COMMISSION REGULATION (EEC) No 83/91

of 5 December 1990

on the application of Article 85 (3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [1], as amended by Regulation (EEC) No 2344/90 [2], and in particular Article 2 thereof,

Having published a draft of this Regulation [3],

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas :

(1) Council Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices relating directly or indirectly to the provision of air transport services.

(2) Agreemens for the common purchase, development and operation of computer reservation systems relating to timetabling, reservations and Ticketing are liable to restrict competition and affect trade between Member States.

(3) Computer reservation systems (CRS) can render useful services to air carriers, travel agents and air travellers alike by giving ready access to up-to-date and detailed information in particular about flight possiblities, fare options and seat availability. They can also be used to make reservations and in some cases to print tickets and issue boarding passes. They thus help the air traveller to exercise choice on the basis of fuller information in order to meet his travel needs in the optimal manner. However, in order for these benefits to be obtained, flight schedules and fares displays must be as complete and unbiased as possible.

(4) The CRS market is such that few individual European undertakings could on their own make the investment and achieve the economies of scale required to compete with the more advanced existing systems. Cooperation in this field should therefore be permitted. A block exemption should therefore be granted for such cooperation.

(5) In accordance with Council Regulation (EEC) No 2299/89 [4] concerning the code of conduct for computer reservation systems the cooperation should not allow the parent carriers to create undue advantages for themselves and thereby distort competition. It is therefore necessary to ensure that no discrimination exists between parent carriers and participating carriers with regard in particular to access and neutrality of display. The bolck exemption should be subject to conditions which will ensure that all air carriers can participate in the systems on a non-discriminatory basis as regards access, display, information loading and fees. Moreover, in order to maintain competition in an oligopolistic market subscribers must be able to switch from one system to antoher at short notice and without penalty, and system vendors and air carriers must not act in ways which would restrict competition between systems.

(6) In accordance with Article 4 of Regulation (EEC) No 3976/87 this Regulation should apply with retroactive effect to agreements in existence on the date of entry into force of this Regulation provided that they meet the conditions for exemption set out in this Regulation.

(7) Under Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.

(8) The agreements which are exempted automatically by this Regulation need not be notified under Council Regulation No 17 [5]. However when real

[1] OJ No L 374, 31. 12. 1987, p. 9.
[2] OJ No L 217, 11. 8. 1990, p. 15.
[3] OJ No C 211, 24. 8. 1990, p. 7.
[4] OJ No L 220, 29. 7. 1989, p. 1.
[5] OJ No 13, 21. 2. 1962, p. 204/62.

doubt exists, undertakings may request the Commission to declare whether their agreements comply with this Regulation.

(9) This Regulation is without prejudice to the application of Article 86 of the Treaty.

HAS ADOPTED THIS REGULATION :

Article 1

Exemptions

Pursuant to Article 85 (3) of the Treaty and subject to the conditions set out in Articles 3 to 11 of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements between undertakings the purpose of which is one or more of the following :

(a) to purchase or develop a CRS in common ; or

(b) to create a system vendor to market and operate the CRS ; or

(c) to regulate the provision of distribution facilities by the system vendor or by distributors.

The exemption shall apply only to the following obligations :

(i) an obligation not to engage directly or indirectly in the development, marketing or operation of another CRS ;

(ii) an obligation on the system vendor to appoint parent carriers or participating carriers as distributors in respect of all or certain subscribers in a defined area of the common market ;

(iii) an obligation on the system vendor to grant a distributor exclusive rights to solicit all or certain subscribers in a defined area of the common market ; or

(iv) an obligation on the system vendor not to allow distributors to sell distribution facilities provided by other system vendors.

Article 2

Definitions

For the purposes of this Regulation :

'computer reservation system' (CRS) means a computerized system containing information about, *inter alia,* air carrier schedules, fares, seat availability and related services, and throug which reservations can be made or tickets issued or both, to the extent that all or some of these services are made available to subscribers,

'distribution facilities' means facilities provided by a system vendor for the display of information to subscribers about air carrier schedules, fares, seat availability, for making reservations or issuing tickets or both, and for providing any other related services,

'distributor' means an undertaking which is authorized by the system vendor to provide distribution facilities to sbuscribers,

'parent carrier' means an air carrier which is a system vendor or which directly or indirectly, alone or jointly with others, owns or controls a system vendor,

'participating carrier' means an air carrier which has an agreement with a system vendor for the distribution of its services through a CRS. To the extent that a parent carrier uses the distribution facilities of itw own CRS, it is considered a participating carrier,

'subscribers' means an undertaking other than a participating carrier, using a CRS within the Community under contract or other arrangement with a system vendor or a distributor for the sale of air transport services to members of the public,

'System vendor' means any entity and its affiliates which is responsible for the operation of a CRS.

Article 3

Access

1. A system vendor offering distribution facilities shall allow any air carrier the opportunity to participate, on an equal and non-discriminatory basis, in these facilities within the available capacity of the system concerned, subject to any technical constraints outside the control of the system vendor.

2. (a) A system vendor shall not

— attach unreasonable conditions to any contract with a participating carrier,

— require the acceptance of supplementary conditions which, by their nature or according to commercial usage, have no connection with participation in its CRS and shall apply the same conditions for the same level of service.

(b) A system vendor shall not make it a condition of participation in its CRS that a participating carrier may not at the same time be a participant in another system.

(c) A participating carrier shall have the right to terminate his contract with a system vendor without penalty on giving notice which need not exceed six months, to expire no earlier than the end of the first year.

3. Loading and processing facilities provided by the system vendor shall be offered to all participating carriers without discrimination.

4. If the system vendor adds any imporvement to the distribution facilities provided or the equipment used in the provision of the facilities, it shall offer these improvements to all participating carriers on the same terms and conditions, subject to current technical limitations.

Article 4

Display

1. A system vendor shall provide a principal display and shall include therein data provided by participating carriers on schedules, fares and seats available for individual purchase in a clear and comprehensive manner and without discrimination or bias, in particular as regards the order in which information is presented.

2. A system vendor shall not intentionally or negligently display inaccurate or misleading information and, subject to Article 9 (5), in particular:

— the criteria to be used for ranking information shall not be based on any factor directly or indirectly relating to carrier identity and shall be applied on a non-discriminatory basis to all participating carriers,

— no discrimination on the basis of different airports serving the same city shall be exercised in constructing and selecting city-pairs.

Article 5

Information loading

1. Participating carriers and others providing material for inclusion in a CRS shall ensure that the data submitted are comprehensive, accurate, non-misleading and transparent.

2. A system vendor shall not manipulate the material referred to in paragraph 1 in a manner that would lead to inaccurate, misleading or discriminatroy information being provided.

3. A system vendor shall load and process data provided by participating carriers with equal care and timeliness, subject to the constraints of the loading method selected by individual participating carriers and to the standard formats used by the said vendor.

Article 6

Fees

1. Any fee charged by a system vendor shall be non-discriminatory and reasonably related to the cost of the service provided and used, and shall, in particular, be the same for the same level of service.

2. A system vendor shall, on request, provide to interested parties details of current procedures, fees, systems facilities, editing and display cirteria used. However, this provision shall not oblige a system vendor to disclose proprietary information such as software programmes.

3. Any charges to fee levels, conditions or facilities offered and the basis therefore shall be communicated to all participating carriers and subscribers on a non-discriminatory basis.

Article 7

Provision of information

A system vendor shall provide information, statistical or otherwise, generated by its CRS, other than that offered as an integral part of the distribution facilities, only as follows:

(a) information concerning individual bookings shall be made available on an equal basis to the air carrier or air carriers participating in the service covered by the booking;

(b) information in aggregate or anonymous form when made available on request to any air carrier shall be offered to all participating air carriers on a non-discriminatory basis;

(c) other information generated by the CRS shall be made available with the consent of the air carrier concerned and subject to any agreement between a system vendor and participating carriers;

(d) personal information concerning a consumer and generated by a travel agent shall be made available to others not involved in the transaction only with the consent of the consumer.

Article 8

Reciprocity

1. The obligations of a system vendor under Articles 3 to 7 shall not apply in respect of a parent carrier of a third country to the extent that its CRS does not conform with this Regulation or does not offer Community air carriers equivalent treatment to that provided under this Regulation.

2. The obligation of parent and participating carriers under Article 10 shall not apply in respect of a CRS controlled by air carriers of a third country to the extent that that parent or participating carrier is not accorded equivalent treatment in that country to that provided under this Regulation.

3. A system vendor or an air carrier proposing to avail itself of the provisions of paragraphs 1 or 2 must notify the Commission of its intentions and the reasons therefore at least 14 days in advance of such action. In exceptional circumstances, the Commission may, at the request of the vendor or the air carrier concerned, grant a waiver from the 14-day rule.

4. Upon receipt of a notification, the Commission shall without delay determine whether discrimination within the meaning of paragraph 1 or 2 exists. If this is found to be the case, the Commission shall so inform all system vendors or the air carriers concerned in the Community as well as Member States. If discrimination within the meaning of paragraph 1 or 2 does not exist, the Commission shall so inform the system vendor or air carriers concerned.

Article 9

Contracts with subscribers

1. A system vendor shall make any of the distribution facilities of a CRS available to any subcriber on a non-discriminatory basis.

2. A system vendor shall not require a subscriber to sign an exclusive contract, nor directly or indirectly prevent a subcriber from subscribing to, or using, any other system or systems.

3. A service enhancement offered to any other subscriber shall be offered by the system vendor to all subscribers on a non-discriminatory basis.

4. A system vendor shall not attach unreasonable conditions to any contract with a subscriber and, in particular, a subscriber may terminate his contract with a system vendor, without penalty, on giving notice which need not exceed three months to expire no earlier than the end of the first year.

5. A system vendor shall ensure, either through technical means or through the contract with the subscriber, that the principal display is provided for each individual transaction and that the subscriber does not manipulate material supplied by CRSs in a manner that would lead to inaccurate, misleading or discriminatory presentation of information to consumers. However, for any one transaction a subscriber may re-order data or use alternative displays to meet a preference expressed by a consumer.

6. A system vendor shall not impose any obligation on a subscriber to accept an offer of technical equipment, but may require the use of equipment compatible with its own system.

Article 10

Relations with subscribers

1. A carrier shall not link the use of CRS of which it is parent or participating carrier by a subscriber with the receipt of any commission or other incentive for the sale of or issue of tickets for any of its air transport products.

2. A carrier shall not require use of CRS of which it is parent or participating carrier by a subscriber for any sale or issue of tickets for any air transport products provided either directly or indirectly by itself.

3. Paragraphs 1 and 2 shall be without prejudice to any condition which an air carrier may require of a travel agent when authorizing it to sell and issue tickets for its air transport products.

Article 11

Competition between system vendors

The system vendor shall not enter into any agreement or engage in a concerted practice with other system vendors with the object or effect of partitioning the market.

Article 12

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 3976/87, where it finds in a particular case that an agreement exempted by this Regulation nevertheless has certain effects wich are incompatible with the conditions laid down by Article 85 (3) or which are prohibited by Article 86 of the Treaty, and in particular where :

(i) the agreement hinders the maintenance of effective competition in the market for computer reservation systems ;

(ii) the agreement has the effect of restricting competition in the air transport or travel related markets ;

(iii) the system vendor directly or indirectly imposes unfair prices, fees or charges on subscribers or on participating carriers ;

(iv) the system vendor or distributor refuses to enter into a contract with a subscriber for the use of a CRS without an objective and non-discriminatory reason of a technical or commercial nature ;

(v) a parent carrier who holds a dominant position within the common market or in a substantial part of it, refuses to participate in the distribution facilities provided by a competing CRS without an objective and non-discriminatroy reason of a technical or commercial nature ;

(vi) the system vendor denies participating carriers access to any facilities other than distribution facilities without an objective and non-discriminatory reason of a technical or commercial nature.

Article 13

This Regulation shall enter into force on 1 February 1991 and expire on 31 December 1992.

It shall apply with retroactive effect to agreements which were in existence at the date of its entry into force, from the time when the conditions of application of this Regulation were fulfilled.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 December 1990.

For the Commission

Leon BRITTAN

Vice-President