JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
19 May 1994 *

In Case T-2/93,

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, and Christopher Vajda, of the Bar of England and Wales, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

TAT SA, a company incorporated under French law, established in Tours (France), represented by Antoine Winckler, of the Paris Bar, and Romano Subiotto, Solicitor, with an address for service in Luxembourg at the Chambers of Elvinger and Hoss, 15 Côte d'Eich,

and

British Airways plc, a company incorporated under English law, established in Hounslow (United Kingdom), represented by 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 decision of the Commission of 27 November 1992 (IV/M. 259 — British Airways/TAT) relating to a proceeding 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),

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

composed of: R. Schintgen, President, R. García-Valdecasas, H. Kirschner, B. Vesterdorf and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 23 February 1994,

gives the following

Judgment

Factual background

1 By application lodged at the Court Registry on 5 January 1993 the Société Anonyme à Participation Ouvrière Compagnie Nationale Air France (hereinafter referred to as 'Air France') brought an action pursuant to Article 173 of the EEC Treaty for the annulment of the decision of the Commission of 27 November 1992 (IV/M. 259 — British Airways/TAT, hereinafter referred to as 'the decision') relating to a proceeding 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, hereinafter referred to as 'the Regulation').

2 It appears from the documents before the Court that the concentration in question was notified to the Commission on 23 October 1992 pursuant to Article 4 of the Regulation. On 31 October 1992 the Commission published in the *Official Journal of the European Communities* the notice provided for by Article 4(3) of the Regulation (Official Journal 1992 C 283, p. 10). In paragraph 4 of that communication, the Commission invited 'interested third parties to submit their possible observations on the proposed concentration'.

3 Following that publication, the applicant submitted its observations by letter of 9 November 1992; in particular, it disputed the Commission's definition of the market, submitting that the definition did not take account of the competitive situation throughout the Community civil aviation market, especially as regards the strengthening of the position of one of the parties to the concentration in question, British Airways plc (hereinafter referred to as 'British Airways'), in the international intra-Community network.

4 The correspondence between the applicant and the Commission took the form of letters of 10 November, 17 November, 19 November, 23 November, 2 December and 21 December 1992.

The contested decision

5 In the decision, the Commission finds, in application of Article 6(1)(b) of the Regulation, that the concentration in question does not raise serious doubts as to its compatibility with the common market.

6 It is apparent from the decision that the concentration in question concerns the acquisition by British Airways of 49.9 % of the share capital of TAT European

Airlines (hereinafter referred to as 'TAT E. A.'), with the remaining 50.1 % continuing to be held by TAT SA (hereinafter referred to as 'TAT').

7 The acquisition agreement further provides for the grant to British Airways of an option to purchase the aforementioned 50.1 % at any time up to 1 April 1997. TAT is in turn granted the right to require British Airways to purchase the remaining 50.1 % of the shares held by TAT on 1 April 1997. According to the actual wording of paragraph 5 of the decision, the Commission considered that, since it was not certain whether those options would be exercised, the possible second transaction should not be taken into account for the purposes of assessing the operation which had been notified.

8 The decision also refers (in paragraphs 6 and 7) to the following provisions contained in a shareholders' agreement concluded between British Airways and TAT:

(a) the board of directors of TAT E. A. is to have nine members, five of whom are to be nominated by TAT and four by British Airways;

(b) the President and the Director-General of TAT E. A., who hold the same positions in TAT, are confirmed in their functions for an initial period of two years with the consent of British Airways;

(c) major decisions can only be taken by the board of TAT E. A. if at least one director nominated by TAT and one director nominated by British Airways vote in favour of the proposal (such decisions include, *inter alia*, any changes to the business plan for the period 1993-96 drawn up and agreed by TAT and British Airways simultaneously with the acquisition agreement);

(d) the deputy Director-General responsible for commercial matters is to be nominated by British Airways.

9 The business plan sets forth, in particular:

(1) the routes TAT E. A. will operate and the aircraft and timetables with which it will operate;

(2) the fleet plan;

(3) projections for the number of passengers to be carried and the yield to be achieved;

(4) the strategy on international routes.

10 On the basis of those factors, the Commission concludes that TAT E. A. 'will be jointly controlled' by British Airways and TAT (paragraph 9).

11 In paragraphs 10 to 13 of the decision, which deal with the question whether a concentration, within the meaning of Article 3 of Regulation No 4064/89, exists, the Commission concludes, first, that the anticipated duration of the joint venture — approximately six and a half years, given that the agreement on the joint undertaking is to cease on 1 April 1997 if the options are not exercised — is sufficiently long to bring about a lasting change in the structure of the undertakings concerned.

12 Next, it finds that, in consequence of the transfer of part of the share capital, TAT has ceased to operate in the field covered by the transfer, with the result that it can no longer be regarded as an actual or potential competitor of either TAT E. A. or British Airways. As to the competitive relationships between British Airways and TAT E. A., the Commission finds that British Airways will have a substantial and growing influence on the way in which the joint venture is to be run and developed, and will play a leading role in its management.

13 On the basis of those considerations, the Commission states that the acquisition by British Airways of joint control of TAT E. A. does not have as its object or effect the coordination of the competitive behaviour of undertakings which remain independent, within the meaning of the first paragraph of Article 3(2) of the Regulation, and concludes from this that the transaction in question constitutes a concentration within the meaning of Article 3(1) of the Regulation.

14 Having found, in paragraph 14 of the decision, that the concentration has a Community dimension within the meaning of Article 1(2) of the Regulation, the Commission examines, in paragraphs 15 to 26, its compatibility with the common market.

15 The Commission finds that British Airways did not have any presence whatever on the French domestic routes prior to the contested transaction, whereas in 1991 TAT E. A. accounted for 3.8% of the total scheduled traffic on those routes, in terms of the overall number of passengers carried, and Air France (directly or through Air Inter) had an 84.9% share of the number of passengers. It concludes from this that the transaction in question does not lead to any overlap with respect to TAT E. A.'s domestic routes, its effect being to allow British Airways a limited access to the French domestic network and certain possibilities to feed its operations from France.

16 As regards the international services offered by TAT E. A. and British Airways, the Commission goes on to find that it is only on the Paris-London and Lyons-London routes that there is any overlap between the services operated by TAT E. A. and British Airways.

17 It is on the basis of those two international routes that the Commission gives its definition of the relevant market. According to the decision (paragraph 19), that definition has to start from a route, or from a bundle of routes to the extent that there is substitutability between the routes comprised in it. Other factors which could prove to be relevant, according to the decision, are the structural conditions

prevailing at airports and their capacity, as well as the impact of an extensive or high volume network in a given geographical area.

18 As regards substitutability between the routes in question, the Commission considers that each 'pair of cities', namely Paris-London and Lyons-London, may be regarded as a market. It takes the view, however, that, in the context of the transaction at issue, the question of substitutability between airports is of considerable importance. In that regard, and in the case of the London-Paris route, the Commission examines the situation in respect of competition between the different airports involved. It states that, whilst all airlines operate solely from Charles-de-Gaulle airport in Paris, a variety of airports are used on the London side. British Airways operates the London-Paris route mainly from Heathrow, but, through the intermediary of Dan Air, it also provides a Paris service from Gatwick airport. TAT E. A. serves that route only from Gatwick. The main competitors of TAT E. A. and of British Airways do not fly to Paris from Gatwick.

19 On the basis of that examination, the Commission finds that the transaction at issue does not alter the market shares of British Airways and TAT E. A. as regards the Heathrow-Paris route, but that, on the Gatwick-Paris route, its effect is to give the parties to the contested transaction a market share of 98.6%, with Dan Air (British Airways) holding 81.6% and TAT E. A. 17%.

20 Overall, that is to say, as regards the total air traffic between London and Paris, the concentration results in the British Airways-TAT E. A. group having a market share of 52.2%, with British Airways having 49.5% and TAT E. A. 2.7%, whilst, of their competitors, Air France has 32.9%, British Midland 9.4%, Air UK 3.7%, Air Brymon 1.1% and 'others' 0.6% of the market.

21 As regards the London-Lyons route, the Commission states that British Airways and Air France operate only from Heathrow, whilst TAT E. A. serves Lyons only from Gatwick. There are no other competitors on either route. Whilst the transaction at issue does not have any effect on the Heathrow-Lyons route, it gives British Airways-TAT E. A. 100% of the market from Gatwick. Overall, that means that the group holds 58.6% of the market (British Airways having 45.3% and TAT E. A. 13.3%), with Air France holding the remaining 41.4%.

22 In the Commission's view, a certain degree of substitutability exists between Heathrow and Gatwick, but the fact that both those airports are congested means that substitutability does not necessarily operate.

23 The Commission concludes from this (paragraph 23) that the position in which British Airways finds itself as a result of the concentration may restrict competition on the routes concerned. The absence of slots at Heathrow and Gatwick could constitute a barrier to the entry into the market of any competitors interested in the routes in question. In order to take that factor into account, the parties to the transaction have undertaken to the Commission if need be to make a number of slots available to companies wishing to operate the routes concerned.

24 On the basis of those considerations, and of the commitments entered into by the parties to the concentration, the Commission concludes, at point VII of its decision, that the transaction at issue does not raise serious doubts as to its compatibility with the common market.

Procedure and forms of order sought by the parties

25 By order of 15 July 1993, the Court of First Instance (First Chamber) granted leave to the United Kingdom, British Airways and TAT to intervene in this case in support of the form of order sought by the defendant.

26 On hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

27 The parties presented oral argument and answered questions from the Court at the hearing on 23 February 1994.

28 The applicant claims that the Court should:

(i) annul the decision of the Commission of 27 November 1992 (IV/M. 259 — British Airways/TAT);

(ii) order the Commission to pay the costs.

29 The Commission contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

30 The United Kingdom contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs, including those incurred by the intervener.

31 TAT, intervener, contends that the Court should:

(i) dismiss the application as inadmissible;

(ii) alternatively, dismiss it as unfounded in fact and in law;

(iii) declare the application unreasonable and vexatious within the meaning of Article 87(3) of the Rules of Procedure;

(iv) order the applicant to pay all the costs, including those incurred by the intervener.

32 British Airways, intervener, contends that the Court should:

(i) dismiss the application as inadmissible or unfounded;

(ii) order the applicant to pay the costs, including those incurred by the intervener.

Admissibility

Brief summary of the pleas in law and arguments of the parties

33 Without formally raising any objection of inadmissibility, the Commission expresses 'its doubts as to the admissibility of the present application, given that the applicant has not shown that the act which it seeks to have annulled is of individual concern to it'. The Commission maintains in that regard that, since the Regulation does not lay down any procedural rules for the submission of complaints, the conditions specified by the Court of Justice in its judgment in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, in the context of Article 93(2) of the EEC Treaty, could be applied, *mutatis mutandis*, as the relevant criteria for the purposes of assessing the admissibility of an action contesting a decision, adopted under the Regulation, declaring a concentration compatible with the common market.

34 The Commission acknowledges that the applicant's observations regarding the transaction at issue were prompted by the notice provided for by Article 4(3) of the Regulation, which, in its view, is a necessary condition, but still not enough to render its application admissible.

35 It further acknowledges that Air France is TAT's main competitor. According to the Commission, however, Air France has not shown how its position in the market in question is significantly affected by the transaction at issue, as the aforementioned case-law requires it to do. It notes, by way of example, that the applicant has not defined the markets in which the new entity might use its possible dominant position to the detriment of Air France.

36 The United Kingdom agrees with the Commission that it would be appropriate for the Court to apply, in the present case, the principles laid down in the judgment in the case of *Cofaz* v *Commission*, cited above, and also considers that the rules on State aid provide a convenient analogy with the rules on concentrations laid down by the Regulation.

37 TAT also concurs, in essence, with the Commission's line of argument. As regards, more particularly, the first criterion to be applied in determining the admissibility of an application, namely effective intervention in the administrative proceedings, TAT adds that that condition is not fulfilled in the present case. TAT maintains that Air France merely responded to an invitation to submit observations contained in the notice published pursuant to Article 4 of the Regulation, and that those observations do not constitute a request for the opening of a thoroughgoing proceeding or for the prohibition of the notified transaction, which would have been rejected by the Commission.

38 British Airways maintains that Air France does not have a legal interest in bringing proceedings in accordance with the second paragraph of Article 173 of the EEC Treaty, as interpreted by the settled case-law of the Court of Justice. It observes that Air France has made no serious effort to show how its own economic or legal interests are affected by the measure which it is contesting. According to British Airways, Air France brought its action merely as a competitor, both on the particular routes to which the transaction relates and within the Community generally.

39 The applicant considers, first, that merely through taking part in the administrative proceedings it is already sufficiently individualized for its application to be held admissible. Secondly, the applicant considers that, since it is engaged in the same field of activities as the undertakings benefiting from the decision, its competitive position has necessarily been significantly affected by the transaction in question, because of its concentrative nature. Those two factors result in its being individually interested for the purposes of Article 173 of the EEC Treaty.

Findings of the Court

40 The Court notes, as a preliminary point, that the decision was addressed not to the applicant but to British Airways and to TAT. It follows that the application can only be admissible if it is of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 173 of the EC Treaty, which reproduces the second paragraph of Article 173 of the EEC Treaty.

41 It is common ground between the parties that the decision is of direct concern to the applicant. It is necessary to consider, therefore, whether the decision is also of individual concern to it.

42 It should be borne in mind in this regard that it is settled law 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' (see the judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95 and the judgment of the Court of First Instance in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169).

43 The Court must therefore examine whether in the present case the applicant's circumstances are such as to differentiate it from all other persons.

44 The Court observes, first, that, following the communication provided for by Article 4(3) of the Regulation, the applicant informed the Commission by letters of 9, 10, 19 and 23 November 1992 of its critical observations, supported by figures and statistical data, regarding the concentration at issue, and that the Commission replied to those criticisms by letter of 17 November 1992, signed by the Commissioner responsible for competition matters. The criticisms related to the

definition of the market which, according to the applicant, had to be taken into account in assessing the effects of the concentration on the market, and to the effects of the concentration on the competitive position of British Airways *vis-à-vis* other operators, particularly Air France. Thus, the applicant made essentially the same criticisms in that correspondence as those which it put forward in the written pleadings which it submitted to the Court. According to the Commission's written response of 17 November 1992, the Commissioner responsible for competition matters had instructed his staff to make a careful study of Air France's comments 'so that they are taken fully into consideration in the examination of the compatibility of that transaction with the common market'.

45 Secondly, it is apparent from the actual wording of the contested decision that, in assessing the competitive situation on the two markets identified as being the markets concerned after the concentration, the Commission mainly took into account the position of Air France. In paragraph 17 of the decision, the Commission compares the competitive positions, on the French domestic routes, of British Airways, TAT and Air France, concluding that 'the main airline operating in this market is by far Air France ... with an 84.9% share of the overall number of passengers ...'. Paragraph 20 of the decision, in which the Commission considers the question of substitutability between airports, contains a very detailed examination of the positions of British Airways, TAT and Air France. That is also the case with paragraph 21 of the decision.

46 Thirdly, it is apparent from the documents before the Court that the applicant was obliged, pursuant to an agreement concluded on 29 October 1990 between it, the French Government and the Commission, to give up the whole of its interest in TAT by 30 June 1992, and that the concentration between TAT and British Airways was notified to the Commission four months later.

47 The Court considers that those three factors are sufficient to differentiate the applicant from all other persons and that they are such as to distinguish it individually, just as in the case of the persons addressed by the decision.

48 It follows that the application is admissible.

Substance

49 The applicant puts forward four pleas in support of its claims.

(a) The first plea is that the Commission infringed Article 3(1), (2) and (3) of the Regulation by failing to take account of the true nature of the transaction at issue and by wrongly regarding it as a transaction creating a common undertaking in the nature of a concentration, instead of acknowledging that British Airways has in fact assumed sole control of TAT E. A.

(b) The second plea is that the Commission infringed Article 1(1) and (2), Article 2(1) and (3) and Article 8(2) and (3) of the Regulation in not defining precisely the relevant market, as regards either the products or the geographical area involved.

(c) The third plea is that the Commission infringed Article 190 of the EEC Treaty in that in describing the relevant market the Commission confined itself to the routes directly concerned by the transaction in question.

(d) By its fourth plea the applicant contends that the Commission acted in breach of the principle of the protection of legitimate expectations and infringed Article 155 of the EEC Treaty in declaring the transaction at issue compatible with the common market despite the fact that, had such a transaction been known about in good time, it would have made it impossible for the agreement

of 29 October 1990 between the applicant, the French Government and the Commission to be concluded.

The first plea: infringement of Article 3(1), (2) and (3) of the Regulation

(1) *Admissibility of the plea*

50 The Commission regards the first plea as inadmissible since in its view the applicant has failed, in the light of the particular circumstances of this case, as described in paragraph 12 of the decision, to show how British Airways' sole control, as opposed to joint control, of TAT E. A. adversely affects the legitimate interests of Air France by significantly affecting its position on the relevant market or markets. On the contrary, if British Airways were considered merely to have acquired joint control with TAT, it would be necessary to re-examine the transaction if control became exclusive, that is to say, if the purchase option granted in favour of British Airways is exercised. It might be that, in the context of such examination, and taking account of developments in the field of air transport, which the Commission regards as undergoing major changes, it could reach a different conclusion as to the compatibility of the transaction with the common market or consider it necessary, for the purposes of declaring it compatible, to attach fresh conditions to its decision. It concludes in its rejoinder that 'the acquisition by an undertaking of sole or joint control of another undertaking is an important factor for the purposes of assessing the impact of such an acquisition on competition pursuant to Article 2 of the Regulation'.

51 The applicant replies that the effect on competition in the case of the acquisition of sole control is different from that in the case of the acquisition of joint control.

Where sole control is acquired, an economic operator disappears from the market, thereby strengthening the market position of the undertaking making the acquisition. According to the applicant, it follows that the Commission's assessment of the compatibility of a concentration with the common market must depend in particular on the sole or joint nature of the control which is acquired.

52 The Court finds that the Commission's pleadings clearly show that the Commission itself considers the question whether TAT E. A. is controlled solely by British Airways or jointly by British Airways and TAT to be 'an important factor' for the purposes of assessing the transaction at issue with reference to Article 2 of the Regulation. The Commission states in its rejoinder that, in the event of British Airways ceasing to have joint control over TAT E. A. and acquiring sole control, notification would be necessary and it would have to examine the matter afresh, which, according to the Commission, could result in a different conclusion as to the compatibility of the transaction with the common market.

53 It follows, accordingly, that the applicant undeniably has an interest in seeking from the Court a review of the Commission's assessment as to the joint or sole nature of the control acquired by British Airways over TAT E. A. and that the plea is therefore admissible.

(2) *The substance of the plea*

54 The plea falls into two parts, the first being to the effect that the Commission failed to have regard to the true nature of the concentration at issue and the second

being to the effect that the Commission erred in its assessment of the option granted to British Airways by the shareholders' agreement.

(a) The first part

— Brief summary of the parties' arguments

55 The applicant maintains that the issue whether sole or joint control is acquired over an undertaking is a question of fact which must be assessed in the light of the economic objectives pursued by the acquiring undertaking. The extent of the interest acquired, the voting systems and the existence of a business plan are merely financial and legal aspects which do not by themselves enable that question to be resolved.

56 According to the applicant, the findings contained in the decision itself clearly show that the real object of the concentration at issue is to integrate the domestic and international operations of TAT E. A. into the organization and structure of British Airways. However, the Commission omitted to examine the underlying reality. Thus, it failed to take into consideration the contents of the business plan, even though, according to the applicant, they are such as to lead inevitably to the conclusion that the entity appearing to take the legal form of a joint venture is no more than a screen concealing what is in fact an acquisition vesting sole control in British Airways.

57 The applicant arrives at the conclusion that in deciding that the transaction at issue resulted in the creation of a joint venture within the meaning of Article 3(2) of the Regulation, and not an acquisition, within the meaning of Article 3(1), of TAT E. A. by British Airways, with sole control vesting in the latter undertaking, the Commission had regard only to the legal aspects, and failed to draw the logical

conclusions from its own findings regarding the economic aspects, thereby infringing Article 3(1) to (3) of the Regulation.

58 The Commission denies that it infringed Article 3 of the Regulation by concluding that British Airways acquired joint control with TAT over TAT E. A., and states that it took into consideration in this regard not only the legal and financial aspects but also, and above all, the nature of the decisions requiring at all times the agreement of the two founding undertakings, particularly the contents of the business plan of the joint undertaking. It states that the business plan relates to a number of matters, such as the routes served by the joint subsidiary, aircraft, timetables, strategy on international routes, etc. which are, by their nature, closely linked to TAT E. A.'s commercial strategy.

59 The United Kingdom considers that the Commission rightly concluded that TAT E. A. is jointly controlled by British Airways and TAT and that, in any event, if the Commission's reasoning on that point is incorrect, it does not vitiate the operative part of the decision, in which the notified concentration is found to be compatible with the common market.

60 According to TAT, it is clear from the facts of the case that British Airways cannot in any way be regarded as having sole control of the joint undertaking TAT E. A., either in law or in fact. In law, TAT has control over all important decisions relating to the operations of TAT E. A. so long as the purchase option is not exercised by British Airways.

61 British Airways maintains that it clearly does not have exclusive control over TAT E. A., given that TAT retains a majority shareholding and appoints the majority of the directors of TAT E. A., and given further that TAT representatives occupy the positions of president and director-general of TAT E. A.

Findings of the Court

62 It should be recalled, as a preliminary point, that Article 3(3) of the Regulation provides as follows: 'For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking ...'.

63 In view of the factual and legal aspects of this case, the Court considers that the Commission was correct in finding that there exists joint control by British Airways and TAT over the joint venture created by the transaction at issue.

64 In particular, it is apparent from the decision, first, that TAT now retains 50.1% of the shares in TAT E. A., and, secondly, that major decisions can only be taken by the board of TAT E. A. if at least one director nominated by TAT and one director nominated by British Airways vote in favour of the proposal.

65 In view of those findings, and even though British Airways exercises a substantial and growing influence, the Commission was correct in finding that there exists joint control. The business plan, containing the main aspects of the policy of the joint venture, was drawn up jointly by British Airways and TAT and cannot be changed without the agreement of TAT, which constitutes the majority shareholder in TAT E. A. and holds the majority of the voting rights on the board of that company, as well as the posts of president and director-general. In the light of the foregoing, the existence of an agreement as to representation and of a system of 'code-sharing' between TAT E. A. and British Airways is not inconsistent with

British Airways' controlling TAT E. A. jointly with TAT, since such agreements do not in any way alter the allocation of responsibilities in the management of TAT E. A., and thus the way in which control is exercised over that undertaking, nor its legal status. Such agreements are the result of negotiations between the parties and cannot be concluded without the consent of the directors of TAT E. A., in accordance with the rules contained in the statutes of that company, as analysed above.

66 It follows that the first part of the plea must be rejected.

(b) The second part of the plea

— Brief summary of the arguments of the parties

67 The applicant observes that the date of expiry of the period in which British Airways may exercise its option to acquire the remaining shares in TAT E. A. is coterminous with the date of entry into force of the Community rules providing for the free exercise of cabotage traffic rights within the Member States, namely 1 April 1997. That is by no means a fortuitous coincidence, and in fact removes the uncertainty regarding the exercise of the option by British Airways. By failing to take that fact into consideration, the Commission infringed Article 3 of the Regulation.

68 The Commission states in reply that, when it examines the compatibility of a concentration with the common market, it has to base its findings not on factors of a more or less hypothetical nature, such as the possible exercise of an option in the

future, but solely on the matters of fact and law existing at the time of the notification. The simultaneity in dates pointed out by the applicant cannot alter that analysis.

69 TAT argues, first, that the air transport services provided by TAT E. A. in France are not in any way capable of being termed cabotage, and, secondly, that the purchase by British Airways of an interest in an undertaking established in another Member State constitutes no more than the exercise of its freedom of establishment.

— Findings of the Court

70 As the defendant maintains, the appraisal by the Commission of the compatibility of a concentration with the common market must be carried out solely on the basis of the matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors the economic implications of which cannot be assessed at the time when the decision is adopted.

71 In the present case, it is apparent from the documents before the Court that the exercise by British Airways of the option granted to it is a factor of a hypothetical nature, given that, first, it is common ground that British Airways had not exercised that option at the date when the decision was adopted, and, secondly, that the applicant has not established that British Airways had the intention at that date of exercising it or that it has since formed such intention.

72 In the circumstances, the Commission was right to leave that potential transaction out of account in its appraisal of the concentration which it had to consider. It follows that the second part of the plea must be rejected.

The second plea: infringement of Articles 1, 2 and 8 of the Regulation

Brief summary of the arguments of the parties

73 In the applicant's view, the definition of the relevant market adopted by the Commission in paragraphs 19 to 22 of the decision, according to which the two relevant markets are the Paris-London and Lyons-London routes, is very incomplete, and thus erroneous, since it does not correspond to economic reality. It complains that the Commission did not take into consideration the economic reality of the European network of British Airways. That reality is such as to require the Commission to find that the relevant market is the market in international air transport provided anywhere in the common market between different Member States. Had the Commission proceeded on that basis, it would have found, first, that the concentration at issue enables British Airways, through the intermediary of TAT E. A., to attract French customers towards London so that they can use its international air transport services from that city, and, secondly, that by virtue of that transaction British Airways owns or controls four out of the seven carriers serving the London-Paris link and is the only company operating directly or indirectly from all the airports in the London area.

74 The applicant further complains that the Commission overlooked the fact that Article 3(2) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (Official Journal 1992 L 240, p. 8) provides that all Member States are to be obliged, with effect from 1 April 1997, to authorize cabotage traffic rights within their territory by air

carriers licensed by another Member State. The applicant maintains that, as from 1 April 1997, British Airways will thus be able, by virtue of the concentration at issue, to develop, under its own banner or that of TAT E. A., services inside French territory operating from Paris and Lyons, and that the Commission should have taken that factor into account.

75 The applicant concludes that the Commission, in assessing the effects of the concentration at issue solely on the two routes directly concerned by it, did not make a correct appraisal of the compatibility of the concentration with the common market. It further states that, having demonstrated the Commission's failure correctly to define the relevant market, it cannot be criticized for not showing, or seeking to show, that the transaction in question creates or strengthens a dominant position on the market.

76 The Commission replies that the definition of the relevant market which it adopted in the decision is consistent with both the case-law of the Court of Justice (judgment in Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803) and its own practice. It further states that it also took into consideration, as the applicant demands, the effects of the transaction at a wider level on competition between air carriers of a European size and, in particular, the effect which the integration of TAT E. A. into the British Airways network would have on future competition at that wider level on the part of carriers of that size.

77 The United Kingdom and the interveners TAT and British Airways concur with the Commission's arguments regarding the definition of the relevant market. In the United Kingdom's view, it has not been established that the concentration involved the creation or strengthening, on one of the relevant markets, of a dominant position as a result of which effective competition would be significantly impeded. It considers, therefore, that there was no legal basis for the Commission to take any decision other than the one which it adopted. TAT observes that, by widening the definition of the market, Air France makes it appear all the more unlikely that British Airways has established a dominant position in the market thus defined. It considers, therefore, that if the definition of the market proposed

by the applicant were to be accepted, this would make it all the more necessary to authorize the concentration at issue. Lastly, British Airways states once again that owing to the diversity and widespread nature of the services to be taken into consideration it is inappropriate to define the market as widely as the applicant proposes.

Findings of the Court

78 Article 2(2) of the Regulation provides that: 'A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market'. However, Article 2(3) provides that a concentration which creates or strengthens such a position must be declared incompatible with the common market.

79 It follows from those provisions that the Commission is bound to declare a concentration compatible with the common market where two conditions are fulfilled, the first being that the transaction in question should neither create nor strengthen a dominant position and the second being that competition in the common market must not be significantly impeded by the creation or strengthening of such a position. If, therefore, there is no creation or strengthening of a dominant position, the transaction must be authorized, without there being any need to examine the effects of the transaction on effective competition.

80 In order to assess whether the first condition is fulfilled in a given case, the Commission must first define the relevant market (see, by analogy, the judgment of the Court of First Instance in Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 69, and, on appeal, the judgment of the Court of Justice of 2 March 1994 in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667).

81 It should be borne in mind in this regard that in the present case the Commission found in paragraph 19 of its decision that the relevant market was 'each city-pair' constituting the point of departure and the point of arrival of the routes regarded by it as being directly concerned by the transaction at issue, and that it concluded, in paragraph 26 of its decision, that the transaction does not create or strengthen a dominant position as a result of which effective competition is impeded.

82 Since the applicant has asserted, on the one hand, that it does not in principle contest the validity of the definition adopted by the Commission, but, on the other hand, that it regards it as very incomplete, and thus erroneous, the Court must review the definition of the relevant market adopted by the Commission.

83 In this regard, the Court considers that the Commission's definition of the market is correct, as regards both the product concerned and the geographical area.

84 The definition of the market adopted by the Commission accords with the principles stated by the Court of Justice in its aforesaid judgment in *Ahmed Saeed*, in that the Commission examined, in paragraphs 17 to 21 of its decision, the two routes on which there was an overlap between the services proposed by the parties to the concentration, namely Paris-London and Lyons-London, and their possible substitutability with other routes, and arrived at the convincing conclusion, first, that there is no substitutability between those two routes and other routes, and, secondly, that there is very little substitutability between the two routes themselves.

85 Furthermore, it is apparent from paragraphs 17 and 19 of the decision, even though the explanations given are short and concise, that the Commission did not limit its examination to consideration of the effects of the planned transaction solely on the two routes directly concerned by the planned transaction, but also assessed the effects of that transaction at a wider level, with regard to international

operations from France (paragraph 17) and to the effects on an extensive or high volume network (paragraph 19). It follows that the criticism directed at the Commission by the applicant on this point has no basis in fact and cannot therefore be accepted by the Court.

86 In any event, as the United Kingdom observes, the applicant does not claim in its pleadings before the Court, either expressly or impliedly, that the Commission committed an error of assessment in finding that the transaction at issue neither created nor strengthened a dominant position on the markets regarded by the Commission as relevant; nor does it claim that such a position would have been created or strengthened on the market as it should, in its view, have been defined. In the circumstances, it cannot contest the legality of the Commission's decision to declare the transaction compatible with the common market.

87 That result is not in any way vitiated by the arguments advanced by the applicant in the second and third parts of the plea. Even if, as the Commission states in paragraph 17 of its decision, the concentration at issue enables British Airways to attract French customers to its international air transport services departing from the United Kingdom, and even if it is correct that British Airways controls four of the seven carriers operating on the London-Paris route, and even assuming, further, that British Airways will be able, by means of the transaction in question, to develop operations within French territory from 1 April 1997 more easily than other non-French airlines, the fact remains that the applicant has not shown how such circumstances should have led the Commission to prohibit the concentration at issue, in the absence of the creation or strengthening of a dominant position on any market whatever.

88 It follows that the plea must be rejected.

The third plea: infringement of Article 190 of the Treaty

Brief summary of the arguments of the parties

89 The applicant maintains that the Commission, confronted by the applicant with two different, and necessarily complementary, definitions of the market for the product and the geographical market concerned by the concentration at issue, infringed Article 190 of the Treaty in failing to state the grounds which led it to base the contested decision on only one of those two definitions.

90 The Commission points out that, as the Court of Justice has consistently held, it is not bound to state reasons for the rejection of arguments put forward by parties to the administrative proceedings, nor, *a fortiori*, for the rejection of those advanced by third parties. Moreover, it not only incorporated in its definition factors connected, in particular, with the existence of European networks and the conditions prevailing at airports but also provided the data needed to justify the fact that no detailed consideration was given to the effects of the concentration on British Airways' network.

91 In so far as the interveners make any observations on this point, they concur with the reasoning put forward by the Commission.

Findings of the Court

92 The Court of Justice and the Court of First Instance have consistently held that, although under Article 190 of the Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements

which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings (see, *inter alia*, the judgment of the Court of First Instance in Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833, paragraph 257).

93 In the present case, the Court considers that the statement of reasons for the decision clearly indicates the matters of fact and of law and the other considerations which led the Commission to adopt the contested decision. Since the Commission is not obliged to state the reasons for its rejection of the wider definition of the market advanced by Air France, a third party in the matter, it cannot be regarded as having failed on this point to fulfil its obligation to provide a statement of reasons.

94 Moreover, as stated above (paragraph 86), the Commission's decision in fact not only takes into consideration the two routes directly affected by the concentration but also contains a more general appraisal of the effects of the proposed concentration.

95 It follows that the plea must be rejected.

The fourth plea: breach of the principle of legitimate expectations

Brief summary of the arguments of the parties

96 In the context of this plea, the applicant explains that on 29 October 1990, following its concentration with other French carriers — UTA and Air Inter, it concluded with the Commission and the French Government an agreement obliging it

to cease its involvement in the decision-making organs of TAT, of which it was then a shareholder, and to divest itself totally of its interest in that company by 30 June 1992. The sole purpose of that obligation to divest was to ensure that there was an independent competitor, *vis-à-vis* the applicant, on the French domestic air transport market.

97 According to the applicant, not only was it never envisaged that a foreign company of a comparable size, namely British Airways, could be substituted in its place as a shareholder having joint or sole control over TAT E. A., such a possibility would have made it impossible for the agreement to be concluded. It also states that the Commission gave no indication, either during the preliminary negotiations or when the agreement was concluded on 29 October 1990, that it thought it conceivable, and even compatible with the common market, for the applicant to be replaced as a shareholder in TAT by a foreign competitor of the same size. In its view, the contested decision therfore conflicts with the agreement in question.

98 The applicant accordingly concludes that, by declaring the concentration between British Airways and TAT E. A. compatible with the common market, the Commission failed, at least as regards the latter's domestic operations, to fulfil its obligation to protect the applicant's legitimate expectations, thereby breaching the general principle of the protection of legitimate expectations enshrined in Community law and infringing Article 155 of the Treaty, both of which take precedence over the provisions of a regulation.

99 The Commission contends, in opposition to that argument, that, far from going against the letter and the spirit of the agreement of 29 October 1990, the control over TAT E. A. acquired by British Airways only strengthens the possibility of increased competition on the French domestic market by reaffirming the position of TAT E. A. as an 'independent competitor of Air France', which was its sole concern at the time when the agreement was concluded. According to the Commission, the fact that such a possibility, which it could not in any event have foreseen, was not envisaged during the discussions prior to the conclusion of the agreement cannot result in its being obliged to prohibit — in breach, moreover, of fundamental Community principles including that of freedom of establishment —

a concentration compatible with the competition rules applying to the common market.

100 The United Kingdom submits that this plea is, 'as a matter of principle, fundamentally misconceived'. Furthermore, it does not consider there to be any incompatibility between the agreement in question and the decision, nor, in consequence, any prejudice to legitimate expectations.

101 The two other interveners concur with the reasoning of the Commission and of the United Kingdom.

Findings of the Court

102 It should be recalled that a consequence of the hierarchy of Community legal acts, as laid down in the Treaty and upheld in Community case-law, is that an act of general application cannot be implicitly altered by an individual decision (see the judgment of the Court of Justice in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 44). It follows that a Community institution cannot be forced, by virtue of the principle of the protection of legitimate expectations, to apply Community rules *contra legem*.

103 The Court finds that the documents before it in the present case show in any event that the agreement concluded on 29 October 1990 between the French Government, Air France and the Commission only contains commitments on the part of the first two parties, the Commission, for its part, not entering into any commitment. There is nothing, therefore, either in the actual terms of that agreement or in

any other matter relied on before the Court, to indicate in any way that the Commission undertook not to declare a concentration between TAT and a competitor of the same size as Air France compatible with the common market. Consequently, the applicant has not established to the requisite legal standard that any legitimate expectations were created in its regard.

104 It follows that the plea must be rejected.

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

Costs

106 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 failed in its submissions, and since the defendant and the interveners have asked for their costs to be paid, the applicant must be ordered to pay the costs, including those of the interveners TAT and British Airways. Since the applicant is to pay its own costs as well as those of the defendant and of the interveners TAT and British Airways, TAT's claim for application by the Court of Article 87(3) of the Rules, relating to the payment of costs unreasonably or vexatiously incurred, has become nugatory.

107 Under Article 87(4) of the Rules, the Member States which intervened in the proceedings are to bear their own costs. Consequently, the United Kingdom shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and to pay the costs of the defendant and of the interveners TAT and British Airways;

3. Orders the United Kingdom to bear its own costs.

Schintgen García-Valdecasas Kirschner

Vesterdorf Lenaerts

Delivered in open court in Luxembourg on 19 May 1994.

H. Jung R. Schintgen

Registrar President