JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
24 March 1994 *

In Case T-3/93,

Société Anonyme à Participation Ouvrière Compagnie Nationale Air France, a company incorporated under French law, established in Paris, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14a Rue des Bains,

applicant,

v

Commission of the European Communities, represented by Francisco Enrique González Díaz, a member of its Legal Service, and by Géraud de Bergues, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

United Kingdom of Great Britain and Northern Ireland, represented by John D. Colahan, of the Treasury Solicitor's Department, acting as Agent, assisted by Christopher Vajda, of the Bar of England and Wales, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

and

British Airways plc, a company incorporated under English law, established in Hounslow (United Kingdom), represented by Richard Fowler QC, of the Bar of England and Wales, and William Allan and James E. Flynn, Solicitors, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

interveners,

APPLICATION for the annulment of the Commission's decision of 30 October 1992, made public by the spokesman for the Commissioner responsible for competition matters, whereby the Commission declared that it had no jurisdiction under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (in the corrected version published in Official Journal 1990 L 257, p. 13) to examine the acquisition of Dan Air Services Limited by British Airways plc,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, C. P. Briët, D. P. M. Barrington, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 23 November 1993,

gives the following

Judgment

The factual and legal background to the dispute

1 In the wake of problems encountered by the British civil aviation company Dan Air Services Limited (hereinafter referred to as 'Dan Air'), a member of the Davies and Newman Holdings plc group (hereinafter referred to as 'Davies and Newman'), British Airways plc (hereinafter referred to as 'BA') put itself forward as a prospective candidate for the takeover of that undertaking. The Davies and Newman group contains a main company, Dan Air, which accounts for approximately 90% of the group's turnover. Dan Air has a 50% interest in Gatwick Handling, which itself has a 50% interest in Manchester Handling. The group comprises four other companies, namely Shearwater Insurance Company Limited, Davies and Newman Travel Limited, Airways Leasing Company Limited and Dan Air Aviation Limited.

2 The acquisition of Dan Air was not notified to the Commission pursuant to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (in the corrected version published in Official Journal 1990 L 257, p. 13, hereinafter referred to as 'the Regulation'). However, there were informal contacts with Commission staff. On 16 October 1992 BA informed the Merger Task Force (hereinafter referred to as 'the MTF') of the proposed concentration. On that date its advisers informed the Commission's staff in writing that in their view the operation did not fall within the scope of the Regulation, since under the proposed terms of the operation Davies and Newman's turnover within the common market was less than ECU 250 million. They requested the Commission's staff to let them know as quickly as possible their reaction to that analysis. A memorandum was annexed to that correspondence showing that Davies and Newman's turnover during the company's last financial year, ended 31 December 1991, was higher or lower than ECU 250 million, depending on whether or not account was taken of the turnover resulting from Dan Air's charter activities. On the latter hypothesis, the turnover amounted, according to that document, to ECU 232.9 million. By letter of 21 October 1992 the Commission's staff (the MTF) confirmed to BA that, on the basis of the information provided, the proposed operation did not appear on an initial analysis to have a Community dimension. That letter stated that the views expressed in it were those of the MTF and were not binding on the Commission itself.

3 The relevant provisions of the Regulation are as follows:

Article 1:

' 1. ... this Regulation shall apply to all concentrations with a Community dimension ...

2. For the purposes of this Regulation, a concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million;

and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.'

Article 3:

' 1. A concentration shall be deemed to arise where:

...

(b) — one or more persons already controlling at least one undertaking ... acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

...'

Article 4:

' 1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

...'

Article 5:

' 1. Aggregate turnover within the meaning of Article 1(2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover ...

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

...'

Article 6:

' 1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

...'

Article 22:

' 3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).

...'

4 On 23 October 1992 the terms of the transaction were laid down in an agreement concluded between Davies and Newman of the one part and BA of the other part ('Agreement relating to the sale and purchase of part of the undertaking of Davies & Newman Holdings PLC', hereinafter referred to as 'the agreement of 23 October 1992').

5 The agreement of 23 October 1992 contains in particular the following terms:

' 2 AGREEMENT TO SELL THE SHARES AND ASSETS

Subject to the terms and conditions of this Agreement, with effect from 1 November, 1992 the Vendor shall sell as beneficial owner and the Purchaser, relying only on the terms and undertakings contained in this Agreement, shall purchase the Shares and the Assets free from all claims of the Vendor but subject to charges, liens, equities and encumbrances of third parties and together with all rights and advantages now and hereafter attaching thereto.

3 CONSIDERATION

The aggregate consideration for the purchase of the Shares and the Assets shall be:

3.1 £1 which shall be paid to the Vendor at Completion; and

3.2 the assumption by the Purchaser of the Liabilities.

4 CONDITIONS

4.1 *Conditions Precedent* Completion of this Agreement is conditional upon:

(omissis)

4.1.2 the Office of Fair Trading indicating in terms satisfactory to the Purchaser that it is not the intention of the Secretary of State for Trade and Industry to refer the proposed acquisition of the Shares and Assets by the Purchaser, or any matters arising therefrom, to the Monopolies and Mergers Commission;

4.1.3 the European Commission indicating in terms satisfactory to the Purchaser that neither the proposed acquisition of the Shares and Assets by the Purchaser nor any matters arising therefrom give rise to a concentration falling within the scope of Council Regulation (EEC) 4064/89;

(omissis)

4.1.5 the completion to the reasonable satisfaction of the Purchaser of the discontinuation or disposal of the charter operations of the Group as part of the rationalisation of the Group and preservation of its remaining business comprising:

(a) the disposal or transfer of ownership and/or possession of all aircraft owned, leased or held on hire purchase by the Company which have been identified by the Purchaser in writing prior to exchange of this Agreement to the Vendor as surplus to the requirements of the proposed future scheduled operations of the Group;

(b) the transfer, repudiation or termination of all contracts for charter flights by the Group;

(c) the effective termination of employment of employees employed by the Company or by the Vendor or the Group in the business of the Company in accordance with the provisions of the document in the agreed terms;

(d) the disposal to the Vendor of all books and records which contain information exclusively in respect of the charter operations of the Group;

(omissis)

4.2 *Waiver* The Purchaser may, in its sole discretion, waive any of the conditions referred to in Clauses 4.1.2 to 4.1.9 by written notice to the Vendor (...) on or before 5 pm on the last day for satisfaction of such conditions.

6 COMPLETION

6.1 *Date and Place:* Subject as hereinafter provided, Completion shall take place at the offices of the Purchaser's Solicitors on a date specified by the Purchaser which will be on or after 1 November, 1992 but otherwise not more than 3 days after the conditions set out in Clause 4.1 are satisfied. Any notice by the

Purchaser specifying such date may be revised by notice at the Purchaser's discretion, provided that the revised date is within such 3 day period.'

6 In performance of the obligation laid down in Clause 4.1.5 of the agreement, Davies and Newman ceased its charter operations prior to the effective date of the transaction and disposed of those parts of its undertaking which were not needed for the continuation of its scheduled operations. Davies and Newman provided to the respective coordinators all the slots held by it in respect of its charter flights, reduced its fleet of 38 aircraft to 12, terminated the charter contracts and reduced its flight staff.

7 By a further letter, dated 28 October 1992, supplementary information was provided to the Commission's staff by BA's advisers. By letter of 30 October 1992 the Commission's staff confirmed that in their view the transaction did not have a Community dimension. As before, the letter stated that the views expressed in it were those of the MTF and that they were not binding on the Commission in respect of any future decisions which it might take.

8 A statement by the spokesman for the Commissioner responsible for competition matters, also dated 30 October 1992, was reported in the following terms by the Europe press agency (hereinafter referred to as 'Agence Europe') on 31 October 1992:

'The proposed concentration between British Airways and Dan Air (disputed by interested third parties in Great Britain) is not considered of Community dimension as one of the quantitative thresholds fixed by the EC regulation on the prior control of mergers is not reached, stated a spokesman for the European Commission on Friday.

The regulation, according to which the Commission may authorise or impede a merger, stipulates in particular that "the total turnover achieved individually in the Community by at least two of the companies concerned" should be greater than 250 Mecus per year. This amount is not achieved by the regional European airline Dan Air, either within the Community or at world level. The Commission cannot, therefore, intervene. In the name of subsidiarity, it is up to the British Mergers and Monopolies Commission (MMC) to take a position on the project. Sir Leon Brittan's spokesman stated that the Commission, in its preliminary calculations, did not take into account Dan Air charter flight business because, as a prerequisite for merger with the British number one in air transport, Dan Air (affiliate to the holding company Davis & Newman) should give up this line of business. The merger regulation clearly stipulates on this that "only the turnover concerning the parties which are the object of the transaction are taken into consideration".'

9 The agreement of 23 October 1992 was submitted to the competent British authorities responsible for the control of concentrations, namely the Secretary of State for Trade and Industry (hereinafter referred to as 'the Secretary of State') and the Office of Fair Trading (hereinafter referred to as 'the OFT'). On 2 November 1992 the Secretary of State announced, by way of a statement to the press, that the national authorities had decided not to refer the matter to the Monopolies and Mergers Commission.

10 The transfer of the securities by which the concentration was effectively brought about took place on 8 November 1992.

11 On 9 November 1992 the Compagnie Nationale Air France (hereinafter referred to as 'Air France') sent to the Commission a letter concerning two matters. First, it contained Air France's observations regarding the matter giving rise to this action; secondly, it set out Air France's comments regarding the acquisition by BA of TAT European Airlines (hereinafter referred to as 'TAT'). That acquisition was at the time being examined by the Commission, following the receipt by it of

notification of the operation from BA. In the letter, Air France gave an account of the changes in the functioning of the market resulting from the dominant position which it claimed BA had gained as a consequence of the two operations.

12 With particular regard to the operation at issue in the present case, the applicant in its letter challenged the Commission's interpretation of the Regulation, observing that it was inappropriate to take into account, in calculating the relevant turnover for the purposes of appraising the 'Community dimension' of the operation, the fact that the undertaking taken over was to discontinue its charter activities.

13 In his reply to the applicant, dated 17 November 1992, the Commissioner responsible for competition matters, Sir Leon Brittan, adhered to the Commission's initial view; he pointed out, first, that in his view the cessation of the charter operations had occurred prior to the acquisition of Dan Air by BA, and secondly, that it was appropriate, pursuant to the first paragraph of Article 5(2) of the Regulation, to take into account only the turnover relating to the activities forming the subject-matter of the acquisition. The applicant responded in turn to that reply on 23 November 1992, confirming its initial interpretation of the Regulation.

14 On 27 November 1992 the Commission decided that it had no objection to the acquisition of TAT by BA, considering, in accordance with the conditions laid down in Article 6(1)(b) of the Regulation, that there were no serious doubts as to its compatibility with the common market (Official Journal 1992 C 326, p. 16).

15 The publication of that decision prompted a further letter from the applicant to the Commission, dated 2 December 1992, to which the Commissioner replied on 21 December 1992, adhering to the initial interpretation given to the Regulation and informing the applicant that the Belgian Government had filed a request within the meaning of Article 22(3) of the Regulation. The Commission gave its decision on that request on 17 February 1993 (Official Journal 1993 C 68, p. 5). The Commission found on that date that the operation had no Community dimension and that it neither created nor strengthened a dominant position within the territory of the Kingdom of Belgium.

The course of the procedure

16 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 5 January 1993, Air France brought this action for the annulment of the decision of 30 October 1992, which was made public on that date by the aforementioned declaration by the spokesman for the Commissioner responsible for competition matters.

17 By a separate document bearing the same date, the applicant applied for this case to be joined with Case T-2/93; that case, which was brought on the same day, concerned an application for the annulment of the aforementioned decision of the Commission of 27 November 1992. On 20 January 1993 the Commission informed the Court that it was not in favour of the two cases being joined, since they were too dissimilar. The parties were advised that the President of the Court of First Instance did not at that stage intend to join the two cases.

18 On 27 August 1993 the applicant applied once again for this case to be joined with Case T-2/93. The Commission informed the Court on 6 October 1993 that it was not in favour of the joinder of the cases.

19 By a separate document, lodged on 24 February 1993, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure. On 2 April 1993 the applicant submitted its observations on the objection of inadmissibility. By order of the Court dated 28 May 1993, the objection of inadmissibility was joined to the substance of the case. The written procedure between the main parties was completed on 6 October 1993, when the Commission lodged its rejoinder.

20 On 21 May 1993 the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as 'the United Kingdom') sought leave to intervene in support of the form of order sought by the defendant, pursuant to Article 37 of the Protocol on the Statute of the Court of Justice of the EEC, which is applicable to proceedings before the Court of First Instance by virtue of the first paragraph of Article 46 thereof. On 26 May 1993 BA sought leave, first, to intervene in support of the form of order sought by the defendant and, secondly, to express itself in English.

21 By order of 1 July 1993 the Court of First Instance gave leave to the United Kingdom and BA to intervene in the proceedings, rejected BA's application for derogation from the language rules in so far as that application concerned the written procedure, and reserved its decision on BA's application for derogation from the language rules in so far as it concerned the oral procedure.

22 By order of 21 September 1993, the Court gave leave to BA to express itself in English in the oral procedure.

23 BA and the United Kingdom lodged their statements in intervention on 31 August and 1 September 1993 respectively. On 5 October 1993 the applicant submitted its observations on those statements. On 6 October 1993 the Commission informed the Court that it had no observations to make on BA's statement in intervention and submitted its observations on the statement in intervention of the United Kingdom.

24 Upon hearing the Report of the Judge-Rapporteur the Court decided to open the oral procedure without any preparatory inquiry. However, the main parties were requested on 28 May 1993 to produce certain documents and to reply to certain written questions put by the Court. Further requests for the production of documents were also made to all the parties on 13 July 1993. On the same date certain other questions were put to the Commission and to the United Kingdom.

25 The Commission submitted the documents requested and replied to the Court's written questions on 7 July 1993 and 6 October 1993. It informed the Court that it did not possess any document embodying the spokesman's statement forming the subject-matter of the present dispute. On 27 August 1993 the applicant replied to the questions put by the Court and submitted observations on the questions put to the other parties and also on the answers given by the defendant. On 31 August 1993 BA replied to the question put by the Court. On 1 September 1993 the United Kingdom replied to the question asked of it and produced the documents requested.

26 The main parties and the interveners presented oral argument and answered questions put to them by the Court on 23 November 1993.

Forms of order sought by the parties

27 Air France claims that the Court should annul 'the decision of 30 October 1992 made public by the Commission's spokesman and published by Agence Europe on 31 October 1992 by which the Commission declared that it had no power to consider, under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, the concentration between British Airways and Dan Air, and (should) order the defendant to pay the applicant's costs'.

28 The Commission contends in its objection of inadmissibility that the Court should dismiss the application as inadmissible and should order the applicant to pay the costs.

29 The applicant claims in its observations on the objection of inadmissibility that the Court should declare the present application admissible.

30 The Commission contends in its defence that the Court should dismiss the application and order the defendant to pay the costs.

31 The United Kingdom, intervener, considers that 'no error of law was committed by the Commission in concluding that the acquisition by British Airways plc of Dan Air Services Limited was not a concentration with a Community dimension within the meaning of Article 1(2) of Council Regulation (EEC) No 4064/89'.

32 BA, intervener, 'supports the conclusions of the Commission in its contention that the Court should dismiss Air France's application as inadmissible and unfounded and should order Air France to pay the costs, including those incurred by BA in intervening in the case'.

Admissibility

33 The objection of inadmissibility raised by the Commission is composed of four parts. First, the Commission maintains that the contested statement is not in the nature of a decision capable of forming the subject-matter of an action for

annulment; secondly, it maintains that the application is not admissible, given the form of the act which it seeks to contest; thirdly, the Commission maintains that the form of action chosen by the applicant is not appropriate; fourthly, and lastly, the Commission maintains that, even if it were accepted that the contested statement is in the nature of a decision, the applicant has not established that it is of direct and individual concern to it.

As to whether the act is in the nature of a decision

Summary of the parties' arguments

34 According to the Commission, the contested statement cannot be categorized as a decision capable of forming the subject-matter of an action for annulment under the conditions laid down in Article 173 of the EEC Treaty. It cannot have the legal effect of settling a legal situation in a definitive and mandatory way, in particular because it is not binding on national authorities as regards the determination of their powers (judgment of the Court of Justice in Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299; judgment of the Court of First Instance in Case T-113/89 *Nefarma* v *Commission* [1990] ECR II-797). The Commission challenges the argument that the decision of 17 February 1993 can be interpreted as meaning that the Belgian authorities acknowledged that the contested statement of 30 October 1992 triggered the start of the one month time-limit allowed them for requesting the implementation of the provisions of Article 22(3) of the Regulation.

35 According to the Commission, Article 6(1)(a) of the Regulation gives it power to decide that the Regulation is inapplicable to a concentration only in so far as it has received notification of it. To the extent to which such notification is not effected, there is nothing in the Regulation which enables it to adopt a decision regarding such an operation (orders of the Court of Justice in Case 151/88 *Italy* v *Commission* [1989] ECR 1255 and Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917; judgment of the Court of Justice in Joined Cases 253/78 and 1/79 to 3/79

Giry and Guerlain and Others [1980] ECR 2327; judgment of the Court of First Instance in *Nefarma* v *Commission*, cited above).

36 The Commission further considers that, if the contested statement was not in the nature of a decision, nor could the answers subsequently given to the applicant by the Commissioner responsible for competition matters, which were of a purely optional nature, amount to a decision (order of the Court of First Instance in Case T-36/92 *Syndicat Français de l'Express International and Others* v *Commission* [1992] ECR II-2479, paragraph 48).

37 The United Kingdom considers, on the other hand, that the statement made by the Commission's spokesman constitutes a decision open to judicial review (judgment of the Court of Justice in Case 22/70 *Commission* v *Council* [1971] ECR 263 — the 'ERTA' case — paragraph 33 *et seq.*). It maintains that the United Kingdom authorities would not have asserted jurisdiction over the transaction unless there had been a decision by the Commission that it did not have a Community dimension.

38 According to BA, the contested statement does not constitute an actionable decision. The expression by the MTF of its opinion in its two letters of 21 and 30 October 1992, referred to above, did not produce any legal effect. If — which is denied — the transaction had to be notified to the Commission, those letters could not have absolved BA from that obligation. According to BA, those letters did not empower Member States to apply their national laws. Such powers derived directly from the Regulation and from the fact that the operation did not have a Community dimension. Lastly, the letters did not preclude the Commission from the subsequent exercise of its own powers.

39 The applicant considers, for its part, that the contested act is in the nature of a decision and is thus capable of forming the subject-matter of an action for annulment. It maintains that, in order for a decision to exist, all that is needed is for it to

have been adopted by the Commission. The Commission does not deny that it reached the firm view that it had no jurisdiction under the Regulation to examine BA's acquisition of Dan Air. The spokesman stated publicly that the Commission had adopted a decision, based on the Regulation, and more particularly on Articles 1(2)(b) and 5(2), that it had no jurisdiction in the matter, thus indicating, first, that BA's acquisition of Dan Air was a concentration within the meaning of Article 3 of the Regulation, and secondly, that the national authorities alone were competent to appraise the transaction.

40 According to the applicant, two points of substance emerge from the spokesman's statement. The first is that by 30 October 1992 the Commission had reached the firm view that the transaction did not have a Community dimension, the result being that any reference to the 'preliminary' nature of the act was thus inappropriate. BA did not proceed to notify the transaction following the statement by the spokesman, which implied that that formality was unnecessary. According to the applicant, the fact that the Commission did not react when the OFT examined the matter, and that in its letters to the applicant the Commission adhered to the view expressed in the contested act, establishes the definitive nature of that view. The second point is that by 30 October 1992 the Commission had also reached the conclusion that the transaction fell within the jurisdiction of the national authorities in the United Kingdom, and it could not be argued that those authorities could declare that they had no competence to examine it on the ground that it had a 'Community dimension'. Furthermore, the adoption of the decision of 17 February 1993 confirms that the Kingdom of Belgium likewise acknowledged that the spokesman's statement was in the nature of a decision.

41 According to the applicant, by reason of its definitive nature the act made public on 30 October 1992 is in substance identical to a decision adopted pursuant to Article 6(1)(a) of the Regulation. The distinction drawn between the contested statement and a decision adopted following notification is purely formal. Referring to the adage 'Tu patere legem quem fecisti', the applicant maintains that the contested act has mandatory force, in that the Commission is bound by the statement made by its spokesman on 30 October 1992. The absence of any provision in the Regulation for a complaints procedure reinforces the possibility, if actions of

the type brought by the applicant are held to be inadmissible, of the Commission determining points of principle regarding the interpretation of the Regulation without any possibility of judicial review.

42 According to the applicant, the discussion regarding the Commission's powers to act on its own initiative in relation to unnotified concentrations is beside the point. The real question relates not to the fact that the Commission refrained from taking cognizance of a transaction not notified to it but to the fact that it declared that it had no jurisdiction with regard to the transaction. Consequently, according to the applicant, the real jurisdictional question arising in this case is whether, in the absence of notification of the transaction, the Commission was competent to find that it fell outside the scope of the Regulation.

Assessment by the Court

43 The Court observes *in limine* that, according to the case-law of the Court of Justice, 'in order to ascertain whether the measures in question are acts within the meaning of Article 173 it is necessary ... to look to their substance. ... Any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void' (judgment of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639; see, to the same effect, the judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367).

44 In order to assess, in the light of that case-law, whether the statement in issue constitutes an act against which an action for annulment may be brought, it is necessary, therefore, to examine the extent to which the statement produces legal effects. From that standpoint the Court considers that the contested statement produces legal effects in a number of respects.

45 The Court considers that the contested act produced, first, a series of legal effects with regard to Member States. Having regard to its general scheme, the application of the Regulation in principle precludes the application of any other rules, in particular national laws which also have as their object the review of transactions involving concentrations between undertakings and which in the event of the Regulation being inapplicable in principle apply to such transactions. Which national laws are potentially applicable to a given transaction depends on the location of the undertakings which are parties to the transaction and of the markets and activities to which it relates. In the present case, the effect of the statement by the Commissioner responsible for competition matters, by which he publicly declared the Regulation to be inapplicable to the transaction in issue, was to confirm beyond all doubt the competence of the Member States whose territory was more particularly concerned having regard to the location of the undertakings which were parties to the transaction and the air services involved, namely the United Kingdom and the French Republic, to appraise the concentration in the light of their own national laws relating to the review of such concentrations. Moreover, one of the aforesaid Member States did in fact examine the transaction under its national law. The United Kingdom, which has intervened in support of the form of order sought by the defendant, itself contends that the present action is admissible, correctly pointing out that the statement of the Secretary of State dated 2 November 1992 was made possible by the contested statement of 30 October 1992 publicly declaring the Regulation to be inapplicable to the transaction.

46 Furthermore, the contested act produced effects in relation to any Member State whose territory is affected, directly or indirectly, by the transaction. Once the Commission has publicly declared, as in the present case, that a given concentration does not have a Community dimension, that removes any uncertainty as to the fulfilment of the conditions governing the application, by one or more Member States, of Article 22(3) of the Regulation. The Court notes that, here again, the provisions in question have, for the first time since the Regulation came into force, actually been applied by a Member State, in this instance the Kingdom of Belgium. Moreover, as the applicant has pointed out, the request made by the Kingdom of Belgium was in fact submitted within the time-limit of one month from the date of the contested statement, as laid down by the said provisions.

47 Next, the Court considers that the contested act also produced legal effects with regard to the undertakings which were parties to the concentration. As is confirmed, moreover, by the letters sent to the applicant by the Commissioner responsible for competition matters before the present action was brought, the effect of such a statement was absolve the undertakings involved in the transaction from the obligation to notify it to the Commission pursuant to Article 4(1) of the Regulation. It should in particular be noted that, since by virtue of Article 7(1) of the Regulation the notification of a concentration with a Community dimension has in principle suspensory effect, a public announcement to the undertakings involved in a transaction that they do not have to notify it is tantamount, from the standpoint of the Community law on concentrations, to permitting its immediate completion. It follows that, under Community law, the effect of the contested statement was to make it possible for BA to proceed forthwith with the acquisition of Dan Air.

48 Furthermore, the applicant is correct in its assertion that, in the circumstances of this case, the defendant institution is bound by the terms of the contested statement. Having regard to the difficulty of reversing an operation such as the one at issue in this case, such an operation cannot be satisfactorily completed in a situation in which the undertakings concerned are faced with legal uncertainty.

49 The Court observes, at this stage in its reasoning, that a clear distinction is to be drawn between the contested act and the letters sent to BA on 21 and 30 October 1992, not only because of the legal effects which the act had on the undertakings involved in the transaction, as just analyzed, but also because of the differences in the form taken by those successive appraisals of the transaction. The letters sent to BA on 21 and 30 October 1992 emanated solely from Commission staff and expressly stated, moreover, that they were not binding on the Commission as such; the contested act, on the other hand, must be considered to have been adopted by the Commissioner responsible for competition matters and thus publicly committed the Commission as a whole, particularly since it has been shown that the Commission intended to abide by its terms.

50 It follows from all the legal and factual considerations examined above that the Commission is wrong in maintaining that the legal appraisal and classification made public on 30 October 1992 were of a preliminary nature. Whilst it is true that such a description could be given to the appraisals made by the MTF in its letters of 21 and 30 October 1992, the same could not in any way be said to apply to the contested act, which was issued by a member of the Commission who was making a statement on the Commission's behalf. Consequently, for the reasons set out above, the legal nature of the contested statement is different from that of the opinion expressed by the MTF in the reply which it sent to BA on the same date as that of the contested act. Even though the letter from the MTF is a comfort letter within the meaning of the judgment in *Giry and Guerlain and Others*, referred to by the Commission, and cannot as a result form the subject-matter of an action for annulment, the position is different in the case of the contested statement. Moreover, as the applicant points out, the Commission cannot claim that it intended to make public an appraisal which was not of a definitive nature. It has in fact been adequately established in these proceedings that the Commission's appraisal was founded not only on the fact of the transaction being in the nature of a concentration but also on its not having a 'Community dimension'. In referring to the preliminary calculations which had been carried out, the Commissioner did not mean provisional calculations but the initial calculations needed to appraise the 'Community dimension' of any concentration operation between undertakings.

51 The Court considers, therefore, that the effects of the contested statement are exactly the same, for the undertakings which were parties to the proposed transaction, as would be the effects of a Commission decision, issued after the transaction had been notified and duly brought before it, in which it found that the transaction did not have a 'Community dimension' for the purposes of Article 6(1)(a) of the Regulation. For Member States and third parties, particularly direct competitors of the undertakings which were parties to the transaction, the effects are at least the same as those resulting from a formal decision by the Commission, likewise adopted pursuant to that provision of the Regulation. It is not contested that such a decision would be capable of forming the subject-matter of an action for annulment before the Court.

52 Consequently, the Commission's argument that it could find that a transaction did not have a 'Community dimension' only in the circumstances laid down in Article 6(1)(a) of the Regulation, that is to say following notification of the transaction, cannot be upheld. The legal effects of the contested statement are thus adequately established at this stage in the Court's reasoning, whether the effects are those produced in relation to the undertakings directly involved in the concentration, Member States or third parties.

53 Moreover, the Court considers to be unfounded the Commission's contention that, in order for the contested statement to be accepted as being a decision, the Commission would have to be regarded as having acted 'on its own initiative'. The Court considers that acceptance that the contested statement embodies an actionable decision amounts to no more than recognition of the fact that the Commission, acting on the basis of the opinion expressed by the MTF in response to the request made to it by BA, publicly stated that the Regulation was not applicable to the transaction in question. Since the Regulation, whose application cannot depend merely upon the wishes of the parties, empowers the Commission to examine certain concentrations, the Court considers that, contrary to the Commission's contentions, the latter must necessarily have the power to verify its own competence in relation to a given transaction, regardless of whether that transaction was notified, and to find, as in the present case, that the Regulation is not applicable to a given transaction.

54 It follows that the first part of the objection of inadmissibility raised by the Commission must be rejected.

The form of the act

55 According to the Commission, a further reason why the contested act is not in the nature of a decision is its form; it is not addressed to any person identified by name and does not represent the communication of a decision adopted by it, but simply expresses an opinion on the interpretation of the Regulation. Moreover,

given that it was made orally, the communication, which was intended for the general public, was not such as to be the subject of notification under Article 191 of the EEC Treaty. Furthermore, the applicant was unable — and for obvious reasons — to produce the alleged decision by the Commission as an annex to its application, contrary to the provisions of Article 19 of the Protocol on the Statute of the Court of Justice of the EEC.

56 The interveners and the applicant have not submitted any specific observations on this point.

57 The Court observes *in limine* that, as is apparent from the case-law of the Court of Justice, 'the choice of form cannot change the nature of the measure' (judgment of the Court of Justice in Case 101/76 *Honig* v *Council and Commission* [1977] ECR 797) and 'the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under (Article 173)' (judgment in *IBM* v *Commission*, cited above; see also, to the same effect, the 'ERTA' judgment, cited above). It is in the light of that case-law that the merits of the second part of the objection of inadmissibility raised by the defendant must be examined.

58 The Court notes that the contested act is in an unusual form, inasmuch as, first, it is apparent from the inquiry into the case, and in particular from the Commission's answers to the written questions put by the Court, that no written document exists apart from the transcription published by certain press agencies such as Agence Europe, and secondly, the very wide publicity given to the statement tends, by its very form, to assimilate it to an act of general application rather than a decision of an individual nature. However, as regards the fact that the act is not in written form, it has been consistently held, for example in the cases previously cited (see paragraph 43 above), that the right to bring proceedings takes into account, first of all, the contents of the act and whether it produces legal effects which affect the applicant personally. Furthermore, the Court of Justice has previously held to be admissible actions brought against acts which take an unusual form, such as a purely verbal decision (judgment of the Court of Justice in Joined Cases 316/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641).

In the present case, the terms of the statement, far from being contested by the institution, were on the contrary amply confirmed by it both in the course of the correspondence which took place prior to the bringing of this action and in the course of these proceedings. As regards the nature of the publicity given to the act, it should be noted that this was independent of the act itself, has no bearing on its legality and affects only the date from which the time allowed for bringing an action against it starts to run.

59 Consequently, the Court considers that it must reject both the argument that the applicant has been unable to annex to its application a copy of the contested statement and the argument that the contested statement, not having been properly notified to the undertakings involved in the concentration, has not yet started to produce effects since, as already stated, for the purposes of determining this dispute, the contested statement certainly produced effects on third parties.

60 It follows that the second part of the objection of inadmissibility raised by the Commission must be rejected.

The objection regarding 'parallel legal remedies'

Summary of the arguments of the parties

61 According to the Commission, the contested act did not in any way prevent the applicant, if it considered its case to be well-founded, from giving formal notice to the Commission to call on BA to notify the transaction. Such notice would have enabled the applicant either to have recourse, pursuant to Article 175 of the EEC Treaty, to proceedings for failure to act, in the event of a failure to respond on the part of the Commission, or, in the contrary case, to an action for annulment. In the present case, however, Air France never submitted any such request.

62 The Commission also maintains that the applicant should, in the context of the annulment proceedings, have directed its claims against one of the replies addressed to it by the Commissioner responsible for competition matters, rather than against the statement of 30 October 1992, which was not addressed to it. Moreover, in the Commission's view, the applicant should within a reasonable period after 31 October 1992, by which date it was in a position to know of the existence of the contested statement, have requested the institution to communicate it to it. In the absence of any such step, the action is inadmissible.

63 Lastly, the Commission maintains that the proceedings should have been brought before the national courts, even though it might have been necessary for a reference to be made to the Court of Justice under Article 177 of the EEC Treaty for a preliminary ruling on the question of the 'Community dimension' of the transaction. The Commission considers that the applicant's position could only have been affected, if at all, by a decision taken by the national authorities.

64 The United Kingdom has not submitted any observations on this point.

65 BA points out that Air France has not submitted any observations to the United Kingdom authorities.

66 The applicant maintains that the Commission's finding that it has no jurisdiction in respect of operations which are not notified to it cannot have the effect of depriving undertakings of a remedy against that finding. To follow the Commission's reasoning would mean that the Commission would be able, without being subject to judicial review, to agree with undertakings involved in a concentration that there was no need for it to be notified of the transaction. This could lead to two distinct procedures, depending on whether or not the transaction was notified to the Commission.

Assessment by the Court

67 In the Court's view, it is certainly true that the remedies advocated by the Commission are, as a general rule, the only ones which are available to third parties in the context of disputes arising following informal contacts between undertakings and the Commission, as envisaged in point 8 of the preamble to Commission Regulation (EEC) No 2367/90 of 25 July 1990, as amended, on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (Official Journal 1990 L 219, p. 5). However, they are not appropriate to the circumstances of the present case; nor do they preclude other remedies. In the present case, recourse to the legal procedures advocated by the Commission would have unnecessarily protracted the resolution of the dispute in circumstances which, as the Commission itself has acknowledged, are hardly compatible with the urgency which characterizes the general scheme of the Regulation. Without in any way seeking to call in question the essential role played by the informal contacts procedure from the standpoint of the principle of sound administration, the Court considers, out of concern for procedural economy and the effective exercise of judicial review, that it was legitimate for the applicant, having regard to the answers given to the various letters which it sent to the Commissioner responsible for competition matters, to take the view that a formal notice to the Commission would not produce the desired result and that it was open to it to have direct recourse to an action for annulment of a statement comprising a legal appraisal of the facts on the part of the competent authority.

68 Moreover, the Court observes that, although the Commission has asserted that the claims made in the application for annulment should have been directed against one of the replies given to the applicant by the Commissioner responsible for competition matters, rather than against the contested statement of 30 October 1992, the letter from Air France to the Commissioner responsible for competition matters dated 9 November 1992 is to be interpreted as a request made to the Commission for the modification or withdrawal of its own appraisal of the facts, as embodied in the contested statement of 30 October 1992. In those circumstances, it was legitimate for the applicant to institute proceedings directly against the initial appraisal made by the Commission on 30 October 1992, rather than against the institution's response of 17 November 1992, in which it refused to accede to the applicant's request, as is apparent from the terms of the letter

(see, by analogy, the judgment of the Court of First Instance of 28 October 1993 in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169).

69 The Court turns next to the objection that the applicant should instead have directed its action against the decision of the Secretary of State, in so far as that decision necessarily implied that that authority was competent to rule on the concentration in question, subject to the possible need for a reference to the Court of Justice under Article 177 of the Treaty for a preliminary ruling on the question whether the transaction had a 'Community dimension'. Without there being any need to consider whether it was possible to dispute before the national courts the legality of a Commission decision which by that time had become definitive, it may in any event be noted that the possible existence of a remedy before the national courts cannot preclude the possibility of contesting the legality of a decision adopted by a Community institution directly before the Community courts under Article 173 of the Treaty. That is particularly so in the present case since, as the applicant has rightly pointed out, the review of a concentration carried out under the laws of one or more Member States cannot be compared, as regards its scope and effects, with that carried out by the Community institutions on the ground that those different reviews have the same objective. Unlike reviews carried out at Community level, reviews by national authorities are limited to an appraisal of the scope of the operation within the territory of the Member State concerned; moreover, such reviews are particularly complex in matters involving international civil aviation.

70 Lastly, the Court considers that it cannot be argued, in the circumstances of the present case, that the applicant should, within a reasonable period after 31 October 1992 (by which date it was in a position to know of the existence of the contested statement), have requested the institution to communicate the statement to it, since the letters sent to the Commissioner responsible for competition matters are to be regarded, as has been stated (see paragraph 68 above), as seeking the withdrawal or modification by the institution of the decision contained in the contested statement. In response to those requests, which were themselves made within a reasonable time, the Commissioner merely confirmed his own initial interpretation of the Regulation and refused the requests, without contesting

the existence of the statement, or the accuracy of its contents or the applicant's interpretation of it. Consequently, a request for the communication of the act was in any event pointless.

71 It follows that the third part of the objection of inadmissibility raised by the Commission must be rejected.

The question whether the contested decision is of direct and individual concern to the applicant

Summary of the arguments of the parties

72 The Commission considers that the statement of 30 October 1992 does not clearly alter the applicant's legal position. In the Commission's view, even if the Court were to conclude that the contested statement constitutes an act producing binding legal effects, the act did not adversely affect the applicant, which has not established that the Commission's conclusion that the Regulation was inapplicable to the concentration in itself alters its position. The contested statement is without prejudice to the question of the compatibility of the operation with the common market. For that reason again, it cannot have produced any legal effects (judgments in *IBM* v *Commission*, cited above, and in Case 53/85 *Akzo* v *Commission* [1986] ECR 1965).

73 The Commission further considers that, even if the contested statement were to be categorized as a decision taken under Article 6(1)(a) of the Regulation, such a decision was not of individual concern to the applicant (judgments of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, Case 231/82 *Spijker Kwasten* v *Commission* [1983] ECR 2559 and Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 25). In order for an undertaking to be

regarded as individually concerned by an operation, it is not enough that it is in competition with the undertaking involved in that operation.

74 According to the Commission, the applicant's argument that the limitations imposed by the case-law of the Court of Justice with regard to the admissibility of actions for annulment brought by individuals should not be applied in the field of concentrations would mean, if it were accepted, that any airline could bring an action, contrary to the wording of Article 173 of the Treaty, which provides that the decision the legality of which is in issue must be of direct and individual concern to the applicant (judgment of the Court of Justice in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, paragraph 16).

75 The United Kingdom has not submitted any particular observations on this point.

76 In BA's view, Air France has not established that its interests are affected by the measure contested by it (judgment of the Court of Justice in Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459, paragraph 7). According to BA, the applicant's complaint concerns, in reality, alleged discrimination of which it regards itself as the victim.

77 The applicant considers that the decision is of direct and individual concern to it. It submits that a decision by the Commission to the effect that it is not competent to examine the compatibility of the operation at issue with the common market is such as to alter its legal position. First, the Commission appears to be requiring the applicant to prove, straight away, the incompatibility of the operation with the common market. Secondly, the Commission seems to consider that a declaration by it that it has no competence to examine a transaction must automatically confer competence on the national authorities, without taking account of the fact that the appraisals carried out by the national authorities are undertaken on the basis of material and territorial factors which are different from those applicable to appraisals by the Commission.

78 According to the applicant, the disappearance of its competitor Dan Air, to the benefit of another competitor, namely BA, which took it over, constitutes a sufficient alteration in market positions for the direct competitors of the undertaking effecting the take-over to be individually concerned by the operation. In the present case, the consequences flowing from BA's acquisition of Dan Air directly affected the position of Air France. Moreover, in its letters to the Commissioner responsible for competition matters, to which it makes express reference, Air France demonstrated in detail the ways in which the operation was of direct and individual concern to it. Not only did BA take over Dan Air's position at Gatwick, but it also took control or possession henceforth of four of the seven flights on the Paris-London route; on the Nice-London route, BA's share of the air traffic amounted to 70%, placing it in a dominant position of a clearly restrictive nature in that particular market. In the market for the various networks established by the large-scale European carriers, Air France is BA's main competitor. BA's acquisition of Dan Air had a multiplier effect which affected the applicant individually.

Assessment by the Court

79 It should be noted *in limine* that 'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed' (judgment in *Plaumann* v *Commission*, cited above).

80 Having regard to those principles, the Court considers, first, that it follows from the foregoing (see paragraph 47 above) that since the contested statement enabled, in law and in fact, the proposed operation to be put into effect immediately, it was such as to bring about an immediate change in the situation in the market or markets concerned, depending solely on the wishes of the parties. In the present case, it is clear from an analysis of the terms of the agreement of 23 October 1992 that it was to take effect on the later of 1 November 1992 or the date of satisfaction of the suspensory conditions contained in it, which included, *inter alia*, the receipt by the undertakings concerned of confirmation by the Commission, in terms of

sufficient certainty, that the operation did not fall within the scope of the Regulation. In those circumstances, and given that the actual share transfer giving effect to the concentration took place on 8 November 1992, the contested statement is to be regarded as of direct concern to the undertakings engaged in the international civil aviation market or markets who could, on the date of the contested act, be certain of an immediate or imminent change in the state of the market. On the other hand, had the Commission considered that the operation had a 'Community dimension', those undertakings would have had the assurance that no change in the state of the market or markets could occur prior to the expiry of the period laid down in Article 7(1) of the Regulation and before they had had the opportunity of asserting their rights and being heard.

81 The effect of a finding by the Commission that an operation involving a concentration between undertakings does not have a 'Community dimension' is to deprive third parties of the procedural rights conferred on them by Article 18(4) of the Regulation which they would have been able to exercise if the operation, having a 'Community dimension', had been notified to the Commission. For reasons relating both to its immediate legal effects on the market or markets affected by the proposed concentration and to the procedural rights of third parties, the contested statement is therefore to be regarded as directly affecting the position of competitors in the civil aviation market or markets (see the similar reasoning contained in the judgments of the Court of Justice in Case 26/76 *Metro* v *Commission* [1977] ECR 1875 and Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23).

82 Lastly, as regards the question whether the contested statement is of individual concern to the applicant, it appears secondly that, as the Commission acknowledged during the proceedings, the situation of Air France is clearly different, having regard to the concentration in issue, from that of other international air carriers. The concentration leads to the substitution of BA for Dan Air on the regular routes operated by the latter. It appears that the air links involved concern connections, first, between France and the United Kingdom and, secondly, between Belgium and the United Kingdom. As regards the connections between France and the United Kingdom, the departure points on the routes operated by Dan Air were London and Manchester and the destinations were Montpellier, Nice, Paris,

Pau and Toulouse. The connections between Belgium and the United Kingdom concerned the Brussels-London route. By virtue of the acquisition of Dan Air, BA's position on all those routes is significantly stronger, whereas the competitive position of the Air France group has been correspondingly affected in a manner which distinguishes it individually from any other air carrier. In those circumstances, Air France's position is comparable to that of an addressee of the decision, within the meaning of the *Plaumann* judgment. Consequently, the Court considers that Air France has sufficiently established that the contested act clearly alters its position in the market and that it is of direct and individual concern to it, within the meaning of the judgments in *Eridiana and Others* v *Commission* and *Cofaz and Others* v *Commission*, cited above.

83 The fourth part of the objection of inadmissibility raised by the Commission must therefore be rejected.

84 It follows from all of the foregoing considerations that the objection of inadmissibility raised by the Commission must be rejected.

Substance

85 In its application, the applicant relies on three pleas in law in support of its claim for annulment:

— the first relates to an infringement of Article 1(1) and (2) and Article 5(1) and (2) of the Regulation;

— the second relates to a breach of the general principle of legal certainty in the application of Article 1(1) and (2) and Article 5(1) and (2) of the Regulation;

— the third relates to a disregard of the general principle of sound administration and an infringement of Articles 155 and 190 of the EEC Treaty.

86 In its reply, the applicant also maintains that the contested decision constitutes a breach of the general principle of equal treatment.

The first plea submitted in support of the application for annulment, relating to an infringement of Article 1(1) and (2) and Article 5(1) and (2) of the Regulation

Summary of the arguments of the parties

87 The applicant contests the Commission's view that the operation at issue does not have a 'Community dimension' within the meaning of Article 1(1) of the Regulation because, in assessing the turnover of the undertaking acquired, its turnover from its charter activities is not to be taken into account on the ground that those activities were discontinued prior to the concentration giving rise to the dispute.

88 The applicant considers, first, that Article 5(1) of the Regulation obliges the Commission, in assessing whether Article 1(2) is applicable, to take account of the turnover achieved by an undertaking which is a party to a concentration in respect of its ordinary activities during the preceding financial year. It is common ground that Dan Air carried on its charter activities during the preceding financial year.

According to the applicant, therefore, the turnover achieved in respect of that area of activity should have been taken into account for the purposes of the appraisal of the 'Community dimension' of the operation.

89 The applicant maintains, secondly, that the discontinuance of an area of activity by an undertaking which is a party to a concentration does not give rise to the application in its favour of the provisions of Article 5(2) of the Regulation, which only concern partial transfers. Whereas the continuation of activities not the subject of the transfer is an essential condition for the application of Article 5(2) of the Regulation, activities which are discontinued during the preceding financial year, or during the period following the end of that year and the date when the concentration is effected, form an integral part of the activities transferred. To take into account any changes arising after the end of the reference year would be to rob that concept of all effect. For that reason, only changes which affect the undertaking itself, by means of either the acquisition or the disposal of assets, should be taken into consideration. That rule is all the more applicable where, as in the present case, the discontinuance of part of its activities by the undertaking making the transfer occurs by reason of a contractual obligation imposed on it by the transferee undertaking.

90 According to the applicant, the purpose of the criterion of turnover for the reference year is to make it possible for it to be determined automatically — and without any room for argument — whether the economic appraisal of the operation is to be made at Community level or national level. The reference date applied in order to determine whether that operation has a Community dimension is not the same as that which forms the basis for the Commission's substantive appraisal of the operation, as is apparent from the decision of the Commission in the case of Accor/Wagons-lits (Decision 92/385/EEC of the Commission of 28 April 1992 declaring the compatibility with the common market of a concentration, Case No IV/M. 126, Official Journal 1992 L 204, p. 1). The concept being one of accounting, the choice of the financial year constituting the reference year for the purposes of appraising the dimension of the operation must be strictly adhered to. Moreover, according to the applicant, the liabilities in respect of the charter business were assumed by the transferee.

91 The Commission considers that the interpretation of Article 5 of the Regulation suggested by the applicant ignores both the letter and the spirit of the Regulation, as well as the purpose of the turnover thresholds provided for in Article 1(2) of the Regulation and the method by which they are to be calculated. The purpose of the thresholds is to reflect the real significance of the operation in relation to the structure of the bid. It follows that turnover calculations are meaningless unless they are applied to undertakings in the form which they take at the moment at which the concentration occurs. Consequently, the Commission cannot depart from its practice of taking account of the economic significance of the assets actually transferred. To have taken into consideration the activities of Dan Air which were discontinued prior to the transaction would have resulted in an incorrect appraisal of the significance of the transaction.

92 Even though the reference to the turnover for the preceding financial year is intended to provide a clear and indisputable basis, it cannot result in the structural changes arising after that date being ignored. The Commission considers that there is nothing in the first subparagraph of Article 5(2) of the Regulation which confirms the restrictive interpretation of that provision advanced by the applicant. The provision is not in any way concerned with what happens to those parts of the undertaking which are not transferred. Consequently, it no more excludes cases in which the activity in question is discontinued prior to the transfer than cases in which the activity is continued by an operator other than the transferee. In this particular case, Dan Air's charter activities had been discontinued, and the fact that BA took over Dan Air's liabilities does not in itself mean that BA took over the assets relating to the charter activities of the company which it acquired. Were it the case, however, that BA appeared to be circumventing Community law, the Commission would not have hesitated to apply the provisions of Articles 8(4), 14 and 15 in relation to it. If the activity were resumed within a period of two years, the Commission would be obliged to examine the operation as a whole at the date of such resumption, in accordance with the second subparagraph of Article 5(2). Lastly, the Commission considers that the solution advocated by the applicant, requiring accounting data to be adhered to, would introduce inequality between the Member States, inasmuch as the rules relating to the presentation of accounts may differ from one Member State to the next.

93 The United Kingdom considers that the exclusion of the turnover from charter operations is consistent with the Regulation, whether it is accepted that the

contested transaction involved the acquisition of only part of an undertaking within the meaning of Article 5(2) of the Regulation, or alternatively whether it is accepted that the undertaking concerned, within the meaning of Article 5(1) of the Regulation, is the undertaking constituted by the activities acquired. Clearly, if in the context of the same transaction, Dan Air had continued to operate its charter business, the transaction would have fallen within Article 5(2) of the Regulation. The same result would have followed if Dan Air had transferred its charter business to a person other than BA. The United Kingdom sees no reason why a different approach should be taken when the part of the undertaking not acquired is discontinued. Moreover, the agreement of 23 October 1992 contained a condition framed in the alternative, namely the disposal or discontinuance of the business.

94 In the alternative, should Article 5(2) be held inapplicable, then Article 5(1) must apply. In the absence of a definition of the term 'undertaking' in the Regulation, it must be understood as designating an economic unit. In the present case, the part of Dan Air's business which ceased to be independent and which came under the control of BA was that comprising Dan Air's business other than its charter operations. That part of the business was immediately identifiable by its turnover and should, according to the intervener, be regarded as the undertaking concerned, within the meaning of Article 5 of the Regulation.

95 BA considers that it acquired only part of the undertaking of Davies and Newman and that only the turnover in respect of that part of the undertaking should therefore be attributed to the transferor, pursuant to Article 5(2) of the Regulation. In the particular circumstances of this case, the undertaking of Davies and Newman which came under the control of BA comprised all the personnel and assets needed for the continuation by Dan Air of its scheduled services alone. From the point of view of Davies and Newman, it was this which constituted 'the undertaking concerned', and only the turnover of that undertaking was to be taken into account.

96 According to BA, the fact that the discontinuance of the charter business was voluntary is irrelevant, since as a result of their disposal the slots, personnel and aircraft needed for the relaunching of Davies and Newman's charter business did not

come under the control of BA. Moreover, if, contrary to the foregoing arguments, the extent of the undertaking of Davies and Newman fell to be assessed at a date prior to that on which the operation was effected, then clearly BA did not acquire all of that undertaking and it follows that Article 5(2) of the Regulation should apply.

Assessment by the Court

97 The Court notes first of all that Article 1(1) of the Regulation provides that 'this Regulation shall apply to all concentrations with a Community dimension'; under Article 4(1), 'concentrations with a Community dimension defined in this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.'

98 Secondly, under the terms of Article 3 of the Regulation, 'a concentration shall be deemed to arise where ... (b) one or more persons already controlling at least one undertaking ... acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings'; Article 1(2) of the Regulation provides that, 'for the purposes of this Regulation, a concentration has a Community dimension where: (a) the combined aggregate Community-wide turnover of all the undertakings concerned is more than ECU 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State'.

99 It follows from those provisions, taken together, that the question whether the acquisition of Dan Air by BA was an operation with a 'Community dimension', within the meaning of those provisions, is tantamount to inquiring whether the acquisition, as governed by the terms of the agreement of 23 October 1992, had to be notified to the Commission. At that date, the transferee and the transferor reached complete agreement and, if the operation had a 'Community dimension', that agreement constituted the point at which time started to run for the purposes of notification in accordance with Article 4(1) of the Regulation.

100 In that regard the Court notes, first of all, that even though the acquisition of part of an undertaking is only possible as a general rule in so far as the acquisition contract concerns fixed assets and not the acquisition of financial assets, it is nevertheless apparent from the terms of the agreement of 23 October 1992, and particularly from Clause 2, headed 'Agreement to Sell the Shares and Assets', that the aim of the agreement was both the transfer to BA of the portfolio of shares held by Davies and Newman and the transfer of certain fixed assets constituting the undertaking. Furthermore, it is clear from Clause 4.1.5 of the agreement — which the applicant wrongly describes as a resolutory condition but which in fact constitutes a suspensory condition — that the parties intended, with effect from 23 October 1992, to make performance of the acquisition contract conditional on the assets relating to the charter business not being acquired by the transferee, either because the assets would be disposed of by the transferor to a third party or because the transferor would arrange for the discontinuance of its charter business. By making the date on which the contract took effect conditional on fulfilment of, *inter alia*, the condition laid down in Clause 4.1.5, the parties clearly intended to exclude the charter business from the scope of the acquisition contract. Consequently, and given that BA gave an undertaking to the Commission on 28 October 1992 that it would not implement Clause 4.2 of the agreement entitling it to waive the abovementioned suspensory condition, Clause 4.1.5 is to be interpreted as limiting the agreement to assets of Davies and Newman other than those needed for the operation of the charter business, that is to say, to the assets required for the operation of scheduled flights and the business of the other subsidiaries of the group (see paragraph 1 above).

101 Article 5 of the Regulation provides that: '1. Aggregate turnover within the meaning of Article 1(2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities ...

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers ...'.

102 It is apparent from the general scheme of that provision that the Community legislature intended that the Commission should intervene, in performance of the task conferred upon it of controlling concentrations, only where the proposed operation is of a certain economic size, that is to say, where it has a 'Community dimension'. The objective of Article 5(2) of the Regulation is thus to determine the real dimension of the concentration for the purposes of examining whether, having regard to the parts of the undertaking which are actually acquired, whether or not constituted as legal entities, the proposed operation has a 'Community dimension' within the meaning of Article 1 of the Regulation.

103 Having regard to the objective of Article 5(2) of the Regulation, and despite the fact that the article contains no express reference to the discontinuance of activities, the Court considers that the concepts of the partial transfer and the partial discontinuance of activities are comparable, inasmuch as they both allow a precise appraisal to be made of the exact subject-matter, composition and extent of the proposed concentration. It follows that only the turnover relating to those parts of the undertaking which are actually acquired are to be taken into account for the purposes of appraising the dimension of the proposed operation. Consequently, reference should only be made to the turnover for the last financial year of those parts of the undertaking which are actually acquired.

104 It is apparent from the foregoing analysis of the acquisition contract concluded between BA and Davies and Newman on 23 October 1992 that, by virtue of the suspensory condition contained in Clause 4.1.5, the assets needed for carrying on

the charter business are expressly excluded from the scope of the contract. By thereby restricting the scope of the concentration to only some of the assets of the undertaking acquired, the acquisition contract confers upon that operation the nature of a partial acquisition within the meaning of Article 5(2), relating to the fixed assets of part of the undertaking. It is common ground that, following the completion of the concentration, the transferee undertaking was not in economic terms made up of the sum of the undertakings party to the concentration, since BA, in its new form, did not comprise the assets needed by Davies and Newman for the charter operations of Dan Air prior to the completion of the operation. That finding cannot be contested on the ground that the transferee assumed the transferor's liabilities, including those relating to the charter business.

105 In applying the provisions of Article 5(2) of the Regulation, therefore, only the turnover in respect of activities effectively forming the subject-matter of the transaction was to be taken into account for the purposes of the appraisal of the 'Community dimension' of the operation. It is common ground that the turnover thus determined, that is to say, the turnover relating solely to the part of Davies and Newman which was acquired by BA, determined at the end of the preceding accounting year and communicated to the Commission by BA in the schedule of calculations annexed to the letter of 16 October 1992, is below the threshold laid down by the provisions of Article 1(2) of the Regulation.

106 Even though the concentration does not appear to have actually taken place until the last of the suspensory conditions laid down in the agreement of 23 October 1992 was satisfied, that is to say, on a date between 2 and 8 November 1992, the Court considers that, in the light of the terms of the contract taken as a whole, as well as the undertakings given by BA, the Commission was entitled to proceed on 30 October 1992, the date of the contested statement, with the appraisal of the 'Community dimension' of the operation for the purpose of determining whether or not the proposed operation needed to be notified, and to do so without waiting for the last of the suspensory conditions to be satisfied.

107 The Court further observes that, as the Commission has pointed out, if it appeared that an undertaking was in reality seeking, by means of a partial discontinuance of activities, to circumvent the provisions of the Regulation, the Commission would have at its disposal the means laid down by the Regulation, in particular those provided for in Articles 8(4), 14 and 15, by which to remedy the situation. That is in any event not the position in the present case, since it is common ground that the terms of the contract, particularly the permanent discontinuation by Dan Air of its charter operations and the undertakings given by BA, were scrupulously adhered to.

108 It follows from all the foregoing considerations that the first plea relied on by the applicant in support of its application for annulment must be rejected.

The second plea submitted in support of the application for annulment, relating to a breach of the general principle of legal certainty in the application of Article 1(1) and (2) and Article 5(1) and (2) of the Regulation

109 This plea is expressed in two parts: the applicant maintains, first, that the notion of the discontinuance of an activity does not correspond to any precise legal or economic concept and that the Commission, by having recourse to it, has breached the principle of legal certainty, and, secondly, that the Commission should, on the contrary, have used the powers conferred on it by the Regulation, and particularly those contained in Article 8(2), in order if necessary to oblige the transferee permanently to discontinue the charter operations.

110 The Commission expresses puzzlement, as a preliminary point, over the interrelation between the first two pleas put forward by the applicant in support of its application for annulment. If the Court were to reject the first plea, it would follow that the Commission's interpretation of Article 5 of the Regulation was correct. The correct application of a provision of Community law cannot

constitute a breach of the general principle of legal certainty. Furthermore, the notion of the discontinuance of an activity is wholly unambiguous. The fact that it is not expressly referred to in the Regulation is thus of no consequence, since it is indisputably covered by it.

111 The interveners have not submitted any observations on this point.

112 The Court considers, as regards the first part of the plea, and in addition to what is stated in paragraph 103 above, that the notion of the discontinuance of an activity is purely a question of fact and that, consequently, the allegation that, by taking into consideration the discontinuance of the charter operations, the Commission committed a breach of the principle of legal certainty must be rejected.

113 As regards the second part of the plea, it is in any event not for the Court, in the context of the annulment proceedings, to substitute its own appraisal for that of the Commission and to rule on the question whether the Commission should have imposed an obligation, by means of Article 8(2) of the Regulation, requiring discontinuance of the activity, particularly since that provision of the Regulation concerns the substantive examination of the compatibility of the proposed concentration with the common market carried out by the Commission in respect of an operation which has been the subject of prior notification (see the most recent decision on the point, contained in the judgment of the Court of First Instance in Joined Cases T-68/69, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403, paragraphs 319 and 320).

114 It follows that the second plea advanced in support of the application for annulment must also be rejected.

The third plea submitted in support of the application for annulment, relating to a disregard of the general principle of sound administration and an infringement of Articles 155 and 190 of the EEC Treaty

115 This plea is also broken down into two parts. The applicant complains that the contested decision was made, first, without consulting the Member States or any interested third undertakings, and secondly, in breach of Article 190 of the Treaty. First of all, the general principle of sound administration required the Commission to seek advice, with a view to settling a question of principle with full knowledge of all the issues, even though it was not expressly bound by any provision to hold any such consultations. Secondly, the obligation to give reasons laid down in Article 190 of the Treaty forms part of the general principle of the right to a fair hearing (judgment of the Court of Justice in Case 24/62 *Germany* v *Commission* [1963] ECR 63). By refraining from making any relevant reference to the Regulation, the Commission failed to discharge that obligation. Consequently, the contested decision is vitiated by a failure to state the reasons on which it was based, since the real reasons for which it was given did not become apparent until after 30 October 1992. Consequently, the reasoning on which the contested statement was based was not capable of being understood from the statement alone.

116 The Commission, referring to the case-law of the Court of Justice, considers, first of all, that it was not under any obligation to consult the Member States or any interested undertakings prior to issuing an opinion on the acquisition of Dan Air by BA. Secondly, the Commission maintains that the complaint regarding the alleged failure to state its reasons arises in any event from confusion between the formal statement of the reasons on which the decision was based and the validity of the reasons. In the present case, the Commission maintains that it gave an adequate statement of the reasons why it considered that the Community-wide turnover of the acquired undertaking was less than ECU 250 million. The question whether those reasons were correct and such as to justify the Commission's finding that it had no competence to deal with the matter falls within the ambit of the review of the substantive legality of the act.

117 The United Kingdom does not consider that the Regulation requires the Commission to consult the Member States before making a decision as to its own competence to deal with a concentration. The rights of Member States are laid down in Article 19 of the Regulation, and those of third parties in Article 18(4). Neither of those articles is applicable where the operation is not notified.

118 BA has not submitted any observations on this point.

119 As regards the first part of the plea, the Court observes, in accordance with the judgment of the Court of Justice in Case 71/74 *Frubo* v *Commission* [1975] ECR 563, that to require the Commission to go through the formality of consultation where, as in the present case, the provisions applicable to the matter under consideration do not impose any such consultation obligation on the institution, would oblige it to fulfil unnecessary formalities and needlessly delay the procedure. Consequently, the Court does not consider that there exists any general principle of law which would lead the Community courts to impose on the Commission a consultation obligation for which, as in the present case, there is no provision in the legislation.

120 As to the second part of the plea, the Court considers that, as the Commission has rightly pointed out, it arises from a confusion between a complaint relating to a failure to state the reasons on which a decision was based and the question whether the reasons given for the decision were valid. In the present case, the Court considers that — as is moreover adequately established by the present action itself, from which it is clear that the applicant was perfectly well placed to dispute the validity of the interpretation of the Regulation set out in the contested statement — the statement contains a clear and adequate account of the reasons on which it was based, in that it indicated that the operation did not have a 'Community dimension' and set forth the legal and economic reasoning on which that conclusion was based.

121 Consequently, the third plea advanced in support of the application for annulment must also be rejected.

The fourth plea submitted in support of the application for annulment, relating to a breach of the general principle of equality

122 The applicant maintains that, prior to the adoption of the contested statement, the Commission arranged, or agreed to take part in, consultation with the United Kingdom, from which the other Member States, and in particular the French Republic, were wrongly excluded. The general principle of equality should extend to all Member States in their relations with the Commission. Consequently, the applicant is entitled to rely on a plea relating to the failure to consult its own government.

123 The Commission states that it did not take part in any tripartite negotiations between the United Kingdom, BA and itself. The fact that it sent to the OFT a copy of its letter to BA of 30 October 1992 merely demonstrates the Community institution's spirit of cooperation towards the national authorities responsible for competition matters. Whilst it acknowledges that the Court of Justice has expressly enshrined the principle of equal treatment between the Member States with regard to Community law (judgment of the Court of Justice in Case 231/78 *Commission* v *United Kingdom* [1979] ECR 1447, paragraph 17), the Commission doubts that individuals can avail themselves of that principle, which only concerns relations between the Member States and the Communities.

124 The interveners have not submitted any observations on this point.

125 The Court considers that this plea has no basis in fact, since, contrary to the applicant's claims, there is nothing in the documents before the Court which indicates that the Commission consulted the United Kingdom Government prior to the adoption of the contested statement. This plea must therefore be rejected, without there being any need to examine either its admissibility with regard to Article 48(2) of the Rules of Procedure or the question whether natural or legal persons are entitled to rely on a breach of the principle of equal treatment between Member States.

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

Costs

127 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs, including those incurred by British Airways as intervener.

128 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the United Kingdom is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1) Dismisses the application;

2) Orders the applicant to pay the costs, including those of the intervener British Airways;

3) Orders the United Kingdom of Great Britain and Northern Ireland to pay its own costs.

Cruz Vilaça Briët Barrington

Saggio Biancarelli

Delivered in open court in Luxembourg on 24 March 1994.

H. Jung J. L. Cruz Vilaça

Registrar President