JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)
6 June 1995 *

In Case T-14/93,

Union Internationale de Chemins de Fer, an association of railway companies, having its head office in Paris, represented by Chantal Momège, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Bernd Langeheine, of its Legal Service, and Géraud de Bergues, a national official seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 92/568/EEC of 25 November 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.585 — Distribution of railway tickets by travel agents) (OJ 1992 L 366, p. 47),

* Language of the case: French.

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

composed of: J. Biancarelli, President, R. Schintgen, C. P. Briët, R. García-Valdecasas and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 8 November 1994,

gives the following

Judgment

Facts

1 International passenger transport by rail operates, essentially, by adding together successive national services and thus requires cooperation between national railway companies ('railways'). The price of an international ticket is generally equal to the total of the fares for the national sections of the journey. A clearing system allows each railway to receive the part of the fare corresponding to that part of the service provided by it, with each railway guaranteeing to the others the calculation and payment of the sums due.

2 International tickets may be sold by the railways themselves or by accredited travel agents. The sale of a ticket by a travel agent entails the payment of a commission calculated on the basis of the total price. Where an agent sells a ticket for an international journey provided by two or more railways, the agent receives a commission from each of them, calculated in proportion to the revenue which each receives. Similarly, where a railway sells directly an international ticket for a journey which it provides in conjunction with one or more other railways, it receives a commission from each of the other railways on whose behalf it sold the ticket. Approximately 130 million international tickets are sold each year.

3 In 1952, the Passenger Committee of the Union Internationale des Chemins de Fer (International Railway Union, hereinafter 'the UIC'), whose membership comprises 69 railways, drew up a 'Travel Agencies' leaflet ('Leaflet No 130'). That leaflet, which has been updated on numerous occasions, in particular in 1989, regulates certain aspects of the relationship between the railways and the travel agents. The version of Leaflet No 130 which is at issue in these proceedings contains, *inter alia*, the following provisions.

4 With regard to the *conditions governing the appointment of travel agents,* Article 1.1 of Leaflet No 130 provides:

'1.1 Agencies shall be accredited by the main railway of the country in which they are situated. In respect of through coupons or sectional coupons involving another railway, this official approval shall be given subject to the agreement of the latter.

Exceptions to these rules can, however, be made, notably in reciprocal agreements concluded between the various railways.'

5 The applicant has explained that a 'through coupon' is an international ticket and that a 'sectional coupon' is a domestic ticket of another railway.

6 With regard to the *granting of commissions to agents,* Article 3 of Leaflet No 130 provides:

'3.1 Each Railway is recommended to grant Agencies the same rate of commission on its sectional coupons and on its proportion of through tickets and coupons.

In cases where certain Railways which leave the Agencies to print their own coupons, desire to differentiate between the rates of commission paid on the two varieties of ticket, in order to pay the Agencies for printing, it is desirable that the difference between the rates of commission granted be as low as possible.

3.2 Railways must grant a commission on their proportions of through tickets and coupons and of sectional coupons purchased by Agencies at the stations and official offices of the Railway which accredited them, inasmuch as the agreement binding the said Agencies to this Railway does not allow them to make them out themselves.

Railways are recommended to grant a lower rate of commission (5%) on the tickets purchased in this way than that applied in the case of tickets issued by the Travel Agencies themselves ...'

7 With regard to the *rates of commission*, Article 4 of Leaflet No 130 provides:

'4.1 The commission rates granted to agencies approved by a foreign railway for services rendered, or to foreign railways for services rendered by their stations, are listed in Appendix 4.

These rates shall apply to all services provided in international traffic covered by the TCV (Tarif Commun Voyageurs — Joint Passenger Rates) ...

4.3 The commission rate granted to other railways and to agencies approved by a foreign railway shall, in principle, be uniformly set at 10%.

Railways granting a commission rate of less than 10% shall only receive from other railways a commission rate matching that which they themselves grant to these railways (reciprocity agreement).

This provision applies to both "agency" and "station" sales.

4.4 Railways shall be able to grant a commission rate higher than that stipulated in Appendix 4, on the basis of bi-or multilateral agreements.

4.5 Railways which approve an agency for the sale of services shall themselves settle the full amount of commission due to this agency for services rendered. The same practice shall apply for services which an agency is authorized to obtain from railway ticket counters, with the proviso that the reduced commission rate granted

in this case shall be included in the commission granted by other railways for the "station" sales of the railway that approved the agency concerned.

...'

8 It appears from the version of Appendix 4 of Leaflet No 130 in force from 1 January 1990 that the rate of commission granted to travel agents accredited by a foreign railway amounts to 10% of the sale price of the ticket for 26 European railways, including those of 11 of the 12 Member States of the Community as constituted prior to 1 January 1995. The only exception is the Italian railway, which grants a commission of 6% for tickets purchased in stations and 9% for those issued by travel agents. In its case, the same applies to tickets sold in Italy, on which the Italian railway receives a commission also of 6% or 9%.

9 Finally, Article 1.3 of Leaflet No 130 recommends railways to use, in their agreements with travel agents, the *provisions of the model contract* in Appendix 1 to the leaflet. Articles 1 and 4 of that model contract stipulate as follows:

'ARTICLE 1

Scope of the Agreement

1) The ..... Railway (hereinafter called the Railway) hereby authorizes the ..... Travel Agency (hereinafter called the Agency) to issue the national and international rail tickets corresponding to the tariffs which were communicated to it.

...

ARTICLE 4

Obligations of the Agency

The Agency is required:

1) To endeavour, by every means in its power, to develop passenger traffic over the lines of the Railways participating in the tariffs in accordance with Article 1 and by all other means of transport operated either by the Railways themselves or in association therewith.

2) To carry out the maximum amount of publicity, by all appropriate means, in favour of travel over the lines of the Railways concerned or by the other means of transport referred to in the preceding paragraph.

3) Not to favour by its publicity, by its proposals and also by its advice to the public, the traffic of means of transport competing with the Railways and with the other means of transport referred to in paragraph 1.

...

6) To effect the sale of the tickets with which it has been supplied, as required by the conditions laid down by the Railway, and of the fares notified to it.

7) To make out and sell tickets and coupons at the official fares mentioned in the tariffs and to abstain from collecting any charge for preparing the tickets and coupons issued.'

10 In 1990, the Commission sent requests for information, relating to Leaflet No 130, to the applicant and a number of European railways. The requests sent to Société Nationale des Chemins de Fer Français ('SNCF') and to British Rail were made on the basis of Article 11(3) of Regulation No 17 of the Council of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

11 On 10 October 1991, in accordance with Article 2 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), the Commission sent a statement of objections to the applicant. On 18 February 1992, a hearing was held in Brussels in accordance with Article 7 of Regulation No 99/63.

12 On 25 November 1992, after consulting the Advisory Committee on Restrictive Practices and Dominant Positions provided for in Article 10(3) of Regulation No 17, the Commission adopted Decision 92/568/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/33.585 — Distribution of railway tickets by travel agents) (OJ 1992 L 366, p. 47, hereinafter 'the Decision'). The operative part of the Decision, which is based on Regulation No 17, reads as follows:

'*Article 1*

The International Union of Railways (UIC) has infringed the provisions of Article 85 (1) of the EEC Treaty by adopting and circulating UIC

leaflet No 130 on relations between railway companies and travel agents providing for:

— control of the appointment of agents by each national railway company,

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

— the setting of a standard rate of commission,

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

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

Article 2

The UIC shall bring to an end the infringements referred to in Article 1 within a period of twelve months of the date of notification of this Decision.

Article 3

A fine of ECU 1 000 000 (one million) is hereby imposed on the UIC in respect of the infringements referred to in Article 1.

...'

Procedure and forms of order sought

13 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 8 February 1993.

14 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. The parties presented oral argument and replied to questions put by the Court at the hearing in open court on 8 November 1994.

15 The applicant claims that the Court should:

— annul the Decision on the grounds that it was adopted on an incorrect legal basis and contains inadequate reasoning;

— annul the Decision on the grounds that Article 85(1) of the Treaty was infringed and incorrectly applied and that inadequate reasoning was given;

— annul the Decision on the ground that the Commission infringed the right to a fair hearing by not allowing the UIC to challenge the anticompetitive object of Leaflet No 130;

— annul the Decision on the ground that the refusal to apply Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68 of the Council of 19 July 1968

applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302) constituted a breach of those articles;

— in the alternative, annul Article 3 of the Decision concerning the fines imposed on the UIC on the ground that the criteria for imposing a fine were not met;

— in the further alternative, reduce the amount of the fine imposed on the UIC in accordance with the principles of proportionality and fairness; and

— order the Commission to pay the costs.

16 The defendant contends that the Court should:

— dismiss the application; and

— order the applicant to pay the costs.

Substance

17 The Court considers that the forms of order sought by the applicant, as set out above, are, primarily, the annulment of the Decision and, in the alternative, the annulment or reduction of the fine imposed.

The primary claims for the annulment of the Decision

18 In support of its primary claims, the applicant relies essentially on six pleas in law, alleging: (i) wrongful application of Regulation (EEC) No 1017/68; (ii) breach of Article 85(1) of the Treaty, having regard to the indispensable character of the provisions of Leaflet No 130 relating to approval by the local railway and the uniform commission rate; (iii) misinterpretation by the Commission of the provisions of Leaflet No 130 relating to the discounting of commissions; (iv) infringement of the right to a fair hearing in that the Commission failed to allow the applicant to challenge the alleged object of certain provisions of Leaflet No 130; (v) breach of Article 85(1) of the Treaty with regard to the obligation not to favour competing modes of transport; and (vi) breach of Article 85(3) of the Treaty and/or Article 5 of Regulation No 1017/68.

The first plea — Wrongful application of Regulation No 1017/68

19 Articles 1 and 2 of Regulation No 1017/68 provide as follows:

'*Article 1*

Basic provision

The provisions of this Regulation shall, in the field of transport by road, rail and inland waterway, apply both to all agreements, decisions and concerted practices

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

Article 2

Prohibition of restrictive practices

Subject to the provisions of Articles 3 to 6, the following shall be prohibited as incompatible with the common market, no prior decision to that effect being required: all agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix transport rates and conditions or any other trading conditions;

(b) limit or control the supply of transport, markets, technical development or investment;

(c) share transport markets;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the provision of transport services.'

— Summary of the parties' arguments

20 The applicant claims that the Decision was adopted on an incorrect legal basis, namely Regulation No 17, instead of the correct legal basis, Regulation No 1017/68. In particular, it argues that Leaflet No 130 relates to the 'control of the supply of transport' and the 'fixing of transport rates' within the meaning of Article 1 of Regulation No 1017/68.

21 It stresses, *in limine*, that the railways do not compete but are obliged to cooperate in the provision of international rail services (see above, paragraphs 1 and 2). Within the framework of the common transport policy, moreover, the Council has always insisted on the need for cooperation, in particular so that the railways can present themselves on the international transport market as a single carrier: see Council Resolutions of 7 December 1970 on cooperation between railway undertakings (OJ, English Special Edition, Second Series IX, p. 38) and of 15 December 1981 on Community railway policy (OJ 1982 C 157, p. 1) and Council Recommendation 84/646/EEC of 19 December 1984 on strengthening the cooperation of the national railway companies of the Member States in international passenger and goods transport (OJ 1984 L 333, p. 63).

22 It was in that context, according to the applicant, that Leaflet No 130 was drawn up in order to enable international rail tickets to be sold in a very large number of agencies. It stresses that the system of Leaflet No 130 is based on the principle of a general and reciprocal agency relationship, under which each railway monitors the agents which it accredits on its territory, trains their staff and stands surety for them vis-à-vis the other railways. In addition, each railway calculates and pays out the percentage of the ticket price due to the others, without verification by those other railways.

23 With regard to the 'supply of transport', the applicant maintains, in substance, that Leaflet No 130 sets up a mutual accreditation system designed to provide users with a global and efficient supply of international transport services. The supply of such transport to users is evidenced in material form by a document, the ticket, distributed either directly by the railway companies themselves or through travel agents. The ticket is merely a material representation of the supply of transport, inseparable from that supply and itself of no intrinsic value.

24 Leaflet No 130 further provides detailed rules for the sale of tickets issued by railways or by agents and thus constitutes 'control of the supply of transport'. In that context, the term 'supply' should be taken in its economic sense of 'the quantity of goods and services which a producer is willing to sell for a given price', the sense prevailing also in Community competition law.

25 With regard to the 'fixing of transport rates', the transport rate within the meaning of Regulation No 1017/68 is the fare paid by the passenger for his or her journey. Leaflet No 130 covers that point since, pursuant to the Convention concerning International Carriage by Rail of 9 May 1980 ('COTIF') and the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by

Rail ('CIV') appended thereto, it allows railways to introduce into their agreements with agents the obligation to draw up and sell tickets at the official fares indicated in the tariffs.

26 Furthermore, the fare paid by the passenger for the journey must cover all the carrier's costs, including the remuneration paid to the agent. Even if the distribution of tickets is distinct from the actual carriage, it is none the less indispensable and cannot be separated from that service.

27 With regard to the Commission's reasoning as set out in points 50 to 59 of the Decision, to the effect that there must be a direct link between the agreement in question and the provision of the transport, the applicant submits that no such requirement is apparent either from Article 1 of Regulation No 141 of the Council of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291) or from Article 1 of Regulation No 1017/68. Moreover, notwithstanding the third recital in its preamble, the title and Article 1 of Regulation No 141 refer only to the non-application of Regulation No 17 to 'transport' or 'the transport sector', and Article 2 mentions 'transport by rail'. In any event, Regulation No 141 has become devoid of purpose since the adoption of Regulation No 1017/68, which does not require any direct link between the agreement in question and the transport service.

28 The applicant adds that, in any event, even assuming the requirement of a direct link, such a link is present in this case. It points out that the Commission itself in its defence defined the service provided by the travel agent as 'the negotiation and conclusion of contracts on behalf of transport undertakings'. Such a service is an activity directly relating to the provision of transport services.

29 The applicant also submits that Case 311/85 *VVR* v *Sociale Dienst van de Plaatselijke en Gewestlijke Overheidsdiensten* [1987] ECR 3801, referred to by the Commission in the Decision, is not relevant here.

30 The Commission replies that it based its Decision on Regulation No 17 both because Leaflet No 130 does not relate 'directly' to the provision of transport services and because travel agents are not providers of services ancillary to transport but independent providers of services.

31 The third recital in the preamble to Regulation No 141 defines the scope of the regulation in such a way as to exclude services not directly linked to the provision of the transport service. Similarly, the expression 'providers of services ancillary to transport' must have a limited scope (see the Opinion of Advocate General Dutheillet de Lamothe in Case 10/71 *Ministère Public Luxembourg* v *Muller* [1971] ECR 723, at p. 736, and points 55 to 59 of the Decision).

32 The fact that Regulation No 141 is no longer in force is irrelevant since Regulation No 1017/68, adopted in accordance with Articles 2 and 3 of Regulation No 141, refers explicitly to that regulation in the first and eighth recitals in its preamble and logically covers the activities exempted from the application of Regulation No 17 by Regulation No 141. Moreover, if certain activities not directly relating to transport were to fall within the scope of Regulation No 1017/68 they would be covered at the same time by Regulation No 17, which would give rise to confusion incompatible with the system of Regulation No 1017/68.

33 As to whether Regulation No 1017/68 applies to the transport 'sector' or only to transport 'activities', the context of Regulation No 141 and Regulation No 1017/68 requires the same interpretation to be given to both terms. The reference to 'the distinctive features of transport' excludes agreements entered into by transport

undertakings relating to other activities such as hotel, catering or leisure services. The deciding factor is the nature of the activity to which the agreement relates.

34 In reply to the applicant's arguments concerning 'the supply of transport' and 'the fixing of transport rates', the Commission relies on the reasoning of the Court of Justice at paragraph 20 of its judgment in the *VVR* case, cited above, to the effect that a travel agent must be regarded as 'an independent agent who provides services on an entirely independent basis'. Moreover, if the distribution of tickets were not an entirely independent service, distinct from the transport service, it would be impossible to understand why the railways remunerate each other for that service.

35 Nor is it true that Leaflet No 130 regulates the conditions of supply of international rail transport, a field which is governed by the COTIF and the CIV. At the hearing, the Commission explained that the concept of the 'supply of transport' within the meaning of Regulation No 1017/68 is confined to agreements such as those governing the number or capacity of trains.

— Findings of the Court

36 It appears from points 51 to 59 of the Decision that there were three reasons for the Commission's decision that it should not apply Regulation No 1017/68 in the present case: (i) the Commission considers that it is clear from the *VVR* judgment that a travel agent is 'an independent agent' who provides services 'on an entirely independent basis'; (ii) it considers that Leaflet No 130 does not relate 'directly' to the provision of transport services; and (iii) it maintains that travel agents are not 'providers of services ancillary to transport'.

37 With regard, first, to the Commission's argument based on the interpretation of the *VVR* judgment, the Court considers that that judgment is not relevant for determining the regulation applicable in the present case.

38 It must be borne in mind that the *VVR* judgment concerned the legislation of a Member State authorizing certain agreements between travel agents and tour operators intended to oblige the former to observe the prices of tours fixed by the latter. In that context, the Member State in question argued, *inter alia*, that Article 85(1) of the Treaty was not applicable to such a situation since a travel agent was to be considered as an auxiliary of the tour operator for the purposes of the Commission's Notice on exclusive dealing contracts with commercial agents (JO 1962, p. 2921, no English version available). It was in reply to that argument that the Court of Justice held, at paragraph 20 of its judgment, that a travel agent of the kind referred to by the national court must be regarded as an independent agent who provides services on an entirely independent basis and not as an auxiliary organ forming an integral part of a tour operator's undertaking. The *VVR* judgment did not, therefore, concern the interpretation of Regulation No 1017/68.

39 In addition, the factual background to that case was different from that in the present instance, in particular in that the parties who drew up Leaflet No 130 are railway companies and not travel agents. In any event, the applicant does not maintain that a travel agent should be regarded as an auxiliary within the meaning of the abovementioned Commission notice. Paragraph 20 of the *VVR* judgment thus concerns an argument which has not been raised in the present case.

40 However, even if it were to be assumed that in selling a rail ticket a travel agent is supplying a service 'on an entirely independent basis', for which it receives

remuneration in the form of the commission granted by the railway, that consideration would not alone suffice for Regulation No 1017/68 to be inapplicable to Leaflet No 130.

41 It is true that a travel agent, when selling an international rail ticket, provides a service to the railway concerned. However, that service is provided by an accredited travel agent acting on behalf of the railway, under a contract of agency with the railway. When he sells an international ticket, therefore, the travel agent concludes a contract between the railway and the passenger. The negotiation and conclusion of such contracts of carriage on behalf of the railway and the concomitant issue of the railway's tickets form the principal object of the accreditation of the agent by the railway.

42 The Commission was therefore wrong to conclude, in the second paragraph of point 54 of the Decision, that the provision of services by the travel agent 'does not therefore concern the provision of transport, which is supplied exclusively by the principal'.

43 Secondly, as to whether Leaflet No 130 falls outside the scope of Regulation No 1017/68 because it does not relate 'directly' to the transport service, the question before the Court in the present case concerns the interpretation of Article 1 of Regulation No 1017/68 and not that of Regulation No 141. While the third recital in the preamble to Regulation No 141 may be an important factor in the legislative framework of which it forms a part, the word 'directly' appears neither in Article 1 of Regulation No 1017/68 nor in Article 1 of Regulation No 141, the validity of which expired, in any event, on 30 June 1968 with regard to transport by rail.

44 Moreover, the fact that Article 1 of Regulation No 1017/68 applies, on the one hand, to certain agreements, decisions and concerted practices relating to 'the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services' and, on the other hand, to 'operations of providers of services ancillary to transport' indicates that its scope may be wider than suggested by the Commission.

45 In addition, Article 2(a) of Regulation No 1017/68 provides that the agreements, decisions or concerted practices covered by the regulation are, *inter alia*, those which 'directly *or indirectly*' fix not only 'transport rates and conditions' but also '*any other trading conditions*' and that Article 2(b) refers to agreements, decisions or concerted practices which limit or control 'the supply of transport, markets, technical development or investment'. Consequently, the concept of an agreement or decision which has as its object or effect 'the limitation or control of the supply of transport' within the meaning of Article 1 of Regulation No 1017/68 is not to be interpreted as covering only agreements or decisions governing the number or capacity of trains (see above, paragraph 35) but must include any agreement or decision which limits or controls the supply of transport or markets within the meaning of Article 2 of that regulation.

46 Regulation No 1017/68 cannot, therefore, be interpreted as excluding from its application a decision of an association of railway companies, such as Leaflet No 130, laying down detailed rules for the sale of international rail tickets. That decision concerns activities which are related to, and indispensable for, the provision of rail transport services. Moreover, since international rail transport is at present provided by successive national services (see above, paragraph 1), international rail tickets can hardly be sold without a system of cooperation between railways with regard to their sale and the distribution of the proceeds thereof. Leaflet No 130 relates to those particular aspects of international transport by rail.

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

48 With regard to the 'supply of transport', it is to be noted that Article 1 of Leaflet No 130 relates directly to the determination of points of sale of international railway tickets. If Article 1 of Leaflet No 130 were to have the effects mentioned in points 70 to 72 of the Decision, it would be limiting the railways' 'markets' and thereby limiting or controlling 'the supply of transport' within the meaning of Regulation No 1017/68.

49 With regard to 'transport rates', it is further to be noted that the commission referred to in Article 4 of Leaflet No 130 — which applies to tickets sold both by the railways themselves and by travel agents — constitutes one of the direct costs of the sale of an international ticket and determines the net price, that is to say the price of the ticket less the commission, received by each railway in respect of its part of the international rail transport service provided. In the circumstances of the present case, Article 4 of Leaflet No 130 thus indirectly fixes 'transport rates' within the meaning of Regulation No 1017/68 or fixes 'any other trading conditions' within the meaning of Article 2(a) thereof. The same considerations apply, *mutatis mutandis,* to Article 3 of Leaflet No 130. In addition, Article 3.2 of the leaflet refers to the sale of tickets by the railways to certain agents and thus relates directly to the price and terms of sale of rail tickets.

50 It must further be borne in mind that in Article 1 of the operative part of the Decision, the Commission found that the requirement imposed by Article 4.7 of the model contract, that agents must 'make out and sell tickets at the official fares indicated in the tariffs', infringed Article 85(1) of the Treaty. However, by its very wording, such a provision has as its object or effect 'the fixing of transport rates' within the meaning of Regulation No 1017/68. In that regard, the fact that Article 4.7 of the model contract concerns not the fixing of the official fares themselves but

compliance by travel agents with tariffs already drawn up by the railways is irrelevant, since the price stipulated in that way represents the consideration for the transport service concerned, which must be paid by every passenger.

51 Furthermore, if Article 4.7 of the model contract were taken to prohibit the discounting of commissions, as the Commission maintained in points 89 to 91 of the Decision, such a provision would relate to 'the fixing of transport rates' in so far as the railways would thus be preventing any competition on transport rates between accredited agents by means, in particular, of foregoing a part of their commissions in favour of their customers. In that regard, at point 106 of the Decision, the Commission itself found that 'the practices in question afford the railway companies the possibility of eliminating competition, notably as regards fares, between travel agents in the sale of tickets'. Likewise, in its written pleadings, the Commission argued that the seriousness of the infringement lies in the elimination of competition, 'particularly as regards the fares offered to passengers' (defence, p. 42; see also the same statement at p. 34 of the rejoinder).

52 Finally, as regards the prohibition, in Article 4.3 of the model contract, on agents favouring competing means of transport by their publicity, proposals or advice to the public, it is to be noted that the Commission found, at point 95 of the Decision, that that provision 'has the object and effect of restricting competition between the various means of transport'. It follows that the Commission itself considers that this provision falls within the transport sector.

53 The Commission's second argument, based on the use of the word 'directly' in the third recital in the preamble to Regulation No 141, is therefore unfounded.

54 In reaching that conclusion, the Court has not disregarded the Commission's argument that Leaflet No 130 has anti-competitive effects on the market for the

distribution of tickets. Where, however, as in the present case, the main aspects of a decision fall within the scope of Regulation No 1017/68, the fact that the decision can also have repercussions on competition on related but ancillary markets is not relevant. Any effects which Leaflet No 130 might have on competition on the market for the distribution of railway tickets, as referred to, *inter alia*, in points 70, 71, 78 to 81, 83 and 84 of the Decision, would be at the most secondary to the effects which relate to the transport sector properly so called (see above, paragraph 46 et seq.).

55 Thirdly, the Commission's argument set out in points 55 to 58 of the Decision, to the effect that a travel agent is not a provider of services ancillary to transport within the meaning of Article 1 of Regulation No 1017/68, is also unfounded. The question raised here is not whether a travel agent may be considered, in general, as a provider of services ancillary to transport but whether the specific activities with which this case is concerned are operations of a kind carried out by a provider of services ancillary to transport.

56 In the present case, the relevant travel agency operations, namely the conclusion of contracts of carriage on behalf of a principal and the issuing of tickets, must be regarded as 'operations of providers of services ancillary to transport' within the meaning of Article 1 of Regulation No 1017/68. The agent, acting on behalf of his principal, must be regarded as 'ancillary' to the railway and the 'operations' in question are essential to enable the passenger to be carried to his or her destination. The Commission cannot, therefore, derive any support from Council Directive 82/470/EEC of 29 June 1982 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies (ISIC Group 718) and in storage and warehousing (ISIC Group 720) (OJ 1982 L 213, p. 1), which is of no relevance to the issue in the present case.

57 It follows from all the foregoing that points 51 to 59 of the Decision are vitiated by errors of law and do not justify the conclusion that Leaflet No 130 does not fall within the scope of Regulation No 1017/68.

58 It must nevertheless be determined, in the circumstances of this case, whether those errors of law on the part of the Commission had the effect of depriving the applicant of all or any of the procedural safeguards to which it was entitled in the application of Regulation No 1017/68.

59 In that connection, there are at least three fundamental differences between Regulation No 17 and Regulation No 1017/68.

60 First, in the system of Regulation No 17, prior notification to the Commission of an agreement, concerted practice or, as in the present case, decision of an association of undertakings is, with the exception of the agreements, decisions or concerted practices referred to in Article 4(2) of Regulation No 17, an essential prerequisite for obtaining, where appropriate, a declaration under Article 85(3) of the Treaty that Article 85(1) is inapplicable (see Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 30, and Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 271). In the system of Regulation No 1017/68, on the other hand, notification to the Commission of the agreement, concerted practice or decision of an association of undertakings is optional and does not constitute an essential prerequisite for obtaining an individual declaration under Article 5 of that regulation that Article 2 of the regulation is inapplicable. That, the applicant maintains, was why Leaflet No 130 was not notified to the Commission in the present case.

61 In that regard, even though the Commission did, in the alternative, in points 104 to 107 of the Decision, give a brief negative reply to the question whether Leaflet No 130 might have been exempted under Article 85(3) of the Treaty if it had been notified, it is not certain that the Commission's reasoning would have been the same if it had found, contrary to point 103 of the Decision, that the UIC was entitled to invoke the benefit of Article 5 of Regulation No 1017/68. In that hypothesis, the Commission would have had to state its reasons, if it had rejected the UIC's request for exemption under Article 5 of Regulation No 1017/68, in such a way as to enable the Court to review the lawfulness of such rejection and make clear to the Member States and to interested individuals the circumstances in which the Commission has applied the Treaty (see Case C-360/92 P *Publishers' Association* v *Commission* [1995] ECR I-23, paragraph 39).

62 Secondly, in the present case the Commission consulted the Advisory Committee provided for by Article 10(3) of Regulation No 17, composed of officials of the Member States competent in the matter of restrictive practices and monopolies, and not the Advisory Committee provided for in Article 16(4) of Regulation No 1017/68, composed of officials of the Member States competent in the matter of restrictive practices and monopolies in transport. Since the officials of the Member States consulted on the matter were not those specified in the regulation which should have been applied in the case, it cannot be assumed that the result of the consultation of the proper committee would have been the same.

63 Thirdly, under Article 17(1) and (2) of Regulation No 1017/68, the Commission is not to give a decision in respect of which consultation of the specialist Advisory Committee referred to in Article 16 is compulsory until after the expiry of 20 days from the date on which that Advisory Committee has delivered its Opinion. During that period, any Member State may request that the Council be convened to examine with the Commission any question of principle concerning the common transport policy which it considers to be involved in the particular case for decision. If such a request is made, the Commission is not to give its decision until

after the Council meeting. The Commission must also take into account the policy guidelines which emerge from the Council meeting. That provision therefore sets up a system of protection from which the addressee of the Commission's decision is entitled to benefit.

64 It follows from the foregoing that the application of Regulation No 17 instead of Regulation No 1017/68 amounted in the present case to a breach of an essential procedural requirement and had the effect of depriving the applicant of the procedural safeguards to which it was entitled in the context of the application of Regulation No 1017/68.

65 It follows from all of the foregoing that the error of law committed by the Commission had procedural consequences which the applicant is entitled to challenge and that the first plea in law is therefore well founded.

66 The Decision must therefore be declared void, without it being necessary to consider the applicant's remaining pleas in support of its main claim for annulment or to rule on its alternative claims for the annulment or reduction of the fine.

Costs

67 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 Commission has been unsuccessful and the applicant has applied for costs, the Commission must be ordered to pay the costs.

On those grounds,

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

hereby:

1. Annuls Commission Decision 92/568/EEC of 25 November 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.585 — Distribution of railway tickets by travel agents);

2. Orders the Commission to pay the costs.

Biancarelli Schintgen Briët

García-Valdecasas Bellamy

Delivered in open court in Luxembourg on 6 June 1995.

H. Jung J. Biancarelli

Registrar President