COMMISSION REGULATION (EC) No 3652/93

of 22 December 1993

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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 lasta amended by Regulation (EEC) No 2411/92 [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) 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) Commission Regulation (EEC) No 83/91 [4], as last amended by Regulation (EEC) No 1618/93 [5], grants a block exemption to certain agreements establishing computerized reservation systems, providing they satisfy the conditions imposed by that Regulation. The block exemption expires on 31 December 1993.

(3) Agreements for the common purchase, development and operation of computerized reservation systems relating to timetabling, reservations and ticketing are liable to restrict competition and affect trade between Member States.

(4) Computerized 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 possibilities, 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.

(5) 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.

(6) In accordance with Council Regulation (EEC) No 2299/89 [6], as amended by Regulation (EEC) No 3089/93 [7], concerning the code of conduct for computerized 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 block 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 another at short notice and

[1] OJ No L 374, 31. 12. 1987, p. 9.
[2] OJ No L 240, 24. 8. 1992, p. 19.
[3] OJ No C 253, 30. 9. 1992, p. 11.
[4] OJ No L 10, 15. 1. 1991, p. 9.
[5] OJ No L 155, 26. 6. 1993, p. 23.
[6] OJ No L 220, 29. 7. 1989, p. 1.
[7] OJ No L 278, 11. 11. 1993, p. 1.

without penalty, and system vendors and air carriers must not act in ways which would restrict competition between systems.

(7) In order to maintain effective competition between CRSs, it is necessary to ensure that system vendors do not refrain from competing with each other.

(8) Refusal on the part of parent carriers to provide the same information on schedules, fares and availability to competing CRSs and to accept bookings made by those systems can seriously distort competition between CRSs. Parent carriers should not be obliged to incur costs in this connection except for reproduction of the information to be provided and for accepted bookings; parent carriers must not seek reimbursement of costs that cannot be fully justified.

(9) Billing information should be sufficiently detailed to allow participating carriers and subscribers to control their costs. A parent carrier should accept or reject any bookings/transactions made through a competing CRS on the same terms or conditions as it applies for bookings/transactions made through its own CRS.

(10) 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.

(11) For the purposes of 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.

(12) The agreements which are exempted automatically by this Regulation need not be notified under Council Regulation No 17 [1] as last amended by the Act of Accession of Spain and Portugal. However when real doubt exists, undertakings may request the Commission to declare whether their agreements comply with this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Exemptions

Pursuant to Article 82 (3) of the Treaty and subject to the conditions set out in Articles 2 to 14 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;

(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 purpose of this Regulation:

(a) 'air transport product' means the carriage by air of a passenger between two airports, including any related ancillary services and additional benefits offered for sale and/or sold as an integral part of that product;

[1] OJ No 13, 21. 2. 1962, p. 204/62.

(b) 'scheduled air service' means a series of flights each possessing all the following characteristics:

— it is performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that on each flight seats are available for individual purchase by consumers (either directly from the air carrier or from its authorized agents),

— it is operated so as to serve traffic between the same two or more points, either:

1. according to a published timetable; or

2. with flights so regular or frequent that they constitute a recognizably systematic series;

(c) 'fare' means the price to be paid for air transport products and the conditions under which this priced applies;

(d) 'computerized reservation system' (CRS) means a computerized system containing information about, *inter alia,* air carriers':

— schedules,

— availability,

— fares, and

— related services,

with or without facilities through which

— reservations can be made or

— tickets may be issued,

to the extent that some or all of these services are made available to subscribers;

(e) 'distribution facilities' means facilities provided by a system vendor for the provision of information about air carriers' schedules, availability, fares and related services and for making reservations and/or issuing tickets, and for any other related services;

(f) 'system vendor' means any entity and its affiliated which is or are responsible for the operation or marketing of a CRS;

(g) 'parent carrier' means any air carrier which directly or indirectly, jointly with others, owns or effectively controls a system vendor, as well as any air carrier which it owns or effectively controls;

(h) 'effective control' means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:

— the right to use all or part of the assets of an undertaking,

— rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking;

(i) 'participating carrier' means an air carrier which has an agreement with a system vendor for the distribution of air transport products through a CRS. To the extent that a parent carrier uses the facilities of its own CRS which are covered by this Regulation it shall be considered a participating carrier;

(j) 'subscriber' means a person or an undertaking, other than a participating carrier, using the distribution facilities for air transport products of a CRS under contract or other arrangement with a system vendor;

(k) 'consumer' means any person seeking information about and/or intending to purchase an air transport product;

(l) 'principal display' means a comprehensive neutral display of data concerning air services between city-pairs, within a specified time period;

(m) 'elapsed journey time' means the time difference between scheduled departure and arrival time;

(n) 'service enhancement' means any product or service offered by a system vendor on its own behalf to subscribers in conjunction with a CRS, other than distribution facilities;

(o) 'distributor' means an undertaking which is authorized by the system vendor to provide distribution facilities to subscribers.

Article 3

Access

1. A system vendor shall allow any air carrier the opportunity to participate, on an equal and non-discriminatory basis, in its distribution facilities within the available capacity of the system concerned and 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 may terminate its contract with a system vendor on giving notice which need not exceed six months, to expire no earlier than the end of the first year.

In such a case a system vendor shall not be entitled to recover more than the costs directly related to the termination of the contract.

3. If a system vendor has decided to add any improvement to the distribution facilities provided or the equipment used in the provision of the facilities, it shall provide information on these improvements and offer them to all participating carriers, including parent carriers, with equal timeliness and on the same terms and conditions, subject to any technical constraints outside the control of the system vendor and in such a way that there will be no difference in leadtime for the implementation of the new improvements between parent and participating carriers.

Article 4

Participation

1. (a) A parent carrier may not discriminate against a competing CRS by refusing to provide the latter, on request and with equal timeliness, the same information on schedules, fares and availability relating to its own air services as that which it provides to its own CRS or to distribute its air transport products through another CRS, or by refusing to accept or to confirm with equal timeliness a reservation made through a competing CRS or any of its air transport products which are distributed through its own CRS. The parent carrier shall be obliged to accept and to confirm only those bookings which are in conformity with its fares and conditions.

(b) The parent carrier shall not be obliged to accept any costs in this connection except for reproduction of the information to be provided and for accepted bookings.

(c) The parent carrier shall be entitled to carry out checks to ensure that Article 7 (1) is complied with by the competing CRS.

2. The obligation imposed by paragraph 1 shall not apply in favour of a competing CRS when, in accordance with the procedures of Article 6 (5), Article 7 (3) or Article 7 (4) of Regulation (EEC) No 2299/89, it has been decided that the CRS is in breach of Article 4a of that Regulation or that a system vendor cannot give sufficient guarantees that obligations under Article 6 of that Regulation concerning unauthorized access of parent carriers to information are complied with.

Article 5

Information loading

1. Participating carriers and other providers of air transport products shall ensure that the data they decide to submit to a CRS are accurate, nonmisleading, transparent and no less comprehensive than for any other CRS.

The data shall, *inter alia*, enable a system vendor to meet the requirements of the ranking criteria as set out in the Annex to Regulation (EEC) No 2299/89.

Data submitted via intermediaries shall not be manipulated by them in a manner that would lead to inaccurate, misleading or discriminatory information.

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

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

Article 6

Loading, processing and distribution

1. Loading and/or processing facilities provided by a system vendor shall be offered to all parent and participating carriers without discrimination. Where relevant and generally accepted air transport industry standards are available, system vendors shall offer facilities compatible with them.

2. A system vendor shall not reserve any specific loading and/or processing procedure or any other distribution facility for one or more of its parent carrier(s).

3. A system vendor shall ensure that its distribution facilities are separated, in a clear and verifiable manner, from any carrier's private inventory and management and marketing facilities. Separation may be established either logically by means of software or physically in such a way that any connection between the distribution facilities and the private facilities may be achieved only by means of an application-to-application interface. Irrespective of the method of separation adopted, any such interface shall be made available to all parent and participating carriers on a non-discriminatory basis and shall provide equality of treatment in respect of procedures, protocols, inputs and outputs. Where relevant and generally accepted air transport industry standards are available, system vendors shall offer interfaces compatible with them.

Article 7

Displays

1. (a) Displays generated by a CRS shall be clear and non-discriminatory.

(b) A system vendor shall not intentionally or negligently display in its CRS inaccurate or misleading information.

2. (a) A vendor shall provide through its CRS a principal display or displays for each individual transaction and shall include therein the data provided by participating carriers on flight schedules, fare types and seat availability in a clear and comprehensive manner and without discrimination or bias, in particular as regards the order in which information is presented.

(b) A consumer shall be entitled to have, on request, a principal display limited to scheduled or non-scheduled services only.

(c) No discrimination on the basis of airports serving the same city shall be exercised in constructing and selecting flights for a given citypair for inclusion in a principal display.

(d) Ranking of flight options in a principal display shall be as set out in the Annex to Regulation (EEC) No 2299/89.

(e) The criteria to be used for ranking 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.

3. Where a system vendor provides information on fares the display shall be neutral and non-discriminatory and shall contain at least the fares provided for all flights of participating carriers shown in the principal display. The source of such information shall be acceptable to the participating carrier(s) concerned and the system vendor concerned.

4. A CRS shall not be considered in breach of this to the extent that it changes a display in order to meet the specific request(s) of a consumer.

Article 8

Provision of information

1. The following provisions shall govern the availability of information, statistical or otherwise, from a system vendor's CRS:

(a) information concerning individual bookings shall be provided on an equal basis and only to the air carrier(s) participating in the service covered by the booking and to the subscriber(s) involved in the booking;

(b) any marketing, booking and sales data made available shall be on the basis that:

(i) such data are offered with equal timeliness and on a non-discriminatory basis to all participating carriers, including parent carriers;

(ii) such data may, and, on request, shall cover all participating carriers and/or subscribers, but shall not include any identification or personal information on a passenger or a corporate user;

(iii) all requests for such data are treated with equal care and timeliness subject to the transmission method selected by the individual carrier.

2. A system vendor shall not make available personal information concerning a passenger to others not involved in the transaction without the consent of the passenger.

3. A system vendor shall ensure that the provisions in paragraphs 1 and 2 are complied with, by technical means and/or appropriate safeguards regarding at least software, in such a way that information provided by or created for air carriers cannot be accessed by any means by one or more of the parent carriers except as permitted by paragraphs 1 and 2.

Article 9

Reciprocity

1. The obligations of a system vendor under Articles 3 and 5 to 8 shall not apply in respect of an air carrier of a third country, which controls a CRS either alone or jointly, to the extent that its CRS outside the territory of the Community does not offer Community air carriers equivalent treatment to that provided under this Regulation and under Regulation (EEC) No 2299/89.

2. The obligations of parent or participating carriers under Articles 4, 5 and 10 shall not apply in respect of a CRS controlled by (an) air carrier(s) of one or more third country (countries) to the extent that the parent or participating carrier(s) is (are) not accorded equivalent treatment outside the territory of the Community to that provided under this Regulation and under Regulation (EEC) No 2299/89.

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 therefor 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 paragraphs 1 and 2 exists. If this is found to be the case, the Commission shall so inform all systems 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 10

Relations with subscribers

1. A parent carrier shall not, directly or indirectly, link the use of any specific CRS by a subscriber with the receipt of any commission or other incentive or disincentive for the sale of air transport products available on its flights.

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

3. 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 shall be without prejudice to paragraphs 1 and 2.

Article 11

Contracts with subscribers

1. A system vendor shall make any of the distribution facilities of a CRS available to any subscriber 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 subscriber 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) A system vendor shall not attach unreasonable conditions to any subscriber contract allowing for the use of its CRS and, in particular, a subscriber may terminate its contract with a system vendor by giving notice which need not exceed three months to expire no earlier than the end of the first year.

In such a case a system vendor shall not be entitled to recover more than the costs directly related to the termination of the contract.

(b) Subject to paragraph 2, the supply of technical equipment is not subject to the conditions set out in (a).

5. A system vendor shall provide in each subscriber contract that:

(a) the principal display, conforming to Article 7, is accessed for each individual transaction except where a consumer requests information for only one air carrier;

(b) 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.

6. A system vendor shall not impose any obligation on a subscriber to accept an offer of technical equipment or software, but may require that equipment and software used are compatible with its own system.

Article 12

Fees

1. Any fee charged by a system vendor shall be non-discriminatory, reasonably structured 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.

The billing for the services of a CRS shall be sufficiently detailed to allow the participating carriers and subscribers to see exactly which services have been used and the fees therefor.

As a minimum, booking fee bills must include the following information for each segment:

— type of CRS booking,

— passenger name,

— country,

— IATA/ARC agency identification code,

— city code,

— city pair or segment,

— booking date (transaction date),

— flight date,

— flight number,

— status code (booking status),

— service type (class of service),

— PNR record locator,

— booking/cancellation indicator.

The billing information shall be offered on magnetic media.

A participating air carrier shall be offered the facility of being informed at the time that any booking/transaction is made for which a booking fee will be charged. Where a carrier elects to be so informed it shall be offered the option to disallow such bookings/transactions, unless the booking/transaction has already been accepted.

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

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

Article 13

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 14

Pursuant to Article 7 of Regulation (EEC) No 3976/87, the benefit of this Regulation may be withdrawn where it is found in a particular case that an agreement exempted by this Regulation nevertheless has certain effects which 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 CRSs;

(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 refuses to enter into a contract for the use of a CRS without an objective and non-discriminatory reason of a technical or commercial nature;

(v) 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 15

This Regulation shall enter into force on 1 January 1994 and expire on 30 June 1998.

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 where fulfilled.

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

Done at Brussels, 22 December 1993.

For the Commission

Karel VAN MIERT

Member of the Commission