to be a separate market from that of the provision of airport facilities. Until the adoption of that Decision, Frankfurt Airport had a monopoly on both the market for the provision of airport facilities and that of the provision of ramp-handling services.

⁽⁸⁴⁾ In a number of decisions, the Italian competition authority has found that FS is dominant on the traction market for intermodal container transport. In February 2000, the authority sanctioned FS for having abused its dominant position in the railway traction market for multimodal transport by favouring its own subsidiaries, Italcontainer and Cemat. To deal with excessive demand for rail traction, FS had to introduce a capacity allocation system to ensure fair and efficient allocation of available traction resources.

⁽⁸⁵⁾ Case C-18/88 *RTT v GV-Inno-BM* [1991] ECR I-5941 and Joined Cases C-271/90, C-281/90 and C-289/90 *Spain, Belgium and Italy v Commission* [1992] ECR I-5833.

⁽⁸⁶⁾ See footnote 57. Paragraph 26 of the judgment.

⁽⁸⁷⁾ In Decision 88/518/EC *British Sugar v Napier Brown* (OJ L 284, 19.10.1988, p. 4), the Commission held that British Sugar abused its dominant position on the British sugar market with a course of conduct intended to force Napier Brown to withdraw from the British retail sugar market.

⁽⁸⁸⁾ See footnote 77.

(143) In the present case, although Italian law has appointed FS's subsidiary RFI as the infrastructure manager, it does not confer exclusive rights on FS for the provision of international passenger services, in particular on the route at stake. FS's refusal is therefore only based on its own commercial decision as an undertaking and not on State intervention ⁽⁸⁹⁾.

(144) Finally, according to settled case-law ⁽⁹⁰⁾, a refusal to supply also constitutes an abuse when it leads to the risk of elimination of competition on the part of the requesting undertaking in the relevant market or hindering competitors' development and when it is not objectively justified.

(145) FS's refusal to provide traction, an activity which it routinely performs, is not justified by any objective reason and it protects its monopoly position in the downstream market for international passenger rail services between Basle and Milan. It therefore constitutes an abuse of a dominant position. FS's refusal to provide traction to GVG eliminates a potential competitor and thereby hinders the growth of competition in the downstream market. This harms consumers, who will not benefit from alternatives to existing rail passenger services.

(146) The infringement took place between December 1998 and 27 June 2003. At least since December 1998, GVG requested FS to provide traction services for its planned service on the Domodossola-Milan route. FS did not make any offer to provide traction until August 2002. On 25 November 2002, FS (Trenitalia) offered GVG a draft contract for the provision of traction, including back-up, for its planned service on the Domodossola-Milan route. On 27 June 2003, GVG and FS (Trenitalia) concluded negotiations by agreeing on the traction price.

⁽⁸⁹⁾ A parallel can be drawn with the situation in the *FAG-Flughafen Frankfurt* Decision, in which the Commission specified that Frankfurt Airport's obligation to operate the airport properly and safely did not mean that it was allowed to retain these activities for itself (see recitals 93-96 of the Decision).

⁽⁹⁰⁾ Judgment of the Court of Justice in Joined Cases 6 and 7/73 *ICI and Commercial Solvents* [1974] ECR 223 and Commission Decision 88/518/EEC in *British Sugar v Napier Brown* (see footnote 87).

2. ABUSE ON THE MARKET IN RAIL PASSENGER TRANSPORT

2.1. REFUSAL TO NEGOTIATE THE FORMATION OF AN INTERNATIONAL GROUPING

- (147) At the present stage in the liberalisation of the European rail passenger market, railway undertakings can only provide cross-border rail passenger services if they have formed an international grouping with a licensed railway undertaking established in another Member State. However, the existence of this European regulatory framework does not preclude the application of Article 82 of the EC Treaty to situations in which there is only one railway undertaking available to form an international grouping and which refuses to enter into negotiations with a view to the formation of such a grouping.
- (148) In its judgment in *ENS* ⁽⁹¹⁾ the Court of First Instance held that a service may be regarded as 'necessary' for entry to the relevant market if such a service is not 'interchangeable' and if, by reason of its special characteristics — in particular the prohibitive cost of and/or time reasonably required for reproducing it — there are no viable alternatives available to potential competitors, who are therefore excluded from the market by the refusal to provide such a service.
- (149) In the present case the formation of an international grouping with FS is indispensable for GVG if the undertaking is to be able to provide the international passenger transport service on the Domodossola-Milan route. It is not 'interchangeable' with any other service in the sense that there are no other railway undertakings with which GVG could enter into an international grouping for the purposes of operating this route ⁽⁹²⁾. As set out in recital 101, neither does the option exist at this stage for GVG to set up a subsidiary in Italy with a view to forming an international grouping with its own subsidiary.
- (150) Therefore, unless the refusal by FS to enter into negotiations with GVG with a view to the formation of an international grouping is justified on the basis of objective reasons, it constitutes an abuse of a dominant position. While FS has pointed out in general that there is no obligation under EU law to form an international grouping and that it would enter into an international grouping only if it had a commercial interest in doing so, it has not provided concrete reasons why it could not enter into such negotiations. Instead, FS has argued that its refusal to enter into negotiations with GVG was justified since GVG's planned service would compete with services already provided by FS, in particular the Cisalpino, on the Basle-Milan route ⁽⁹³⁾. To preserve its monopoly on this route, however, is not an acceptable justification for FS's refusal.
- (151) At least since August 1999, FS was aware that GVG wanted to enter into an international grouping with it to provide an international service between Basle and Milan. FS failed to deal with GVG's request until August 2002. On 27 June 2003, the parties signed an international grouping agreement.
- (152) The Commission therefore concludes that by refusing to enter into an international grouping with GVG without any objective justification, during the period from August 1999 until 27 June 2003, FS abused its dominant position on the Italian market for passenger rail transport.

3. EFFECT ON TRADE BETWEEN MEMBER STATES

- (153) GVG aims to provide an international transport service between Germany and Italy. As pointed out, it feeds customers from Karlsruhe, Koblenz and Mannheim into Basle and then provides a rail passenger transport service to Milan. In view of the characteristics of these routes and the heavy traffic and given that this affects a transport service between two Member States of the EU, the abuses described above significantly affect trade between Member States.

I. ARTICLE 86(2) OF THE TREATY

- (154) FS is not relying on the derogation provided for in Article 86(2) of the Treaty to justify its policy.
- (155) In particular, FS has not argued that granting access to GVG on the Domodossola-Milan route would jeopardise

⁽⁹¹⁾ See footnote 34.

⁽⁹²⁾ As the market has not yet been liberalised in Italy, no Italian railway undertaking other than FS has a licence based on Directive 95/18/EC for long-distance passenger rail transport.

⁽⁹³⁾ This is acknowledged by FS in its reply to the statement of objections, points 89 and 107.

the performance by FS in conditions of economic equilibrium of a service of general interest entrusted to it. The Cisalpino service, offered by FS in cooperation with SBB, is not operated on the basis of a public service obligation or a public service contract⁽⁹⁴⁾. The same applies in relation to the trains operated in cooperation with SBB via Chiasso and Domodossola. More generally, FS has not argued that granting access to GVG would jeopardise any public service obligations it may have in relation to transport services it provides on the main infrastructure network in Italy. At all events, the Commission takes the view that there is no evidence that refusing access to GVG to the market in international passenger rail transport between Domodossola and Milan would be necessary to preserve the financial equilibrium of FS in relation to its basic services⁽⁹⁵⁾.

J. REMEDIES

1. TERMINATION OF THE INFRINGEMENT

- (156) Regulation No 17 applies to the abuses relating to the markets for access to infrastructure and traction. The latter lie outside the scope of the procedural rules specific to the transport sector and fall under Regulation No 17 as far as the application of Article 82 of the EC Treaty is concerned. Regulation (EEC) No 1017/68, which lays down the competition rules applying to transport by road, rail and inland waterway, applies to the abuse relating to the refusal to enter into an international grouping on the market for the provision of passenger rail transport.
- (157) Article 3(1) of Regulation No 17 provides that the Commission may, where it finds that there is an infringement of Article 81 or 82 of the Treaty, require the undertakings or associations of undertakings concerned to bring such infringement to an end. Article 11 of Regulation (EEC) No 1017/68 contains similar provisions.
- (158) FS (Trenitalia) has entered into an international grouping agreement and has agreed on the terms of a traction contract with GVG. FS (RFI) has also undertaken to provide GVG with suitable train paths on the Domodossola-Milan segment, as soon as corresponding train paths are made available by SBB on the Swiss network for the Basle-Domodossola segment. The Commission takes note that, given that GVG's entry into

the market has been delayed and as part of an overall settlement between the parties, for a limited period of time FS (Trenitalia) and FS (RFI) have offered GVG special conditions to facilitate its market entry. These terms must be considered to be specific to this case.

- (159) The Commission considers that the undertakings given by FS (Trenitalia) and by FS (RFI), as annexed to this Decision, ensure that the infringement has been brought to an end and that the abuse will not be repeated.
- (160) The Commission takes note that, apart from the above undertakings aimed at solving the particular problem of GVG, FS (Trenitalia) has in addition undertaken to enter into international grouping agreements with other railway undertakings that possess the necessary licence and propose a reasonable project for an international rail service. For a period of five years, FS has undertaken to provide traction services on a non-discriminatory basis to other railway undertakings intending to provide cross-border passenger services. The available capacity, as defined in the commitments, would allow new entrants to operate up to seven international railway services into Italy similar to the one planned by GVG. The traction price would be based on FS (Trenitalia)'s cost, including, *inter alia*, an adequate return on the capital investment and the maintenance costs for the rolling stock concerned.
- (161) While these general undertakings go beyond what is necessary for the termination of the infringements as regards GVG, the Commission considers that they will considerably facilitate entry into the market in international rail passenger services into Italy. The commitments eliminate the most significant market access barriers for start-up companies in this market. New entrants will be able to obtain in a timely manner all necessary information as regards train paths, they will be able to enter into an international grouping and they will obtain the necessary traction services to start their services. The undertakings given by FS will therefore allow market entry in a startup phase which should contribute to enhancing competition in the European rail sector.

2. ARTICLE 15 OF REGULATION NO 17 AND ARTICLE 22 OF REGULATION (EEC) NO 1017/68

- (162) Article 15(2) of Regulation No 17 provides, *inter alia*, that the Commission may impose fines, within the limits set out in that Article, where the undertakings in question have intentionally or negligently infringed Article 82. Article 22(2) of Regulation (EEC) No 1017/68 confers equivalent powers on the Commission.

⁽⁹⁴⁾ See footnote 12.

⁽⁹⁵⁾ See Commission Decision 90/456/EEC of 1 August 1990 concerning the provision in Spain of international express courier services (O) L 233, 28.8.1990, p. 19).

- (163) FS must have been aware of the fact that the behaviour in this case, in particular the refusal to provide information regarding access to the network, prevented a potential entrant from entering the relevant downstream market. An infringement of the competition rules such as the present one would normally be penalised by fines varying in accordance with the gravity and duration of the infringement.
- (164) However, in this case the Commission is refraining from imposing a fine in particular because of the novelty of the case, as GVG has been the first and only new entrant railway undertaking to approach FS with a view to forming an international grouping. Moreover, FS has proposed undertakings which ensure that FS will not repeat the abuses in the future and which should contribute significantly to the dismantling of entry barriers for international rail passenger services into Italy.

K. ADDRESSEE

- (165) As set out in recitals 72 to 81, the FS holding company can be considered responsible as a single undertaking. The Decision is therefore addressed to the FS holding company,

HAS ADOPTED THIS DECISION:

Article 1

By refusing to enter into an international grouping with Georg Verkehrsorganisation GmbH, for the purposes of providing an international rail passenger service between Germany and Italy on the Domodossola-Milan route, Ferrovie dello Stato SpA has abused its dominant position on the Italian market for passenger rail transport, in breach of Article 82 of the EC Treaty.

This infringement lasted at least from August 1999 until 27 June 2003.

Article 2

By refusing to deal effectively with Georg Verkehrsorganisation GmbH's requests for access to the railway network between Domodossola and Milan for the said purposes, Ferrovie dello Stato SpA has abused its dominant position on the market for access to the infrastructure, preventing GVG from entering the market in international rail passenger transport in breach of Article 82 of the EC Treaty.

This infringement lasted at least from September 1995 until 24 July 2002.

Article 3

By refusing to provide traction to Georg Verkehrsorganisation GmbH in the form of a locomotive, a qualified driver with route knowledge and back-up for the said purposes, Ferrovie dello Stato SpA has abused its dominant position on the traction market, preventing GVG from entering the market in international rail passenger transport in breach of Article 82 of the EC Treaty.

This infringement lasted at least from December 1998 until 27 June 2003.

Article 4

Ferrovie dello Stato SpA shall immediately bring to an end the infringements referred to in Articles 1, 2 and 3 of this Decision in so far it has not already done so and shall in future refrain from repeating any similar act or conduct.

Article 5

Until given notice by the Commission that it is no longer required to do so, Ferrovie dello Stato SpA shall report twice a year to the Commission on the implementation of the commitments annexed to this Decision.

Article 6

This Decision is addressed to:

Ferrovie dello Stato SpA
Piazza della Croce Rossa, 1
I-00161 Rome

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 27 August 2003.

For the Commission
Mario MONTI
Member of the Commission