OPINION OF ADVOCATE GENERAL LENZ
delivered on 11 July 1996 *

A — Introduction

1. This appeal affords the Court for the first time an opportunity to rule on the demarcation of the respective fields of application of Council Regulation No 17 of 6 February 1962 — first regulation implementing Articles 85 and 86 of the Treaty [1] — and Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway. [2]

2. This appeal has been brought against the judgment of the Court of First Instance of 6 June 1995, [3] in which that Court declared void Commission Decision 92/568/EEC of 25 November 1992 [4] relating to a proceeding under Article 85 of the EC Treaty.

3. The Commission's proceeding concerned the conditions laid down by the International Railway Union — Union Internationale des Chemins de Fer (hereinafter 'the UIC') — for the marketing by travel agents of international tickets for the carriage of passengers by rail. The railway companies involved in such international passenger transport cooperate in providing the relevant services. The price of a ticket generally corresponds to the total value of the fares payable for the relevant sections of the journey for which the different railway companies are responsible. Operations are cleared after the event between the railway companies so that each receives the fraction of the ticket price corresponding to the part of the service which it provided.

4. Each international tickets can be sold either by the railway companies directly or by accredited travel agents. The travel agents receive commission on the tickets, from each of the railways providing the transport, which is calculated in accordance with the proportion of the revenue received by each railway. A railway company which sells international tickets directly also receives commission from the other railway companies providing the transport.

5. Leaflet No 130 on travel agents drawn up by the UIC in 1952, as repeatedly updated, (hereinafter 'Leaflet No 130') governs certain aspects of relations between the railway

* Original language: German.
1 — OJ, English Special Edition 1959 -1962, p. 89.
2 — OJ, English Special Edition 1968 (I), p. 302.
3 — Case T-14/93 *UIC* v *Commission* [1995] ECR II-1503.
4 — OJ 1992 L 366, p. 47.

companies and travel agents. The provisions in issue are quoted at length in the judgment of the Court of First Instance. [5] Accordingly, only the most important points will be considered here.

6. Under Article 1.1 of Leaflet No 130, travel agents are accredited by the main railway of the country in which they are located. Authorization to sell international tickets is subject in principle to the agreement of the other railways providing the transport. However, railways can make provision for exceptions to this rule in agreements concluded amongst themselves.

7. Article 3.2 of Leaflet No 130 obliges the railways *inter alia* to pay commission on their share of international tickets to travel agents where the latter have not issued the tickets themselves but have bought them from the railway which accredited them. This applies where the agreement between the travel agents and the railway concerned does not allow them to issue tickets themselves. It is recommended that the railways grant 'a lower rate of commission (5%) on the tickets purchased in this way than that applied in the case of tickets issued by the Travel Agencies themselves ...'

8. Article 4 of Leaflet No 130 refers to Appendix 4 to the Leaflet for details of the commission rates to be paid. According to that appendix, the rate of commission paid by the railways of 11 of the 12 Member States of the Community at that time to travel agents authorized by a foreign railway was 10%. [6]

According to Article 4.3 of the Leaflet commission was, 'in principle, ... uniformly set at 10%.'

9. Article 1.3 of Leaflet No 130 recommends railways to use the provisions of the model contract in Appendix 1 to the Leaflet when drawing up agreements with travel agents. In Article 4.3 of that model contract a travel agent undertakes, *inter alia*, 'not to favour by its publicity, by its proposals and also by its advice to the public, the traffic of means of transport competing with the Railways'. Articles 4.6 and 4.7 of the model contract stipulate that the travel agents must sell the tickets at the fares notified by the railways.

10. In its decision the Commission concluded that the UIC had breached Article 85(1) of the Treaty by adopting and circulat-

5 — Cited in footnote 3; at paragraph 4 et seq.

6 — Only the Italian railway granted commission of 6% on tickets bought at stations and 9% on tickets issued by travel agents.

ing Leaflet No 130. It noted the following specific breaches:

'— control of the appointment of agents by each national railway company;

— the joint laying-down of conditions governing the granting of commissions;

— the setting of a standard rate of commission;

— the requirement that agents must make out and sell tickets at the official fares indicated in the tariffs;

— the requirement that agents must not favour competing means of transport in their offers or advice to the public'. [7]

7 — Article 1 of the decision (cited in footnote 4).

The Commission also imposed a fine of ECU 1 000 000 on the UIC in respect of those infringements (Article 3 of the Decision).

11. The UIC then brought an action before the Court of First Instance seeking the annulment of the Commission's decision. In the alternative, it sought the annulment of Article 3 of the Decision or a reduction in the fine.

In support of its principal claim the applicant put forward a plea alleging that the Commission had wrongfully based its Decision on Regulation No 17 rather than on Regulation No 1017/68. It further argued that the Commission decision was in breach of Articles 85(1) and 85(3) of the Treaty and Article 5 of Regulation No 1017/68. It also claimed that its right to a fair hearing had been infringed. Finally, it pleaded that the statement of reasons of the Commission decision was inadequate.

12. The Court of First Instance confined itself to considering the first of the abovementioned pleas alleging that the Commission wrongfully applied Regulation No 1017/68.

13. In the decision in issue, the Commission set out three reasons justifying its having based itself on Regulation No 17 rather than on Regulation No 1017/68. [8] It asserted, first, that UIC Leaflet No 130 governed the accreditation of travel agencies and the sale of tickets by them. It argued that 'this activity does not relate "directly" to the provision of transport services' as required by the third recital of Council Regulation No 141 of 26 November 1962 [9] exempting transport from the application of Council Regulation No 17. [10] Secondly, in its judgment in the *VVR* case, [11] the Court of Justice had already ruled that travel agents provided services on an independent basis. Such independent activity did not concern the provision of transport, which was effected exclusively by the railway companies. Thirdly, travel agents were not among the 'providers of services ancillary to transport' referred to in the second sentence of Article 1 of Regulation No 1017/68.

14. The Court of First Instance considered those arguments in paragraphs 36 to 56 of its judgment.

15. It held in the first place that the judgment of the Court of Justice in the *VVR* case was not relevant to the case under consideration. That judgment was not concerned with the interpretation of Regulation No 1017/68. Even if it were to be assumed that in selling a ticket a travel agent was supplying a service 'on an entirely independent basis', that consideration would not alone suffice for Regulation No 1017/68 to be inapplicable. It was true that a travel agent provided a service to the railway concerned. The provision of that service by a travel agent on behalf of and under a contract of agency with the railway formed the principal object of the accreditation of the travel agent by the railway and therefore did concern the provision of transport (paragraphs 37 to 42 of the judgment).

16. The Court of First Instance then pointed out that, while the third recital in the preamble to Regulation No 141 might be an important factor in the legislative framework of which it formed a part, the word 'directly' appeared neither in Article 1 of Regulation No 1017/68 nor in Article 1 of Regulation No 141 — the validity of which expired, in any event, on 30 June 1968 with regard to transport by rail. Moreover, the wording of Article 1 of Regulation No 1017/68 indicated that its scope might be wider than suggested by the Commission. In addition, the fact that Article 2 of Regulation No 1017/68 covered, *inter alia*, matters which '... indirectly fix ... any other trading conditions' supported that interpretation (paragraphs 43 to 45 of the judgment).

8 — Points 47 to 59 of the decision (cited in footnote 4).

9 — OJ, English Special Edition 1959 -1962, p. 291.

10 — Cited in footnote 4; point 53.

11 — Case 311/85 *VVR* v *Sociale Dienst van de Plaatseldijke en Gewestlijke Overleidsdiensten* [1987] ECR 3801.

17. The Court of First Instance drew the following conclusion from the foregoing arguments in paragraph 46 of its judgment:

'Regulation No 1017/68 cannot, therefore, be interpreted as excluding from its application a decision of an association of railway companies, such as Leaflet No 130, laying down detailed rules for the sale of international rail tickets. That decision concerns activities which are related to, and indispensable for, the provision of rail transport services. Moreover, since international rail transport is at present provided by successive national services (...), international rail tickets can hardly be sold without a system of cooperation between railways with regard to their sale and the distribution of the proceeds thereof.'

18. In the view of the Court of First Instance, Leaflet No 130 'furthermore' related both to the 'supply of transport' and to 'transport rates' within the meaning of Regulation No 1017/68 (paragraph 47 of the judgment).

Article 1 of Leaflet No 130 related 'directly' to the determination of points of sale of international railway tickets. If it were to have the effects alleged by the Commission, it would be limiting or controlling the railways' 'markets' and thereby the 'supply of transport' within the meaning of Regulation No 1017/68. The commission referred to in Article 4 of the Leaflet constituted one of the direct costs of the sale of an international ticket and determined the net price. That article thus indirectly fixed 'transport rates' or any 'other trading conditions' within the meaning of Regulation No 1017/68. Article 3.2 of the Leaflet related 'directly' to the price and terms of sale of rail tickets. By its very wording, the requirement imposed by the model contract to sell tickets at the official fares had as its object or effect the 'fixing of transport rates' within the meaning of Regulation No 1017/68. This would also be the case if the contract were taken to prohibit the discounting of commissions. Finally, the Commission itself considered that the provision contained in Article 4.3 of the model contract 'falls within the transport sector' (paragraphs 48 to 53 of the judgment).

The Court of First Instance stressed that it had not disregarded the Commission's argument that Leaflet No 130 had effects on the market for the distribution of tickets. In the present case, however, the main aspects fell within the scope of Regulation No 1017/68. The effects to which the Commission referred were 'at the most secondary to the effects which relate to the transport sector properly so called' (paragraph 54 of the judgment).

19. Finally, the Court of First Instance considered that the specific activities of travel agents with which the case was concerned

were 'services ancillary to transport' within the meaning of Regulation No 1017/68 (paragraphs 55 to 56 of the judgment).

20. In view of the differences between Regulation No 17 and Regulation No 1017/68, the application of the wrong legal basis constituted a breach of an essential procedural requirement and had deprived the applicant of the procedural safeguards to which it had been entitled. [12]

21. The Court of First Instance therefore declared the Commission decision in issue void, without considering the remaining pleas.

22. The Commission has appealed against this judgment. It takes the view that the Court of First Instance erred in law in three respects in deciding

— that Regulation No 1017/68 covers agreements, decisions and concerted practices which concern activities which are 'related to', and 'indispensable for', the provision of rail transport services,

— that Leaflet No 130 relates both to the 'supply of transport' and to 'transport rates' within the meaning of Regulation No 1017/68, and

— that, in distributing tickets on behalf of railways, travel agents were providing 'services ancillary to transport' within the meaning of Article 1 of Regulation No 1017/68.

23. The Commission claims that the judgment of the Court of First Instance should be set aside and the UIC's application dismissed or, in the alternative, that the case be referred back to the Court of First Instance. The Commission also claims that the UIC should be ordered to pay the costs incurred by the Commission in the proceedings before the Court of First Instance and the Court of Justice.

24. The UIC claims that the appeal should be dismissed and the Commission ordered to pay the whole of the costs.

12 — Paragraphs 58 to 64 of the judgment.

B — Opinion

I — *Preliminary remark*

25. As I have already mentioned, the Court of First Instance confined itself in the contested judgment to considering whether the Commission had applied the correct legal basis for its decision. The task of the Court of Justice in the present appeal is accordingly limited to considering whether the Court of First Instance committed errors of law in so doing. The question raised by the UIC in its response to the appeal and in the rejoinder as to whether the Commission's decision contained an adequate statement of reasons is therefore irrelevant to the appeal.

26. In their pleadings both the Commission and the UIC refer to a series of other Commission decisions relating to transport. [13] In those decisions the Commission took the view it is defending in the present proceedings that the scope of Regulation No 1017/68 (like each of the other regulations on competition in the transport sector) should be interpreted narrowly. [14] There is no need to enlarge upon the point that those decisions are not binding on the Court of Justice in carrying out its task of interpreting the relevant legislation. It should, however, be noted that actions have been brought against at least one of those decisions in which the question of the proper legal basis is raised. Those actions are at present pending before the Court of First Instance. [15] This underscores the importance of the present appeal.

II — *The grounds of appeal in detail*

1. *Field of application of Regulation No 1017/68*

27. The Commission's first plea concerns the finding of the Court of First Instance in paragraph 46 of its judgment that Regulation No 1017/68 also covers agreements concern-

13 — See, in particular, Decision 88/589/EEC of 4 November 1988 — London European/Sabena (OJ 1988 L 317, p. 47), Decision 91/480/EEC of 30 July 1991 — IATA Passenger Agency Programme (OJ 1991 L 258, p. 18) and Decision 94/894/EEC of 13 December 1994 — Eurotunnel (OJ 1994 L 354, p. 66).

14 — The statements made in the Eurotunnel Decision (cited in footnote 13; points 41 to 49) are particularly striking. The doubts expressed by the UIC on that score do not seem to me to be well-founded. Nor, in my view, can it be inferred from Decision 92/213/EEC of 26 February 1992 — British Midland/Aer Lingus (OJ 1992 L 96, p. 34), cited by the UIC, that the Commission has put a broad interpretation on the scope of the procedural rules relating to competition in the transport sector.

15 — See Case T-79/95 *SNCF* v *Commission* and Case T-80/95 *British Railways Board* v *Commission*, both of which concern the Eurotunnel Decision.

ing activities which are 'related to, and indispensable for' the provision of rail transport services. For its part, the Commission takes the view that, in principle, the regulation in question covers only agreements which directly concern the provision of transport.

28. The UIC argues that it is wrong to assume that in paragraph 46 of its judgment the Court of Justice intended to lay down a general criterion to the effect that Regulation No 1017/68 applied to all activities related to, and indispensable for, the provision of transport services. It argues that the Court of First Instance simply used those terms to describe Leaflet No 130. This was one of the indicia on which the Court of First Instance based its finding that Leaflet No 130 relates to particular aspects of international rail transport. If that had not been the case, the Court of First Instance would not have needed to consider immediately thereafter whether the Leaflet related to the supply of transport services or to transport rates.

29. Those arguments may probably be construed as meaning that the UIC considers the plea raised by the Commission to be without purpose. I disagree. As the Commission has rightly observed, the relationship between the finding in paragraph 46 of the judgment and the observations set out thereafter is not entirely clear. The ;1substance of those observations and, in particular, the fact that, in paragraph 47 of the judgment, they are linked to the preceding passage by the word 'furthermore', seem to me clearly to indicate that this is an additional consideration on which the Court of First Instance is relying. Consequently, the Commission's plea clearly must be considered.

30. The Commission's view that Regulation No 1017/68 is intended in principle to cover only agreements which directly concern the provision of transport services as such is based primarily on the rules laid down by Regulation No 141. To understand this view it is accordingly necessary to call to mind at the legislative history of the transport sector.

31. Early in 1962 the Council created, in Regulation No 17, a set of procedural rules for the application of Articles 85 and 86 of the Treaty to the economy as a whole. Regulation No 141, adopted shortly afterwards, retroactively limited the scope of Regulation No 17 in the transport sector. The Community legislature justified this on the ground that, in pursuance of the common transport policy, 'account being taken of the distinctive features of the transport sector,' it might prove necessary to lay down rules governing competition different from those laid down or to be laid down for other sectors. [16] In the

16 — See the first recital in the preamble to Regulation No 141.

third recital in the preamble thereto the Council qualified this as follows:

'The distinctive features of transport make it justifiable to exempt from the application of Regulation 17 only agreements, decisions and concerted practices directly relating to the provision of transport services ...'

32. Article 1 of Regulation No 141 reads as follows:

'Regulation 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article 86 of the Treaty, within the transport market.'

33. Article 3 of Regulation No 141 provides that Article 1 shall remain in force, as regards transport by rail, road and inland waterway, only until 31 December 1965. The Council later extended that deadline until 30 June 1968.

34. On 19 July 1968 — following the expiry of that deadline — the Council adopted Regulation No 1017/68. The Council referred to Regulation No 141 in the preamble thereto. It went on to state that establishing rules of competition for transport by rail, road and inland waterway is part of the common transport policy and of general economic policy. [17] When such rules were being settled account had to be taken of 'the distinctive features of transport.' [18] Since the rules of competition for transport derogated from the general rules of competition, it had to be 'made possible for undertakings to ascertain what rules apply in any particular case'. [19]

The Council went on to state that, with the introduction of a system of competition rules for transport, it was desirable that such rules should apply 'equally' to the joint financing or acquisition of transport equipment for the joint operation of services by certain groupings of undertakings, and also to certain operations in connection with transport by rail, road or inland waterway of providers of services ancillary to transport. [20] Certain types of technical agreement were also to be exempted from the prohibition of cartels. [21]

17 — First and third recitals.
18 — Fourth recital.
19 — Fifth recital.
20 — Sixth recital.
21 — Eighth recital.

35. Article 1 of Regulation No 1017/68, entitled 'Basic Provision,' reads as follows:

'The provisions of this regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical cooperation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping within the meaning of Article 4 of road or inland waterway transport undertakings, and to the abuse of a dominant position on the transport market. These provisions shall apply also to operations of providers of services ancillary to transport which have any of the objects or effects listed above.'

36. Article 2 of Regulation No 1017/68 contains a prohibition of restrictive practices, the wording of which largely echoes that of Article 85(1) of the Treaty. Article 3 provides for a legal exemption from that prohibition for the technical agreements mentioned above. Article 4 contains an exemption for education and the activities of groupings of undertakings in the field of transport by road and inland waterway and their financing or the joint acquisition of transport equipment or supplies.

37. Under Article 30(1), Regulation No 1017/68 entered into force — retroactively — on 1 July 1968.

38. This shows that the limitation to agreements 'directly' relating to the provision of transport services mentioned in the third recital in the preamble to Regulation No 141 is not expressly reflected in Article 1 of the Regulation. Nor is there any corresponding limitation in Article 1 of Regulation No 1017/68 — except in one particular case. It is also undisputed that Regulation No 1017/68 replaced Regulation No 141 in the rail, road and inland waterway transport sectors with effect from 1 July 1968. However, what conclusions should be drawn from these facts are in dispute.

39. The UIC takes the view that Regulation No 141 constituted a set of transitional rules which were superseded by Regulation No 1017/68 and thereafter ceased to have any purpose. The same is true, it argues, of the third recital in the preamble to Regulation No 141. It is thus not possible to rely on that recital in interpreting Regulation No 1017/68. This squares with the view taken by

the Court of First Instance as expressed in the contested judgment. [22]

The UIC further argues that the field of application of Regulation No 1017/68 is wider than that of Regulation No 141. The regulation now in force also covers agreements not directly related to transport. It was entirely within the Council's power to give Regulation No 1017/68 a wider field of application than Regulation No 141. Moreover, Regulation No 1017/68 was prefaced by extensive recitals. If the Council really had intended to restrict the field of application of the regulation in the way the Commission argues it did, it would have explained this in Article 1 itself or at least in the preamble. On that point, it should be noted that, when it adopted Regulation No 1017/68, the Council was aware — as is clear from the recitals — of the need to preserve legal certainty.

40. There is much to be said for this argument. In particular, it is significantly easier to reconcile with the wording of Article 1 of Regulation No 1017/68 than the view taken by the Commission. Nevertheless, I have come to the view that the interpretation advocated by the Commission should be preferred.

22 — Cited in footnote 3; at paragraph 43.

41. In the first place, the Commission quite rightly points out that there is a close relationship between Regulation No 141 and Regulation No 1017/68. The latter regulation refers explicitly to Regulation No 141 in its preamble. It entered into force at the time when Regulation No 141 ceased to apply to transport by rail, road and inland waterway, and followed on directly from it. Leaving aside the inclusion of technical agreements, agreements on joint financing or joint acquisition of transport equipment or supplies and the rules concerning the operations of providers of services ancillary to transport contained in the second sentence, the scope of Article 1 of Regulation No 1017/68 is otherwise largely identical with that of Article 1 of Regulation No 141.

42. To my mind there can be no doubt that Article 1 of Regulation No 141 should be interpreted restrictively. That much is clear simply from the fact that Regulation No 141 excluded the transport sector from the application of Regulation No 17. Since Regulation No 17 is the general regulation for the implementation of Articles 85 and 86 of the Treaty, Regulation No 141 — just like Regulation No 1017/68 — should be treated as a derogating provision and should be interpreted no more broadly than its purpose requires.

However, that purpose was to reconcile the performance of the task set by the Treaty in Article 3(g) of instituting a 'system ensuring that competition in the internal market is not

distorted' [23] with the introduction of a common policy in the sphere of transport required by Article 3(f). Thus, the adoption of Regulation No 141 represented not only a measure pursuant to Article 87 of the Treaty [24] — to which the first recital in the preamble to that regulation expressly refers — but also a measure coming under the common transport policy. [25]

43. Article 74, which opens Title IV of Part Two of the EC Treaty concerning transport, provides as follows:

'The objectives of this Treaty shall, in matters governed by this Title, be pursued by Member States within the framework of a common transport policy.'

In its judgment in *Commission* v *France* [26] the Court of Justice held in this connection:

'When Article 74 refers to the objectives of the Treaty, it means the provisions of Articles 2 and 3, for the attainment of which the fundamental provisions applicable to the whole complex of economic activity are of prime importance. Far from involving a departure from these fundamental rules, therefore, the object of the rules relating to the common transport policy is to implement and complement them by means of common action. Consequently the said general rules must be applied in so far as they can achieve these objectives.'

44. That decision of the Court of Justice was concerned with whether the general provisions of the Treaty were also applicable to sea transport, even though, according to Article 84(1), Title IV only applied to rail, road and inland waterway transport. However, the Court's finding can be generalized. It is undisputed that the provisions of Title IV apply to the rail transport sector (and to road and inland waterway transport). If the general provisions of the Treaty are applicable in a sector which Title IV does not cover, then they must be applicable in a sector such as rail transport which does come under the provisions of that Title. Accordingly, the general provisions of the Treaty — and thus Articles 85 and 86, too — must be applied in the rail transport sector in so far as the objectives of the Treaty can be achieved on that basis. The same is true of the general provisions adopted in order to implement those provisions. The adoption of special rules on competition, for example, is called for only in so far as it is necessary 'to

23 — That provision corresponds to the original Article 3(f) of the EEC Treaty which refers to competition 'in the common market' although no difference of ;1substance is involved.

24 — That article empowers the Council to adopt the regulations or directives required 'to give effect to the principles set out in Articles 85 and 86.'

25 — Regulation No 1017/68 expressly emphasizes this in the third recital in the preamble thereto (cited above).

26 — Case 167/73 *Commission* v *France* [1974] ECR 359, paragraphs 24, 25 and 26.

implement and complement (those general provisions) by means of common action'. Specific legislation on competition in the transport sector is thus only necessary when the 'special aspects of this branch of activity' [27] require it. Where this is not the case, the general rules apply.

45. The Council was aware of these relationships when it adopted Regulation No 141. The distinctive features of the transport sector are referred to in the very first recital. In the third recital the inference is drawn therefrom that the 'distinctive features of transport' make it justifiable to exempt from the application of Regulation No 17 *only* agreements, decisions and concerted practices *directly* relating to the provision of transport services. The fact that this restriction is not expressly stated in Article 1 of Regulation No 141 is, in my view, irrelevant. The Council had clearly stated in the preamble to the regulation that the exemption from the application of Regulation No 17 laid down by Article 1 should be limited to agreements which had a direct connection with the provision of transport services. There could thus be no doubt that Article 1 was to be interpreted in that way and hence restrictively.

46. These considerations are not of historical interest only, Regulation No 141 was indeed superseded by Regulation No 1017/68 in the rail, road and inland waterway transport sectors. However, as far as the interpretation of that regulation, is concerned, in principle it covers only agreements which *directly* concern the provision of transport services.

47. As I have already mentioned, the recitals in the preamble to Regulation No 1017/68 refer to Regulation No 141. Moreover, Regulation No 1017/68 entered into force when Regulation No 141 ceased to be force as regards the sector in issue. Apart from that, the abovementioned parallels in the wording above all suggest that the agreements mentioned both in Article 1 of Regulation No 1017/68 and in Article 1 of Regulation No 141 should be interpreted in the same way.

48. However, both the UIC and the judgment of the Court of First Instance point out that certain agreements included in Article 1 of Regulation No 1017/68 do not appear in Regulation No 141. They draw the conclusion that the regulation at present in force is broader in scope than Regulation No 141. This is obvious and is not disputed by the Commission. The crucial question, however, is whether, as a result, a broader interpretation should be given to the other agreements which were already covered by Regulation No 141 and the requirement for a direct link with the provision of transport services should be disregarded. In my view that question should be answered in the negative.

27 — The words used by the Court in *Commission* v *France* (cited in footnote 26; at paragraph 27).

49. The Commission has pointed out that the technical agreements and agreements on the financing or acquisition of transport equipment or supplies mentioned in the first sentence of Article 1 of Regulation No 1017/68 were included in the regulation for specific purposes. It should, indeed, be noted that Articles 3 and 4 of the regulation makes provision for exemptions from the prohibition of cartels for agreements of this nature. If regard is had to the reasons given by the Council to justify this provision, [28] the Commission's view that the Council did not include such agreements in the regulation in order to widen its sphere of application on generally, but to ensure the legitimacy of such agreements, definitely appears plausible.

Nor does the inclusion in the second sentence of Article 1 of Regulation No 1017/68 of certain operations of providers of services ancillary to transport conflict with that view. Admittedly, I do not agree with the Commission when it claims that Regulation No 141 already covered such operations. On the one hand, the Commission was unable to provide evidence in support of its assertion that this was clear from the Council's thinking at the time. On the other, the wording of the sixth recital in the preamble to Regulation No 1017/68 clearly does not support this view, stating, as it does, that it was 'desirable' that the regulation should 'apply' to such operations. However, the deciding factor, to my mind, is the fact that the second sentence of Article 1 of the regulation includes only those operations of providers of services ancillary to transport 'which have any of the objects or effects listed above'. Thus the second sentence contributes nothing to the interpretation of the agreements under discussion listed in the first sentence of the article.

50. In that connection I would point out that, contrary to the view taken by the Court of First Instance, no inference as to the extent of the field of application of the regulation can be drawn from Article 2 of Regulation No 1017/68. Article 2 is concerned only with the prohibition of cartels. In contrast, the field of application of the regulation, is determined exclusively by Article 1. Moreover, the Commission has cogently argued that the inclusion of Article 2, whose wording echoes Article 85 of the Treaty, can be attributed to the fact that, at the time when the regulation was adopted, it was still not beyond doubt whether Article 85 of the Treaty was directly applicable to the transport sector. Nor has the UIC, in its submissions in the present proceedings, expressly espoused the argument of the Court of First Instance based on Article 2 of the regulation.

51. The Commission also argues that the interpretation put forward by the Court of First Instance would mean that Article 1 of

28 — See particularly the sixth, eighth and ninth recitals.

Regulation No 1017/68 had a broader field of application than Regulation No 141 so far as agreements already affected by the latter regulation were concerned. This would necessarily mean that the field of application of Regulation No 17 became commensurating narrower when Regulation No 1017/68 entered into force. The Commission points out, not without justification, that the Council could have been expected to give reasons for this in the preamble to the regulation. However, no such arguments appear in the preamble. Consequently, it is not apparent that the Council intended that the identically-worded part of Regulation No 1017/68 should have its field of application enlarged in this way by comparison with Regulation No 141.

52. Admittedly, it must be conceded that the wording of Regulation No 1017/68 considered in isolation tends to support the interpretation favoured by the UIC and the Court of First Instance. However, in my view, even in that wording there is some support — admittedly not compelling — for the Commission's view. The assertion of the Court of First Instance in paragraph 43 of its judgment that the word 'directly' does not appear in Article 1 of Regulation No 1017/68 is incorrect. The joint financing or acquisition of transport equipment or supplies are covered by Article 1 only if they are 'directly related to the provision of transport services.' That criterion is not mentioned in the sixth recital in the preamble to the regulation, in which the Council gives reasons for the inclusion of such operations. However, it is stated there that the rules should 'apply equally' to such operations. As there is no indication in the remaining recitals of Regulation No 1017/68 as to what is meant by 'equally,' the question arises as to whether the Council is not implicitly referring to the third recital in the preamble to Regulation No 141. This would explain why the passage in issue in Article 1 of Regulation No 1017/68 requires there to be a 'direct' relationship with the provision of transport services.

In any event, it should be pointed out that the Commission itself has expressed the view that the agreements in issue do not directly concern the provision of transport services. This appears to be the reason why it did not go more closely into the use of the word 'directly' in the passage in question.

53. Convincing support for the view taken here is to be found — as the Commission has rightly pointed out — in the procedural regulations on the application of rules on competition in the field of air transport. Article 1 of Regulation No 141 excluded the application of Regulation No 17 in this sector, too. The resulting gap was not filled until the adoption of Council Regulation (EEC) No 3957/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector. [29] According to Article 1 of the regulation it 'lays down detailed rules for the application of Articles 85 and 86 of the Treaty to air transport

29 — OJ 1987 L 374, p. 1.

services'. The scope delineated thereby is not defined in any more detail elsewhere in the Regulation.

On the same day as Regulation No 3975/87, the Council adopted Regulation (EEC) No 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector. [30] The first recital in the preamble to that regulation reads as follows:

'Council Regulation No 3975/87 lays down the procedure for the application of the rules on competition to undertakings in the air transport sector. Regulation No 17 of the Council lays down the procedure for the application of these rules to agreements, decisions and concerted practices other than those directly relating to the provision of air transport services.'

54. This recital shows quite clearly that, in the air transport sector at least, the Council shares the view taken by the Commission in these proceedings that the special rules on competition should cover only agreements which relate *directly* to transport services as such, whereas all other agreements are to be assessed against the general rules of Regulation No 17. This is consonant with the view expressed by the Council in the third recital in the preamble to Regulation No 141. However, if, in a regulation adopted in 1987 in the air transport sector, the Council expresses the same view as it expressed in Regulation No 141 adopted in 1962, this can only mean that the position adopted in the latter regulation remains unchanged. It does not appear that the Council has changed its view in the intervening years. Both Regulation No 1017/68 and Regulation No 3975/87 concern the transport sector. Both replaced Regulation No 141 in the area of transport which they regulate. In my view, all this points to the inescapable conclusion that it must be assumed that Regulation No 1017/68, which was adopted in 1968, likewise covers only agreements directly relating to the provision of transport services, in so far as the legislature has not provided for exemptions (as in the case of the technical agreements mentioned in Article 1 of Regulation No 1017/68). The fact that the regulations in the air transport sector referred to were adopted nearly 20 years after the regulation at issue in this case is, contrary to the view taken by the UIC, of no relevance. The deciding factor is not the rules on the air transport sector as such but the continuity of the underlying view which may be inferred from those rules.

55. The abovementioned rules on the air transport sector also show quite clearly that the arguments of the UIC based on the ostensibly clear wording of Regulation

30 — OJ 1987 L 374, p. 9.

No 1017/68 are unsuccessful. Regulation No 3975/87 does not contain any express limitation of its scope to agreements directly relating to the provision of transport services either, although this was the intention of the Council — as is clear from the first recital in the preamble to Regulation No 3976/87.

56. The UIC's objections to this view based on the need to safeguard legal certainty are not convincing. Admittedly, if the intention was to make it possible for undertakings 'to ascertain what rules apply in any particular case,' [31] it would have been an obvious step for the legislature to have made it clear that the field of application of Regulation No 1017/68 was to be interpreted narrowly. But the legislature was under no obligation to make that clear.

In the first place, the limited field of application of Regulation No 1017/68 is clear from the very fact that the legislature was empowered only to enact such rules in so far as they were required by the distinctive features of transport. The Council had this limitation in mind when it adopted Regulation No 141, as the third recital in its preamble shows. The special procedural rules relating to transport are thus only applicable where the distinctive features of transport so require. Accordingly, in case of doubt Regulation No 17 is applicable. I would further point out that Regulation No 1017/68 by no means contains a comprehensive set of rules for the rail, road and inland waterway transport sectors. Rather, it covers only certain agreements expressly mentioned in Article 1 of the regulation. That fact alone raises the question as to how the field of application of Regulation No 1017/68 is to be demarcated from that of the general regulation, Regulation No 17. There is a need for a criterion which can be used to effect that demarcation. The criterion suggested by the Commission does reflect — as I have shown — the intention of the legislature and is in line with the substantive limitation of the scope of these special rules which is laid down by the Treaty. The criterion applied by the Court of First Instance, according to which the regulation also applies to activities which 'are related to, and indispensable for, the provision of rail transport services,' on the other hand, raises more questions than it answers, as the Commission has rightly objected.

57. I am, therefore, of the opinion that the Court of First Instance interpreted the field of application of Regulation No 1017/68 incorrectly and thereby erred in law. That error of law would, however, be of no consequence if the view of the Court of First

31 — See the fifth recital in the preamble to Regulation No 1017/68.

Instance that Leaflet No 130 fell in any event within the scope of the regulation were correct.

2. *Applicability of Regulation No 1017/68 to Leaflet No 130*

(a) 'Supply of transport'

58. The Court of First Instance expressed the view that Article 1 of Leaflet No 130 could have as its object or effect the limitation or control of the 'supply of transport'. Its reason for this view was that the article in question related 'directly to the determination of points of sale of international railway tickets'. [32]

59. The Commission argues that Article 1 of Leaflet No 130 does not relate to transport services but to their marketing. The article does not limit the supply of transport but the supply of intermediate services for the marketing of transport services.

60. I can only agree with the view expressed by the Commission. Article 1 of the Leaflet governs the accreditation of travel agents for the sale of tickets. It therefore — as the Court of First Instance rightly recognized — relates to the determination of points of sale. However, the article does not *directly* concern transport services as such. It is not a matter of reducing the number or capacity of trains travelling on a particular route or of limiting or controlling the *supply of transport* in some other way. Rather, the article in issue concerns the question of who should sell tickets. This has nothing directly to do with transport and the distinctive features of transport. Competition for the sale of tickets is limited, not competition on the market for the supply of transport.

61. I am unconvinced by the UIC's argument that the underlying distinction made here between the market for transport services as such, which are provided by the railways to passengers, and the market for the supply of intermediate services relating to the sale of tickets, which the travel agents provide to the railways, cannot be derived from Article 1 of Regulation No 1017/68. As the Commission has quite rightly pointed out, the answer to the question whether a particular case involves the 'supply of transport services' in practice logically presupposes that the relevant market has first been determined.

32 — Cited in footnote 3; at paragraph 48.

62. It is true, admittedly, that the provisions on the accreditation of travel agents can themselves have certain indirect effects on the supply of transport services. For example, it is conceivable that a restriction of the number of points of sale might lead to a drop in demand for tickets, which might prompt railway companies to reduce the supply of transport. At the same time, however, this example shows that such indirect effects are in fact rather unlikely. Moreover, the Commission rightly points out that the railway companies can have no interest at all in such effects.

63. In paragraph 54 of its judgment the Court of First Instance expressed the view that the effects of Leaflet No 130 on competition on the market for the distribution of railway tickets would be 'at the most secondary' to the effects which relate to the transport sector properly so called. The UIC argues that this is a finding of fact which cannot be contested on appeal. This is incorrect. Properly, what is involved is the question whether or not an agreement falls within the field of application of Regulation No 1017/68. This is, therefore, a *question of law* which is certainly subject to review on appeal.

64. The provisions of Article 1 of the Leaflet thus do not relate directly to the provision of transport services and cannot therefore be considered to be agreements which limit or control the supply of transport within the meaning of Article 1 of Regulation No 1017/68.

(b) 'Fixing transport rates and conditions'

65. In its judgment the Court of First Instance took the view that the provisions contained in Articles 3 and 4 of Leaflet No 130 governing the commission to be granted to travel agents constituted agreements fixing 'transport rates' or 'transport conditions.' According to its very wording, the obligation contained in Article 4.7 of the model contract had as its object or effect the 'fixing of transport rates'.

66. In its appeal the Commission first expressed the view that the price paid by a customer for his ticket was made up of two components, first, the transport rate proper and, secondly, the commission for the travel agent. As Leaflet No 130 only contained provisions relating to commission, this did not amount to the 'fixing of transport rates'. In its reply the Commission retreated from this rather artificial distinction which was rightly criticized by the UIC. It also now concedes that the transport rate is the fare payable by the passenger. The commission is one component of that fare.

67. Accordingly, provisions concerning the rate of commission to be paid can have an effect on the transport rate. However, the Commission rightly argues that this would be an *indirect* effect. It should be borne in mind that the transport rate as such is fixed by each railway independently. Each railway determines whether, for example, ECU 25, 50 or 100 should be paid for a journey from A to B. To construe an agreement by which the railways fix the price they pay for a particular service as the 'fixing of transport rates' within the meaning of Article 1 of Regulation No 1017/68 simply because the cost of that service is one component of the transport rate would constitute an unwarranted extension of the field of application of the regulation. The Commission argues in its reply that the price the railways have to pay for their rolling stock (engines and carriages) also affects the transport rate. If one took the argument of the Court of First Instance and the UIC to its logical conclusion, Regulation No 1017/68 would thus, for example, be applicable to an agreement between the railways on the prices that they are prepared to pay their suppliers. In its rejoinder the UIC went so far as to endorse this view explicitly. However, it is clear that such agreements relate to the market in the product in question (for example, railway engines), and not to the transport market as such. They are not agreements which fix transport rates *directly*. The same is true of agreements concerning the commission to be paid to travel agents.

68. As the Commission has rightly acknowledged, the provisions of Articles 3 and 4 of Leaflet No 130 do not relate to the market in transport as such but to the market for the distribution of tickets. As far as the *supply* of transport is concerned, the distinctive features of the sector — such as the fact that, as matters stand at present, railways must necessarily cooperate in the field of international passenger transport — must be taken into account. On the other hand, where the *distribution* of tickets is concerned, there are no such distinctive features to justify the application of Regulation No 1017/68 in the first place. The agreements under consideration here concerning the distribution of tickets are thus covered by the general provisions of Regulation No 17.

69. At first sight, a different assessment seems to be called for as far as the provisions of Article 4.7 of the model contract are concerned. In the Commission's estimation, that article obliges travel agents to sell tickets at the prices fixed by the railways. The obvious conclusion is that this constitutes the 'fixing of transport rates' since the price the passenger ultimately has to pay is being determined.

70. However, it should be borne in mind that it is the railway companies concerned which fix the rate for the transport they provide. The Court of First Instance acknowledges in its judgment that the relevant article of the model contract does not concern the fixing of the official fares themselves. [33] If the article actually prevented travel agents from passing their commission on to passengers or

33 — Cited in footnote 3; at paragraph 50.

sharing it with them, that would, in the view of the Court of First Instance, constitute the fixing of transport rates 'in so far as the railways would thus be preventing any competition on transport rates between accredited agents.' [34] Consequently, the Court of First Instance also recognizes that the article in issue relates to competition between travel agents and thus to the distribution sector but not to transport as such. For that reason too, in my view, this is not a case of the 'fixing of transport rates' within the meaning of Article 1 of Regulation No 1017/68.

71. Support for this view is to be found in the observations of the Court of First Instance on Article 4.3 of the model contract. That article prohibits travel agents from favouring in their operations means of transport competing with the railways. On this point, the Court of First Instance refers to the Commission's statement in its decision to the effect that that provision has the object and effect 'of restricting competition between the various means of transport'. [35] It draws the conclusion that this provision 'falls within the transport sector'. At the same time, it appears to take the view that Regulation No 1017/68 should therefore be applicable to the article. As the Commission rightly argues, that conclusion is dubious. The agreement could certainly affect the air transport sector or the sea transport sector, to which Regulation No 1017/68 does not apply. The Commission rightly asks whether, for that reason alone, it should apply all three sets of special procedural rules valid for those sectors to the article in issue.

72. A sensible solution can only be found by bearing in mind that the provisions of Leaflet No 130 do not directly concern the market for transport but the market for the distribution of transport. Their major impact is on *that* market. The impact on the transport market itself is, in contrast, of a secondary order. Therefore, Regulation No 17, and not Regulation No 1017/68, should be applied to these provisions.

(c) 'Services ancillary to transport'

73. Finally, there remains the view of the Court of First Instance that the activities of travel agents in distributing tickets should be viewed as 'services ancillary to transport' within the meaning of the second sentence of Article 1 of Regulation No 1017/68.

34 — Cited in footnote 3; at paragraph 51.

35 — Paragraph 52 of the judgment (cited above in footnote 3); Paragraph 95 of the decision (cited in footnote 4).

74. The expression 'services ancillary to transport' is not defined in the regulation. In its decision the Commission referred to the Council Directive of 29 June 1982 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies (ISIC Group 718) and in storage and warehousing (ISIC Group 720). [36] According to Article 3 of that directive, the expression 'persons in certain services incidental to transport' covers the activities of a 'commissionaire de transport' (in Belgium, France and Luxembourg), a 'Spediteur' (in Germany) and a 'freight forwarder' (in the United Kingdom). Travel agents, on the other hand, are listed in this nomenclature under 'travel agencies.' This terminology, however, is not binding in the case of Regulation No 1017/68, which has entirely different aims from those of the directive.

75. The Commission also referred to the Opinion of Advocate General Dutheillet de Lamothe in *Ministère Public Luxembourg* v *Muller*. [37] In that Opinion, the Advocate General stated, with regard to Regulation No 1017/68, in 'that the very specialized vocabulary of the law relating to transport, the expression "providers of services ancillary to transport" generally has a relatively limited scope: transport commission agents, bulking or handling undertakings, and so on'. [38]

76. I, too, am inclined to take the view that the expression 'services ancillary to transport' has a particular, narrow meaning. Everything suggests that it only has any meaning in the freight sector. One cannot object — as the UIC does — that this would curtail the field of application of Regulation No 1017/68. As the Commission rightly argues, the expressions used in the regulation are to be interpreted according to their actual meaning and not with a view to treating passenger transport and freight transport as far as possible in the same way. I do not think it is correct, however, to make matters depend simply on the fact that a person is carrying out an auxiliary activity in the transport sector, as the Court of First Instance appears to have done.

77. In the final analysis, however, this question can be allowed to lie. As both the UIC and the Commission acknowledge, the applicability of Regulation No 1017/68 depends not so much on whether the individuals concerned are performing 'services ancillary to transport,' as on whether their activities have the object or effects referred to in the first sentence of Article 1 of the regulation. They must therefore, in the light of my conclu-

36 — OJ 1982 L 213, p. 1.

37 — Opinion in Case 10/71 *Ministerè Public Luxembourg* v *Muller* ECR [1971] 723, at 731.

38 — Cited in footnote 37; at 736.

sions above, be activities which *directly* concern the supply of transport services. This is clearly not the case here. Travel agents do not supply transport services. Their activities are confined to the distribution of tickets. The agreements in issue here, which affect competition on that market, should, therefore, be assessed not by the yardstick of Regulation No 1017/68 but in the light of the general procedural regulation, Regulation No 17.

III — *Summary*

78. For all the above reasons I take the view that the judgment of the Court of First Instance is vitiated by errors of law and should therefore be set aside. At the present stage of the proceedings, however, it is not possible to dismiss the UIC's action against the Commission decision, in line with the Commission's claim. As I have already mentioned, the UIC relied on several pleas in the proceedings before the Court of First Instance, of which that Court has only considered one. The case must therefore be referred back to the Court of First Instance pursuant to the first paragraph of Article 54 of the Statute of the Court of Justice of the EEC.

79. Under Article 122 of the Rules of Procedure the Court of Justice is to make an order as to costs 'where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case'. As this is not the case here, the decision as to costs should be reserved to the Court of First Instance.

C — Conclusion

80. I therefore propose that the judgment of the Court of First Instance of 6 June 1995 in Case T-14/93 *Union Internationale des Chemins de Fer* v *Commission* should be set aside, the case referred back to the Court of First Instance and the costs reserved.