

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

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)

(Only the French text is authentic)

(92/568/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 and 15 thereof,

Having regard to the statement of objections sent to the International Union of Railways on 10 October 1991,

Having given the association of undertakings concerned the opportunity, in accordance with Article 19 (1) of Regulation No 17 and with the provisions of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾, of being heard on the matters to which the Commission has taken objection,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

A. Subject of the proceeding

- (1) This proceeding relates to the conditions laid down by the International Union of Railways (Union

Internationale des Chemins de Fer — UIC) for the appointment of travel agents authorized to issue tickets for the carriage of passengers by rail and the conditions under which appointed agents may sell the tickets.

B. The marketing of international tickets for the carriage of passengers by rail

- (2) Under the rules currently applicable to rail transport, international transport is carried out on the basis of cooperation between all the railway companies involved in a given journey.
- (3) On that basis, the price of an international ticket generally corresponds to the total amount of the fares for the national sections of the journey.

Transport operations are cleared after the event between the railway companies so that each receives the part of the fare corresponding to that part of the service provided by it.

- (4) International rail tickets may be sold by the railway companies themselves or by appointed travel agents. The number of appointed agents and the percentage of tickets sold by them in relation to the total number of tickets sold differ considerably from one Member State to another. In 1990, the situation was as follows :

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

	Number of appointed agents	% of tickets sold by agents	
Germany	1 805	25	
Belgium	211	0,5	Domestic travel :
		53	International travel :
Spain	1 800	24	
France	2 391	20	
Great Britain			
— Domestic travel :	1 983	7,5	Domestic travel :
— International travel :	246	54	International travel :
Greece	140	25	
Italy	1 710	8	
Luxembourg	36	5,2	
Netherlands	184	29	

- (5) The trend in the number of appointed agents differs from one railway company to another. Some railway companies, such as the German railways (DB), the Belgian railways (SNCB) and the Spanish railways (RENFE), have increased the number of appointed agents in recent years, while others such as British Rail (BR) and the French railways (SNCF) have done the opposite.

- (6) During the procedure the representatives of the UIC declared that the number of international journeys is around 130 million per year, at an average cost of ECU 50 per journey, representing a total turnover of around ECU 6 500 million.

C. Renumeration of ticket distributors

- (7) The sale of a travel ticket by a travel agent constitutes a supply of services entailing remuneration.
- (8) Such remuneration takes the form of a commission calculated on the basis of the total amount of the price of the ticket. Thus, where an agent sells a ticket for international carriage performed by two railway companies, the agent receives a commission from the two companies, calculated in proportion to the revenue which each receives.
- (9) Similarly, where a railway company sells directly an international ticket for carriage which it provides in conjunction with another company, it receives a commission from the other company on whose behalf it sells the ticket.

However, the company selling the ticket 'saves' the commission which it would have paid if the ticket had been sold by a travel agent.

D. International Union of Railways (UIC)

- (10) The UIC is a worldwide association of railway companies. Article 1 of the UIC Statutes stipulates that the objectives of the International Union of Railways are :

- '(a) to carry out or commission research work and studies designed to standardize and improve the equipment and operating practices of the railways for the purpose of international traffic ;
- (b) to provide representation for the railways on outside bodies, under the conditions laid down in these Statutes, for the examination of common questions concerning them and for the defence of their interests ;
- (c) to ensure coordination and unity of action with international organizations which are parties to the special agreement contained in Appendix 1. Under the terms of the present Statutes organizations other than the UIC shall be known hereinafter as "participating organizations".'

- (11) The main bodies of the UIC are :

- (a) the General Assembly, which decides on any amendments to be made to the Statutes and on the admission or exclusion of a member, issued directives and takes all relevant decisions on the UIC's activities on the basis of proposals submitted by the Board of Management ;
- (b) the Board of Management comprises 26 Railways, including the Chairman Railway.

Its objective under the Statutes is as follows :

- 'it shall direct the affairs of the UIC and make decisions of general application ;
- it shall appoint the Chairman Railways of study bodies, and the Members of Committees and Technical Committees ;

— it shall adopt the programme of work of study bodies and give them directives for its execution. It shall take all necessary decisions on the basis of proposals and reports submitted to it by these bodies’;

(c) the Secretary-General, who is appointed by the General Assembly, reports on the UIC's activities to the General Assembly and the Board of Management, submits to the Board of Management the accounts and draft budgets of the General Secretariat, arranges circulation of all decisions made by the UIC and is responsible for public relations at the UIC.

(12) The UIC also includes study bodies, provided for in Article 15 of the Statutes, which are as follows:

1) committees set up by the board of management to study important matters relevant to the railways.

These committees are empowered to set up working bodies as follows, to assist them in their work:

— either Working Parties to examine a specific problem,

— or sub-committees for questions of a continuous nature;

2) technical committees, with committee status, set up by the board of management;

3) offices, bureaux and centres which may be formed by the General Assembly to undertake tasks which cannot be performed by the committees;

4) ad hoc groups of a permanent or temporary character, set up by the board of management as needed.

(13) Article 33 of the Statutes provides that the committees and ad hoc groups referred to in Article 15 must comply with the directives of the UIC Higher Authorities in the preparation of their programme of work for submission to the board of management.

The organizational and working procedures applicable to the committees and ad hoc groups are the subject of special regulations approved by the board of management, set out in ‘leaflet C1’.

(14) Article 1 of the abovementioned leaflet provides as follows:

‘Article 1 — The carrying-out of studies, the performance of joint projects and the exchange of

information shall be entrusted, in accordance with the differing spheres of competence, to the following bodies:

1) Eight committees

Passenger Committee
Freight Committee
Finance Committee
Operating Committee
Locomotive and Rolling Stock Committee
Planning and Economics Committee
Fixed Equipment Committee
Information Processing Committee

2) the Control Committee of the Office for Research and Experiments (ORE)

3) the Brussels Central Clearing House (CCH)

4) the ad hoc groups, including the Legal Group, the Documentation Group and the Statistics Group, set up pursuant to Article 15 of the Statutes’ (unofficial version translated from the French).

(15) Under Article 6 of leaflet C1, the committees have full power of decision on matters included in their working programmes.

(16) The committees comprise representatives of the railways, at a grade immediately below Director-General level.

(17) The conclusions of the studies may take the form of ‘leaflets’. Article 12 of leaflet C1 states in this connection that:

‘The conclusions of a study seeking the adoption of a decision of a mandatory, advisory or explanatory nature must be drafted in a definitive form so as to constitute either a new “leaflet” or an amendment to an existing leaflet. The conclusions must stipulate whether any mandatory measures they prescribe must be applied to all the UIC Railways or only to some of them’ (unofficial version translated from the French).

(18) The voting rights of the railways that are members of committees are determined in accordance with the provisions of Article 47 of the Statutes, which states that the railways shall be granted ‘one vote plus one-fifth of the number of votes assigned to them under Article 43, the calculation being taken to the first decimal point’ (unofficial version translated from the French).

However, a mandatory decision may be taken by a given body only if at least two-thirds of its members are represented and if at least half are actually present and take part in the vote.

- (19) The arrangements for the circulation of the minutes of meetings held by Committees or study groups are set out in Annex 2 to leaflet C1.

In all cases, the General Secretariat is responsible for circulating the minutes of meetings to UIC members.

E. The conditions governing the appointment of travel agents

- (20) The UIC Passenger Committee drew up a 'Travel Agency' leaflet, codified under No 130 in 1952 and subsequently updated on numerous occasions. The 1 July 1979 edition is described as the fourteenth edition, and was itself amended at least 11 times up to 1990.

- (21) Leaflet No 130 defines the general relationship between the railway companies and travel agencies and is accompanied by a standard appointment contract and by a table of commissions granted to agents for international traffic services. The main provisions of the leaflet are as follows:

- (22) *Appointment procedures:*

Under Article 1.a. of UIC leaflet No 130, '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'.

The information provided by the undertakings shows that this provision is very widely followed and that the appointment of travel agencies by a railway company outside this country is granted only exceptionally and generally in order to market very specific services.

Such is the case with the SNCF, which has approved an agency in the United Kingdom to sell special tickets for its auto-couche trains.

Similarly, the DSB (Danish Railways) has appointed a number of agencies in Iceland, the United States, Australia and Singapore.

Lastly, the Italian Railways have approved agencies outside Italy, but this involves only agencies of their subsidiary 'CIT'.

- (23) *Use of a standard contract*

Article 1.3 of UIC leaflet No 130 stipulates in this respect:

'In their agreements with agencies, railways are recommended to follow the model contracts shown as Appendix 1 hereto.'

According to the information provided by the railways, this provision is also very widely followed by the railway companies, which incorporate the whole of the model contract or its main provisions into their own contracts.

- (24) *The conditions governing the granting of commissions to agencies*

These are set out in Article 3 of UIC leaflet No 130:

Article 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'.

Article 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 (...) on the tickets purchased in this way than that applied in the case of tickets issued by the travel agencies themselves, except in those countries where the issue of certain types of ticket is never entrusted to agencies and where the normal rate applied to tickets issued by agencies is paid on these types of ticket'.

These provisions of the whole of Article 3 are presented as 'essential prescriptions'. The specific provisions of Article 3 (2) are identified as being mandatory for the railway companies.

- (25) The information provided by the railway companies during examination of the case shows that these provisions concerning the conditions for the granting of commissions are very widely applied by the railway companies.

With regard to the rate of commission granted on sectional coupons and through coupons, the six railway companies questioned on this subject replied that they grant the same rate.

Similarly, 11 of the 12 railways companies in the Community grant a lower rate of commission for tickets purchased by agencies than in the case of tickets issued by the agencies themselves. Only the SNCB grants an identical rate of commission in both cases.

- (26) *The setting of the rates of commission*

In the case of tickets issued by agencies, the rates of commission granted by the railway companies up to 31 December 1989 were as follows:

- ten companies granted 9 %
- one company granted 8.5 %
- one company granted 8 %.

These rates were identical in the case of tickets issued between railway companies.

- (27) With regard to the setting of these rates of commission, the Chairman of the UIC Distribution Committee, in reply to a request for information, told the Commission by letter dated 6 March 1990 that 'the Distribution Committee got the rate of commission granted to agencies increased to 10 % as from 1 January 1990. Exception: the Italian Railways kept the former rate of 9 %, the Tunisian Railways and the Compagnie Maritime Transmediterranea 8 %'.

The Chairman of the UIC Distribution Committee also states that 'pending the reprint of leaflet 130, the railways(*) have received the letter a copy of which is attached'.

- (28) The abovementioned letter was sent to the railways by the Chairman of the UIC Distribution Committee on 24 January 1990.

It states that 'pursuant to the decisions of the UIC Passenger Committee of 25 April 1989 and 26 October 1989, please find attached a corrigendum to UIC leaflet No 130 The attached Annex is to be considered to be a provisional corrigendum to leaflet No 130 pending its reprinting by the UIC' (unofficial version translated from the French).

- (29) The abovementioned corrigendum to UIC leaflet 130 states, with regard to commissions:

'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 TVC and its special Annexes, as well as to all services covered by instructions or agreements that can be assimilated to TCV special Annexes, unless otherwise specified in the corresponding tariffs.

In the case of "reservation" services processed by electronic means as per leaflet No 301-2, the flat commission rate granted by the allocating railway to other railways shall be applicable. 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). Railways shall be able to grant a commission rate higher than that stipulated in Appendix 4, on the basis of bilateral or multilateral agreements. 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 provision 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.'

- (30) The abovementioned Appendix 4 stipulates, for each railway, the rate of commission granted to the travel agencies accredited by a foreign railway and the rate granted to the other railways.

All the European railways grant a rate of 10 %, except the Italian railways, which grant a rate of 6 % for tickets issued in stations and 9 % for tickets issued in agencies.

In the case of all the railways, the rate of commission is granted subject to reciprocity by the other railways.

(*) Terminologie de 'Réseaux' utilisée dans le sens 'entreprise ferroviaire'.

- (31) The information supplied by the railways to the Commission confirms that they do in fact apply a rate of 10 % with the exception of the Italian railways.

- (32) *The obligation to draw up and sell tickets at the official fares indicated in the tariffs*

Article 4 of the standard agreement on the appointment of agencies drawn up by the UIC states with regard to the agencies' obligations:

'The agency is required to draw up and sell the tickets at the official fares indicated in the tariffs and to refrain from charging for the drawing-up of the tickets issued' (unofficial version translated from the French).

- (33) Similar provisions are included by the railway companies in the agreements which they use.

Thus, clause 2 (ii) of the agreement used by the British Railways Board states that 'the Agent shall not sell tickets at any price other than the price fixed by the Board and shall ensure that all tickets are dated prior to issue'.

- (34) Article 4.5 of the agreement used by the SNCB states that 'the agency shall ensure that the tickets entrusted to it are sold in accordance with the SNCB's regulations and at the prices notified to it'.

- (35) Article 5 of the contract used by the SNCF stipulates that 'tickets must be sold at the prices fixed by the railways', and paragraph 5 of the statement of general conditions stipulates that 'tickets must be sold at the prices fixed by the railway. The invoices drawn up in this connection must indicate clearly the sums collected on behalf of the SNCF'.

- (36) Some railway companies supplement these provisions by specific provisions relating to the commissions granted to agencies.

- (37) Clause 3 of the agreement used by the British Railways Board states that 'the Agent shall retain the full amount of the commission allowed by the Board and shall not pass on such commission or

part thereof by rebate or otherwise to any other person'.

- (38) Similarly, the Greek Railways state, in a letter dated 3 April 1990 sent to the Commission, that 'travel agencies appointed by the Greek Railways may not pass on to their customers part of their commission, so as to prevent problems of unfair competition *vis-à-vis* the railways'.

- (39) Lastly, the Danish Railways state, in a letter sent to the Commission on 30 May 1990, that travel agencies may pass on part of their commission, but only to their branches.

- (40) *Ban on promoting competing means of transport*

Travel agencies authorized to sell railway tickets are generally also authorized to sell tickets for other means of transport such as plane, bus and boat.

- (41) Article 1 of the standard agreement drawn up by the UIC stipulates in this respect that 'the Agency is required not to favour, whether by its advertising, by its proposals or by its advice to the public, means of transport competing with the railways and with the other means of transport referred to in paragraph 1' (unofficial version translated from the French) (paragraph 1 refers to the other means of transport operated either by the railways themselves or in association therewith).

II. LEGAL ASSESSMENT

A. Applicability of the competition rules

- (42) According to the representatives of the UIC the competition rules are not applicable in this instance, for three main reasons:

- the appointed agents do not assume the risks connected with the performance of the transport contract,
- the railway companies are not in a competitive situation, but cooperate in providing international services,
- agents cannot go beyond merely negotiating and concluding contracts on behalf of the railways and cannot pass on part of their commission.

- (43) The question of the applicability of the competition rules to relations between travel agents and their principals arose in Case 311/85 VVR v Sociale Dienst (¹).

The Belgian Government had disputed the applicability of Article 85 of the EEC Treaty, arguing that the relationship between a tour operator and a travel agent was one of principal and agent and that a travel agent had therefore to be regarded as an auxiliary organ of the tour operator.

- (44) On this point, the Court of Justice held 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. He sells travel organized by a large number of different tour operators and a tour operator sells travel through a very large number of agents. Contrary to the Belgian Government's submissions, a travel agent cannot be treated as an auxiliary organ forming an integral part of a tour operator's undertaking'.

- (45) This reasoning is applicable to the case in point, since, on the one hand, agents sell transport services, but also hotel, tourist, artistic and other services organized and supplied by a very large number of carriers, tour operators and other providers of services and, on the other, each transport undertaking — in the case in point, each railway company — sells its services through a very large number of distributors, whether agents or other railway companies.

- (46) Travel agents cannot therefore, in this particular instance, be described as auxiliary organs forming an integral part of the railway companies. The relationships between the railway companies and the travel agents are consequently subject to the provisions of Article 85 of the EEC Treaty.

B. Applicability of Council Regulation No 17 of 6 February 1962

- (47) On 10 October 1991, the statement of objections has been sent to the UIC, in accordance with the procedural rules laid down in Council Regulation No 17.
- (48) In its written and oral reply to the statement of objections, the UIC disputed the applicability of

Regulation No 17. According to the UIC, as far as this case is concerned travel agents are providers of services ancillary to transport and, consequently, the procedural rules applicable are Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (²), as amended by the Act of Accession of the Hellenic Republic.

- (49) Article 1 of Regulation (EEC) No 1017/68 provides as follows :

'The provisions of this Regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical cooperation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by 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'.

- (50) However, the UIC's argument cannot be accepted, for three reasons.

- (51) It should be noted, firstly, that the inapplicability of Council Regulation No 17 to transport was laid down in Regulation No 141 of 26 November 1962 (³), as last amended by Regulation (EEC) No 1002/67 (⁴), so as to take account of the distinctive features of transport.

- (52) The third recital of Regulation No 141 states in this respect: 'whereas the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services'.

- (53) The UIC decision to which this proceeding relates concerns the conditions under which travel agents

(¹) Judgment of 1 October 1987, ECR 3801 [1987].

(²) OJ No L 175, 23. 7. 1978, p. 1.

(³) OJ No 124, 28. 11. 1962, p. 2751/62.

(⁴) OJ No L 306, 16. 12. 1967, p. 1.

are appointed for the sale of tickets and the conditions under which those tickets are distributed. Clearly, this activity does not relate 'directly' to the provision of transport services.

- (54) Furthermore, in its aforesaid judgment of 1 October 1987 in Case 311/85, *VVR v Sociale Dienst*, the Court of Justice ruled with regard to the conditions under which travel agents may sell travel organized by tour operators 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'.

Such activity of providing services on an entirely independent basis does not therefore concern the provision of transport, which is supplied exclusively by the principal.

- (55) In 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 and in storage and warehousing⁽¹⁾, the Council also drew a clear distinction between the two activities of provider of services incidental to transport and travel agent.

- (56) Under Article 2 of the directive, the activities of a person providing services incidental to transport include 'acting as an intermediary between contractors for various methods of transport and persons who dispatch or receive goods and who carry out various related activities'.

- (57) Under Article 3 of the directive, the activities of a person providing services incidental to transport correspond to titles such as 'commissionnaire de transport' and 'courtier de fret' in Belgium, France and Luxembourg, 'Spediteur' in Germany and 'freight forwarder' in the United Kingdom.

- (58) The title of 'travel agent' in Ireland and the United Kingdom corresponds to 'agent de voyages' in Belgium, France and Luxembourg and 'Reisebüro-Unternehmer' in Germany.

- (59) It must therefore be concluded that there can be no confusion between the activities of a travel agent and of a person providing services incidental to transport, and that the activities of travel agents constitute a provision of services on an indepen-

dent basis, which falls within the scope of Regulation No 17.

C. The concept of association of undertakings

- (60) The Community's railway companies are public undertakings entrusted with the provision and marketing of passenger and goods transport services. They operate on the various transport markets in competition with other public or private undertakings.

They are therefore undertakings within the meaning of Article 85 of the EEC Treaty.

- (61) Such undertakings set up the 'International Union of Railways' (UIC), which is an association having legal personality that allows the railway companies to cooperate in the technical and commercial areas.

The UIC is thus an association of undertakings within the meaning of Article 85 of the EEC Treaty.

D. The concept of decision by an association of undertakings

- (62) During the proceeding, the UIC asserted that UIC leaflet No 130 was merely a recommendation which did not prevent railway companies from appointing agents outside their territory. According to the UIC, such a recommendation did not constitute a decision by an association of undertakings within the meaning of Article 85 of the EEC Treaty.

- (63) It should be noted in this respect that the provisions of UIC leaflet No 130 were drawn up by the UIC's working bodies and adopted by the Passenger Committee before being sent to the member railways.

- (64) With regard to the rate of commission granted to agents, the Chairman of the UIC's Distribution Committee stated that 'the Distribution Committee has successfully proposed that the rate of commission granted to agents should be increased to 10 % as from 1 January 1990 ...'.

The UIC member railways were informed of this change by letter from the Chairman of the Distribution Committee dated 24 January 1990.

- (65) UIC leaflet No 130 comprises instructions drafted in mandatory terms. Such is the case with paragraph 1.1, which states that 'agencies shall be accredited by the main railway of the country in which they are situated'.

⁽¹⁾ OJ No L 213, 21. 7. 1982, p. 1.

(66) However, most of the provisions in the leaflet are not presented as being binding on the railways.

(67) Nevertheless, in Joined Cases 96 to 102, 104, 105, 108 and 110/82 IAZ v. Commission ⁽¹⁾, the Court of Justice ruled that 'a recommendation, even if it has no binding effect, cannot escape Article 85 (1) where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question'.

(68) The information provided by the railways regarding the conditions under which they decide to appoint travel agents shows that the provisions contained in UIC leaflet No 130 are very widely accepted and applied by the railways.

Thus, with regard to the rates of commission, it has been found that, within the Community, only the Italian railways grant a different rate from the other railways.

(69) It must therefore be concluded that UIC leaflet No 130 accurately reflects the UIC's desire to coordinate its members' conduct in accordance with its statutes and that, in accordance with the case-law of the Court of Justice ⁽²⁾, it constitutes a decision by an association of undertakings within the meaning of Article 85.

E. The restrictions of competition

(70) *Control of the appointment of travel agents by each national railway company*

Under the appointment conditions laid down by the UIC, an agency can be appointed only by the railway of the country in which it is situated.

However, the issuing of travel tickets constitutes a supply of services distinct from the transport provided against remuneration by the railways and the travel agencies.

The commission paid by a railway for the sale of a travel ticket is identical whether the sale is carried out by an agency or another railway acting as ticket distributor.

Competition therefore exists between agents, and between agents and the railways, for the issuing of tickets.

(71) Consumers derive benefit from the presence of travel agents entitled to sell rail tickets.

The availability of many different places where tickets are sold enables consumers to purchase them without having to go too far out of their way.

In addition, agents can provide other services, particularly as regards accommodation, enabling consumers to organize their trips in one operation.

Lastly, consumers may derive financial benefit from the presence of such travel agents.

(72) However, the position adopted within the UIC, namely that appointment may be granted only by the railway of the country in which the agency is situated, has the effect of limiting the number of appointed agents and thus of restricting competition between outlets for the sale of tickets, to the detriment of consumers.

(73) During the proceeding, the UIC's representatives stated that control of the appointment of agencies by each national railway was necessary under the current operation of international rail transport.

Each railway is responsible for the agencies which it accredited on its territory, in terms of accounting and as regards the training of agents and the general supervision of agencies.

It was claimed that the system established by the UIC was thus a system of general and mutual mandate between railways that was essential to the functioning of the market.

(74) That argument cannot be accepted. The UIC's representatives themselves acknowledged during the proceeding that certain railway companies already accredit directly a limited number of agencies outside their national territories. Control of the accreditation of agencies by each national railway cannot therefore be regarded as an essential means for the undertakings concerned to penetrate the market in question.

(75) It must therefore be concluded that the provision in the UIC leaflet relating to control of the appointment of travel agencies by each railway within its territory has the object and effect of restricting competition on the market for the distribution of rail tickets.

⁽¹⁾ Judgment of 8 November 1983, ECR 3369 [1983].

⁽²⁾ In particular IAZ v. Commission mentioned above and Case 45/85, Verband der Sachversicherer v. Commission ECR 447 [1987].

(76) *Definition of the conditions governing the granting of commissions*

Under the provisions of Article 3 of UIC leaflet No 130, it is recommended that each railway:

- grant an identical commission on sectional tickets and on its proportion of through tickets,
- grant on tickets purchased in stations by agencies a lower rate of commission than that granted on tickets issued by the agencies themselves.

Where the agencies purchase tickets in stations, the railways must grant a commission only if the contract does not allow the agency to draw up tickets itself.

(77) Investigation of the case has shown that these provisions are widely applied by the railway companies.

(78) Without such provisions, agencies could negotiate individually with each railway company the conditions governing the granting of commissions and could possibly obtain more advantageous terms.

(79) Furthermore, even if there were no individual negotiations between the railway company and each of the travel agencies, the conditions governing the granting of commissions laid down by each railway company could also be more advantageous for distributors if standard conditions were not laid down by the UIC.

(80) In both cases, the more advantageous conditions obtained by certain agencies would enable them to be in a more competitive position than other agencies and than the railway company in its capacity as a ticket distributor. The agencies could then pass on some of the advantages obtained to consumers.

(81) The abovementioned provisions of UIC leaflet No 130 aimed at ensuring standard conditions for the granting of commissions thus have **the object** and effect of restricting competition between ticket distributors.

(82) *Setting of a standard rate of commission*

It is established that the change in the rate of commission granted to agencies as from 1 January 1990 is the result of a decision adopted within the UIC in 1989.

Since that date, all the Community railway companies grant the same rate of 10 %, except for the Italian railways, which grant 9 %.

(83) The laying-down of a standard rate of commission for the remuneration of agencies prevents agencies from negotiating a more advantageous rate and thus obtaining a competitive advantage over other agencies and the national railway company.

This is because an agency that receives a higher commission is able to offer additional or higher-quality services and thus to compete with other ticket distributors to the benefit of consumers.

(84) The laying-down of a standard rate of commission within the UIC thus has the **object and effect** of appreciably restricting competition on the market for the distribution of rail tickets.

(85) During the proceeding, the UIC stated that the **Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 does not allow agents to pass on part of their commission to their customers and that consequently the setting of a standard rate of commission does not restrict competition.**

(86) The Convention, whose signatories include the twelve Member States of the Community, aims 'to establish a uniform system of law applicable to the carriage of passengers, luggage and goods in international through traffic by rail between Member States, and to facilitate the application and development of this system'.

It includes two appendices which form an integral part of the Convention, including Appendix A which lays down 'uniform rules concerning the contract for international carriage of passengers and luggage by rail (CIV)'.

(87) Article 5 of the CIV rules provides as follows:

'§1. The international tariffs shall contain all the special conditions applicable to carriage, in particular the information necessary for calculating the fares and other charges and, where necessary, the conditions for conversion of currencies.

The conditions of international tariffs may not derogate from the Uniform Rules unless the latter expressly so provide.

§2. The international tariffs shall be applied to all users on the same conditions'.

(88) The UIC cites the provisions of Article 5 (2) of the CIV rules in support of its argument that agents may not pass on part of their commission to users.

(89) That interpretation cannot be accepted. Article 5 of the CIV rules applies only to tariffs for transport services.

However, the commission received by the travel agent constitutes remuneration for services rendered by the agent in respect of the sale of each ticket. The commission does not therefore form part of the tariff for the sale of the transport service, which is performed by the railway companies, and does not fall within the scope of Article 5 of the CIV rules.

(90) In any event, it should be noted that the applicability of the competition rules laid down in the EEC Treaty to the case in point is affirmed in Article 62 of the CIV rules, which stipulates that 'the provisions of the Uniform Rules shall not prevail over those provisions which certain States are obliged to adopt, in traffic among themselves, in pursuance of certain Treaties such as the Treaties relating to the European Coal and Steel Community and the European Economic Community'.

(91) *The requirement that travel agencies should sell travel tickets at the fares indicated by the railways*

Under Article 4 of the UIC model contract, agencies are required to make out and sell tickets at the official fares indicated in the tariffs.

Railway companies are not therefore free to decide whether to permit their accredited agencies to return all or part of their commission to their clients.

(92) Thus, such a decision, taken on a horizontal level, necessarily limits the freedom of the individual railway companies to negotiate the terms and conditions of the agency agreement, and can therefore limit the competitive conduct of the undertakings concerned.

(93) Contrary to the position adopted by the UIC during the proceeding, the provisions of the COTIF cannot, for the reasons set out in paragraphs 89 and 90 above, justify any behaviour inconsistent with Article 85 (1).

(94) *The requirement that agencies must not favour competing means of transport in their offers or advice to the public*

Travel agencies generally offer for sale tickets for a number of means of transport that are in competition with one another.

For a given journey, a means of transport competing with the railways may be able to offer better service in terms of quality or price.

Where this is the case, the abovementioned practice aims to prohibit travel agencies from recommending travellers to use such more advantageous means of transport.

(95) This provision thus has the object and effect of restricting competition between the various means of transport.

(96) During the proceeding, the UIC stated that this clause had been incorporated into the UIC leaflet in the 1950s and that it had fallen into disuse.

(97) However, it should be noted in this respect that the UIC leaflet has been amended 35 times since 1952 and that the provision has never been removed.

(98) Furthermore, in accordance with the case law of the Court of Justice (⁽¹⁾), for the purposes of Article 85 (1) it is unnecessary to take account of the actual effects of an agreement or decision of an association where its object is to prevent, restrict or distort competition.

(99) It must thus be concluded that the prohibition on agencies' favouring competing means of transport in their offers or advice to the public infringes the provisions of Article 85 (1) of the EEC Treaty.

F. Effect on trade between Member States

(100) The abovementioned provisions affecting competition may also affect trade between Member States in several respects. First of all, travel agents operating in one Member State may sell rail-based travel organized by tour operators established in other Member States.

Secondly, these agents may sell tickets to customers residing in other Member States. Thirdly, the travel in question is often to other Member States.

(¹) Notably Judgement of 30 January 1985 in Case 123/83, (BNIC v. Clair) ECR 391 [1985].

G. Article 85 (3)

(101) The UIC never notified UIC leaflet No 130 to the Commission in order to seek application of the provisions of Article 85 (3). No decision may therefore be taken providing for exemption under that Article.

(102) In its reply to the statement of objections, however, the UIC stated that, in its view, the conditions for exemption were met in the case of three objections :

- control of the appointment of agents by each national railway company,
- the laying-down of the conditions governing the granting of commissions,
- the setting of a standard rate of commission.

The UIC bases its request on Article 5 of Regulation (EEC) No 1017/68.

(103) This legal basis cannot be accepted for the reasons set out in paragraphs 49 to 58. Exemption could be granted, if the conditions were met, only under the provisions of Article 85 (3).

(104) However, it has not been shown in respect of the three abovementioned objections that they contribute to improving the distribution of tickets and that consumers derive a fair share of the benefit.

On the contrary, it may be seen that such practices prevent consumers from receiving part of the commission granted to agencies.

(105) Nor has it been shown that the practices in question are indispensable to the attainment of the stated objective of improving distribution.

(106) Lastly, it may be seen that the practices in question afford the railway companies the possibility of eliminating competition, notably as regards fares, between travel agencies in the sale of tickets.

(107) Consequently, even if UIC leaflet No 130 had been notified, it could not have been exempted under Article 85 (3).

H. Article 15 (2) of Regulation No 17

(108) Pursuant to Article 15 (2) of Regulation No 17, the Commission may impose on undertakings or association of undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 (1) of the Treaty. In fixing the amount of the fine, regard

must be had to the gravity and duration of the infringement. The Commission considers that, in this case, there are grounds for imposing a fine on the UIC.

(109) In fixing the amount of the fine, the Commission takes the view that the gravity of the infringement is clear, since it has the object and effect of eliminating competition between all ticket distributors. Furthermore, the infringement has been committed over a long period, since UIC leaflet No 130 was drawn up in 1952.

(110) During the proceeding, the UIC stated that it had acted in good faith in taking the view that the procedural regulation applicable to the case was Regulation (EEC) No 1017/68 and that consequently notification of the decision taken by the association of undertakings was not essential in order to qualify for exemption. The UIC also believed that the appropriate conditions were met for obtaining such exemption.

(111) It should be noted in this respect that, already in 1987 ⁽¹⁾, the Court of Justice made it clear that a horizontal agreement or a horizontal decision by associations of undertakings such as that under consideration, which aims at collectively prohibiting the passing-on of part of the commission, is illegal. As from 1987, the UIC could not thus be unaware that the provisions of the UIC leaflet infringed or, at least, were liable to infringe the competition rules. However, it is clear that, between 1987 and the date on which the statement of objections was sent, the UIC did not take any steps to bring the UIC leaflet into line with Community law.

(112) However, account should be taken of the UIC's expressed intention, after having received the statement of objections, of amending the UIC leaflet in question so as to bring it into line with Community law.

I. Article 3 of Regulation No 17

(113) The UIC has already stated that it wishes to bring the documents which are the subject of this proceeding into line with Community competition law.

(114) However, given the gravity of the infringements, the Commission considers it necessary to stipulate in this decision the requirement that the infringements must be terminated,

⁽¹⁾ Case 311/85, VVR v. Sociale Dienst : reference given above.

HAS ADOPTED THIS DECISION :

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.

The fine shall be paid within three months of the date of notification of this Decision to the following bank account : No 310-0933000-43, Banque Bruxelles Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Brussels.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3.5 percentage points, i.e. 13.75 %.

Should payment be made in the national currency of the Member State in which the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 4

This Decision is addressed to :

International Union of Railways,
14, rue Jean Rey,
F-75015 Paris

This Decision is enforceable according to Article 192 of the EEC Treaty.

Done at Brussels, 25 November 1992.

For the Commission

Leon BRITTAN

Vice-President