JUDGMENT OF THE COURT
11 March 1997 *

In Case C-264/95 P,

Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) in Case T-14/93 *Union Internationale des Chemins de Fer* v *Commission* [1995] ECR II-1503, seeking to have that judgment set aside,

the other party to the proceedings being:

Union Internationale des Chemins de Fer (UIC), 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,

* Language of the case: French.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida and J. L. Murray (Presidents of Chambers), P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 4 August 1995, the Commission of the European Communities brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 6 June 1995 in Case T-13/93 *Union Internationale des Chemins de Fer* v *Commission* [1995] ECR II-1503 ('the contested judgment'), in which it annulled 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; 'the contested decision').

2 As may be seen from the contested judgment, the Union Internationale des Chemins de Fer (International Railway Union; 'the UIC') is a world association of railway companies whose membership comprises 69 railways. In 1952, as part of its activities, it drew up Leaflet No 130, which has been updated on numerous occasions and which regulates certain aspects of the relationship between railways and travel agents, particularly in relation to international passenger transport (paragraph 3).

3 The Court of First Instance found that: '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' (paragraph 1).

4 Leaflet No 130 concerns the conditions governing the appointment of travel agencies by the railway of the country in which they are situated, the granting of commissions to agencies in respect of tickets sold, and the rates of commission granted in respect of international passenger services to other railways and to agencies approved by a foreign railway (with the possibility of granting higher rates on the basis of bi-or multilateral agreements) (paragraphs 4 to 8). Leaflet No 130 also recommends the use of model contract provisions which, *inter alia*, require the agency to comply with the official ticket price as shown in the tariff and not to favour by its publicity, its proposals or its advice to the public, the use of means of transport competing with rail transport and with other means of transport operated by the railways themselves or in association with them (paragraph 9).

5 In 1990, on the basis of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the Commission sent requests for information concerning Leaflet No 130 to the UIC and a number of European railways (paragraph 10). On 10 October 1991, on the same basis, it sent the UIC a statement of objections, and a hearing was held on 18 February 1992 (paragraph 11). After consulting the Advisory Committee in accordance with Regulation No 17, the Commission adopted the contested decision on the basis of that regulation, finding the UIC to be in breach of Article 85(1) of the Treaty and ordering it to pay a fine of one million ecus (paragraph 12).

Procedure before the Court of First Instance

6 On 8 February 1993, the UIC brought an action before the Court of First Instance for, first, the annulment of the contested decision, in support of which it put forward six pleas in law, and, in the alternative, the annulment of the fine or a reduction in its amount (paragraphs 15, 17 and 18).

7 In its first plea, the UIC maintained that the contested decision should have been based not on Regulation No 17 but on Council Regulation No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302). In particular, it argued that Leaflet No 130 related 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, which defines the scope of that regulation (paragraph 20).

8 Article 1 of Regulation No 1017/68 provides:

'Basic provision

The provisions of this regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical co-operation, 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.'

9 In its defence, the Commission explained that it had it based its decision on Regulation No 17 both because Leaflet No 130 did not relate 'directly' to the provision of transport services and because travel agencies were not providers of services ancillary to transport, within the meaning of the second sentence of Article 1 of Regulation No 1017/68, but independent providers of services (paragraph 30). The third recital in the preamble to Council Regulation No 141 of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291) defined the scope of Regulation No 141 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' had to have a limited scope (paragraph 31).

The contested judgment

10 In the contested judgment the Court of First Instance upheld the UIC's application and annulled the contested decision on the basis of the UIC's first plea in law (paragraph 57), holding that errors of law on the part of the Commission amounted to a breach of essential procedural requirements 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 (paragraphs 64 and 65).

11 In paragraphs 43 to 46 of its judgment, the Court of First Instance held as follows:

'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.'

12 In paragraph 47 of its judgment the Court of First Instance held:

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

13 In paragraph 48, with regard to the supply of transport, the Court of First Instance held that Article 1 of Leaflet No 130, concerning the conditions governing the appointment of travel agencies, related directly to the determination of points of sale of international railway tickets and that, therefore, if it were to have the effects mentioned in points 70 to 72 of the contested decision, namely to limit the number of approved agencies, it would be limiting the railways' markets and thereby limiting or controlling the supply of transport within the meaning of Regulation No 1017/68.

14 In paragraph 49, with regard to transport rates, the Court of First Instance found that the commission referred to in Article 4 of Leaflet No 130, which applied to tickets sold both by the railways themselves and by travel agencies, constituted one of the direct costs of the sale of an international ticket and determined 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 fixed 'transport rates' within the meaning of Regulation No 1017/68.

15 In paragraph 50, also concerning transport rates, the Court of First Instance further held that the requirement, imposed by Article 4.7 of the model contract, that agencies must make out and sell tickets at the official fares indicated in the tariffs had, by its very wording, the object or effect of fixing transport rates within the meaning of Regulation No 1017/68.

16 Finally, in paragraph 52, regarding 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, the Court of First Instance noted that the Commission had found, at point 95 of the contested decision, that that provision had 'the object and effect of restricting competition between the various means of transport'. The Court concluded from this that that provision fell within the transport sector.

The appeal

17 In its appeal the Commission requests the Court of Justice to set aside the contested judgment and to dismiss the action brought before the Court of First Instance by the UIC or, failing that, to refer the case back to the Court of First Instance.

18 The UIC contends that the appeal should be dismissed, and requests the Court of Justice to uphold its pleas at first instance.

19 In support of its appeal the Commission puts forward three pleas in law.

The first plea

20 In its first plea, the Commission states first of all that, so far as it is concerned, there is a point of principle at stake, namely the delimitation of the respective spheres of application of Regulations Nos 17 and 1017/68 and indeed, over and above that, of the regulations applying Articles 85 and 86 to sea and air transport. It disputes the finding of the Court of First Instance, in paragraphs 43 to 46 of the contested judgment, that Regulation No 1017/68 applies not only to agreements or concerted practices directly related to the provision of transport, but also to activities which are 'related to' and 'indispensable for' the provision of rail transport services, such as the common determination of detailed rules for the sale of rail tickets.

21 In reality, there are two aspects of this plea.

22 First, as a preliminary point, the Commission argues that, in paragraph 46 of the contested judgment, the Court of First Instance used an inappropriate criterion for determining whether Regulation No 1017/68 applied, by holding that it applied to activities which were related to and indispensable for the provision of transport, whereas, in the Commission's submission, the only criterion which is both logical and easy to apply is the market to which the agreement related.

23 In addition, and as its main argument, the Commission submits that the Court of First Instance was wrong in holding that the term 'directly' should not be regarded as implicit in the wording of Article 1 of Regulation No 1017/68, which defines the scope of the regulation, and thus in refusing to take Regulation No 141 into account. The Commission considers that the decisions by an association of undertakings which are in question are outside the scope of Regulation No 1017/68 because they do not 'directly' concern the provision of transport.

24 On that point, the Commission draws attention to the origins of Regulations Nos 17, 141 and 1017/68, and points out that, initially, the first of those regulations applied to all activities covered by the EEC Treaty, including the transport sector.

Subsequently, Regulation No 141 retroactively removed the whole of that sector from the scope of Articles 85 and 86 of the Treaty. Finally, Regulation No 141 was itself replaced by three sectoral regulations, one of which was Regulation No 1017/68 concerning land, and thus rail, transport.

25 The Commission states that, since it is in the nature of a derogating regulation, Regulation No 1017/68, and in particular its scope, must be narrowly construed and thus applied exclusively to the activity of transport as such. Moreover, since the Council did not indicate that it intended to broaden the scope of Regulation No 1017/68 in relation to that of Regulation No 141, it should be delimited by reference to the latter regulation, and in particular to the third recital in the preamble thereto, which refers to the requirement for a direct link between the agreements and the provision of transport.

26 Similarly, the Commission considers that, contrary to what is stated by the Court of First Instance in paragraph 45 of the contested judgment, Article 2 of Regulation No 1017/68, which provides that the agreements covered by that regulation are, *inter alia*, those which 'directly or indirectly fix transport rates and conditions or any other trading conditions' does not call for a wider interpretation.

27 As regards the first aspect of the first plea, this Court finds that, contrary to what the Commission maintains, it is clear from the contested judgment that the Court of First Instance did not lay down any general principle to the effect that the regulation applies to all activities which are related to, and indispensable for, the provision of transport. On the contrary, having excluded in paragraph 43 *et seq* of the judgment the addition of the term 'directly' to the wording of Article 1 of Regulation No 1017/68, it considered specifically the question whether Leaflet No 130 fell within the agreements covered by that article, that is to say whether it had the object or effect of fixing transport rates or limiting or controlling the supply of transport.

28 As regards the second aspect of the plea, it should be observed that the wording of the relevant part of Article 1 of Regulation No 1017/68 is precise and detailed, as is the wording of Article 1 of Regulation No 141 which it repeats, and does not mention the word 'directly'.

29 Moreover, in paragraph 43 of the contested judgment, the Court of First Instance rightly held that the dispute concerned the interpretation of Regulation No 1017/68 and not of Regulation No 141.

30 In those circumstances, the wording and origins of the regulations do not demonstrate the continuity of intention on the part of the legislature on which the Commission based the contested decision.

31 Finally, having failed to establish that continuity of intention on the part of the legislature, it is not open to the Commission to invoke the need for 'consistency' in interpreting the scope of the three sectoral regulations on transport.

32 The first plea must therefore be dismissed.

The second plea

33 In its second plea the Commission essentially argues that the Court of First Instance erred in law by holding, in paragraph 47 of the contested judgment, that 'Leaflet No 130 relates both to the "supply of transport" and to "transport rates" within the meaning of Regulation No 1017/68'.

34 The Court of First Instance should first, the Commission argues, have analysed the markets and, accordingly, identified the relevant market. Such identification, it submits, is fundamental to and inherent in the question whether the agreements actually concerned the supply of transport or transport rates. In this case, there

were two distinct markets: the transport market, concerned only with the number of trains and seats on those trains, and the ticket distribution market, which the Commission refers to as the 'intermediation market', and which was the market on which the railways bought the services of the agencies. The Commission maintains that the agreements in question should be assessed in relation to their principal, and indeed quasi-exclusive, effects, which occurred on the latter market and not the transport market.

35 The Commission therefore considers that the analysis by the Court of First Instance of the various clauses at issue in paragraphs 48, 49, 50 and 52 of its judgment was erroneous.

36 In relation to paragraph 48 of the judgment, concerning the supply of transport, the Commission submits that, by agreeing to limit the number of points of sale for tickets, the railways were restricting not the supply of transport, namely the number and capacity of trains, but the supply of the intermediation service by limiting the number of accredited agents.

37 As regards paragraphs 49 and 50 of the contested judgment, concerning transport rates, the Commission initially maintained that the amount of the commission represented a distribution cost for the railway that was distinct from the cost of providing transport and that, therefore, Leaflet No 130 did not directly fix transport rates.

38 The Commission then acknowledged in its reply that the commission payment constituted a component of the price of transport, in the same way as traction, maintenance, cleaning etc. However, since the sale of tickets is a service provided by the agent for the benefit of the railways, the latter, by fixing the rate of commission and requiring compliance with the official price, thereby come to an agreement as to the definition of the detailed rules of the intermediation service required of the agencies, so that the agreement relates to the market for the intermediation service and not to the transport market.

39 Moreover, to accept that, by coming to an agreement on a component of the price of transport, the railway companies were thereby determining, even indirectly, the transport rates to be paid by users, would, the Commission maintains, result in any agreement concerning the components of the ticket price falling within the scope of Regulation No 1017/68, which would lead to an inadvertent extension of the scope of that regulation.

40 As regards paragraph 52 of the contested judgment, concerning the prohibition on agents favouring competing means of transport, the Commission likewise maintains that that clause produces its effects on the market for the distribution of travel documents, since it is on that market that the railways limit their freedom by agreeing to impose on travel agents an obligation affecting competition between agents on that market. The Commission further considers that the Court of First Instance's interpretation leads to unforeseen consequences, inasmuch as, since the clause also produces anti-competitive effects on the sea and air transport sectors, the three sectoral regulations concerning land, sea and air transport would have to be applied to it simultaneously.

41 As regards the second plea, taken as a whole, this Court notes that, according to Article 1 of Regulation No 1017/68, that regulation applies *inter alia* to a number of agreements which 'have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport [or] the sharing of transport markets' and also to 'operations of providers of services ancillary to transport which have any of the objects or effects listed above'.

42 It follows from the wording of that article that the application of Regulation No 1017/68 depends upon what is the nature of the agreements in question, which must have the object or effect, *inter alia*, of fixing transport rates or limiting or controlling the supply of transport, and not, as the Commission maintains, upon the prior identification of the market on which those agreements produce their effects.

43 Moreover, as regards paragraph 52 of the contested judgment, contrary to what the Commission maintains, Regulation No 17 does not fall to be applied nor do the three sectoral regulations referred to above fall to be applied simultaneously.

44 On the first point, the Court of First Instance rightly held that the clause prohibiting agents from favouring, in their advertising, proposals or advice to the public, means of transport in competition with rail fell within the transport sector and not under Regulation No 17 which was applied by the Commission in its decision. Indeed, it was the whole of the transport sector which was removed from the scope of the latter regulation by Regulation No 141, which was subsequently replaced by the three sectoral regulations on land, sea and air transport.

45 On the second point, it should be pointed out, first, that the clause in question is intended to produce effects, if not its principal effects, in the land transport sector, since it imposes upon accredited travel agents a neutrality deemed to be favourable to the supply of rail transport, and, secondly, that it forms part of a series of decisions by an association of undertakings the essential clauses of which, as analysed by the Court of First Instance, fall within the scope of Regulation No 1017/68.

46 The second plea must therefore be dismissed.

The third plea

47 In its third plea the Commission complains that the Court of First Instance erred in law by holding, in paragraphs 55 and 56 of the contested judgment, that, by marketing tickets on the railways' behalf, the travel agencies were carrying out 'operations of providers of services ancillary to transport' within the meaning of the second sentence of Article 1 of Regulation No 1017/68, since, first, those travel agencies did not belong to the professional category of providers of such services

and, secondly, the regulation concerns only the operations of such providers which relate directly to the provision of transport.

48 On that point, and without going into the detail of the Commission's argument, it should be pointed out that, in accordance with established case-law, this Court will reject from the outset any challenge directed to grounds of a judgment of the Court of First Instance which are supererogatory, since these cannot entail its annulment (see, in particular, the judgments in Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 31, and Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraph 25).

49 In this case, the grounds stated by the Court of First Instance in paragraphs 55 and 56 of its judgment are supererogatory to those set out in paragraphs 43 to 54.

50 It is clear from the wording of Article 1 of Regulation No 1017/68 that the references, on the one hand, to 'agreements decisions and concerted practices' which meet the specified conditions (Article 1, first sentence) and, on the other hand to 'operations of providers of services ancillary to transport' which meet those same conditions (Article 1, second sentence) are given in the alternative. It is therefore sufficient that one of those two situations applies for Regulation No 1017/68 to be applicable.

51 Since, therefore, the examination of the first two pleas shows that the Court of First Instance did not commit any error of law in the interpretation of the first sentence of Article 1 of Regulation No 1017/68, and since it is clear that the decisions by an association of undertakings which are in question did fulfil the conditions specified in that sentence, the third plea, concerning the second sentence of that article, becomes inoperative, and cannot constitute a basis for the appeal.

52 Since none of the pleas have been upheld, the appeal must be dismissed in its entirety.

Costs

53 Under Article 69(2) of the Rules of Procedure, which applies to the procedure on appeal pursuant to Article 118, 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 appellant has been unsuccessful, it must be ordered to pay the costs of the appeal.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the Commission to pay the costs.

Rodríguez Iglesias	Mancini		Moitinho de Almeida
Murray	Kapteyn	Gulmann	Edward
Puissochet	Hirsch	Jann	Wathelet

Delivered in open court in Luxembourg on 11 March 1997.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President