COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION TO THE COUNCIL

Report of the application of Articles 4a and 6(3) of Council Regulation (EEC) No. 2299/89 as amended by Regulation concerning a Code of Conduct for CRSs[1]

[1] OJ L 220 of 29.7.1989 and OJ L 278 of 11.11.1993

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Introduction

Article 23.2 of the Code of Conduct ("Code") for CRSs states that "The Council shall review the application of Articles 4a and 6(3), based on a report to be submitted, at the latest by the end of 1994, by the Commission." The purpose of this present report is to summarize the experience gained in the implementation of Articles 4a and 6(3) over the past twelve months. In addition, having regard to the need for the Commission to gain more extensive experience of the application of these provisions, it is proposed that the Commission submits a further report to the Council by 31 December 1995, and that the Council defers its review of Articles 4a and 6(3) until that date. The Council will then have a more informed position on which it can base its proposed review.

Background

The two articles to be reviewed by the Council concern the obligations placed on a system vendor to prevent its parent carriers benefitting from preferential treatment in the operation of the CRS which, either separately or jointly, they own or effectively control. Bias in the operation of a CRS can lead to important distortions of competition between the carriers owning the systems and other participating carriers.

The particular features of the two articles that are aimed at eliminating discrimination are as follows:

> Article 4a provides, inter alia, that all loading and/or processing facilities shall be offered to all parent and participating carriers without discrimination. Furthermore, a system vendor must ensure that its distribution facilities are separated in a clear and verifiable manner from any carriers' private inventory and management and marketing functions, and which must be established in such a way that any connection to the distribution facilities may only be achieved by means of an application to application interface available to all participating carriers.

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Article 6(3) refers to the obligation on a system vendor to ensure that the appropriate safeguards are in place so that parent carriers cannot access information, either on individual passengers or in aggregate form such as marketing data, provided by or created for air carriers other than in a manner permitted by the Code.

Allegations of bias in favour of parent carriers often arise from the fact that CRSs evolved from internal reservation systems of air carriers, which, by their very nature, were designed to favour the carrier owning the system. Over the years, the rules governing the operations of CRSs have been strengthened to prevent all the most obvious forms of discrimination in favour of parent carriers. Nevertheless, there still remains a strongly held view in some quarters that, regardless of the controls placed on the operation of a CRS, ownership of a CRS inevitably enables a carrier to benefit from preferential treatment.

In order to be able to respond rapidly should these assertions continue to be made even after the adoption of the amended Code provisions, the Council gave itself the opportunity to review the adequacy of the most important anti-discriminatory provisions in the early stages of the life of the Code.

The new requirement that a system vendor has to provide other participating carriers with an equivalent means of access to its facilities as those enjoyed by its parent carriers has had far reaching consequences for CRS operations. For example, system vendors of hosted systems (CRSs where the parent carrier's internal reservation systems is housed in the CRS it owns) now have to ensure that all parent and participating carriers have the possibility to access the distribution facilities of the CRS through the same application to application interfaces.

An extensive debate has taken place in the CRS industry as to how the adequacy of the procedures put in place by system vendors in response to such detailed rules could be verified. In particular, it is generally considered that the most satisfactory way to determine the adequacy is through the detailed examination of the system by independent experts.

In this context, the Council had recognised the need for the arrangements described in Articles 4a and 6(3) to be tested in a practical manner. It therefore included a provision in Article 21a.1 that a system vendor should ensure that the technical compliance of its CRS with Articles 4a and 6 is monitored by an independent auditor. The system vendor is required to submit the auditor's report, on the inspection and its findings, to the Commission at least once a year, with a view to the Commission taking any necessary action under Article 11 of the Code (enforcement provisions).

Present position

In drafting the report on which the Council can base its review, the Commission considers it essential that it has a sufficient volume of background information available on the practical effects of the implementation of Articles 4a and 6(3). This information can be obtained from two principal sources, firstly, from the technical auditors' reports to be submitted to the Commission in accordance with Article 21a.1, and secondly from the examination of complaints submitted under Article 11. In both cases, the information presently available to the Commission is extremely limited.

In respect of the technical audit, the Commission was aware that, in the first year, system vendors would face difficulties in defining the exact scope of the audit to be carried out, when appointing their technical auditors. The Commission also needed to have its own standard against which it could measure the adequacy of the controls carried out by the system vendors' auditors.

The Commission recognized that the definition of the controls to be applied by the system vendor and the audit of those controls could only be carried out by suitably qualified experts. Consequently an initial list of qualified auditors was drawn up. Furthermore, in January 1994, the Commission initiated the proceedings necessary to appoint a firm of consultants to carry out a study entitled "Guidelines for undertaking audits under Article 21a of Council Regulation 2299/89 as amended by Council Regulation 3089/93". The purpose of the study was to define an approach to the execution of a CRS audit, together with a suggested series of audit procedures. It was also to provide models of the types of audit opinion that could be given by the auditors.

The Guidelines were developed by consultants in close collaboration with a large number of CRS industry experts, and following several meetings of a consultative group set up for this purpose. The final report was submitted to the Commission in October 1994, and was immediately transmitted to the CRSs to assist them in their selection of technical auditors. This report has also been sent to the Member States directly.

In the knowledge that the Commission was intending to publish guidelines for the carrying out of the audit, most system vendors had delayed the appointment of their technical auditors. A consequence of the delay in the appointment of the auditors is that most of the auditors' reports on the first year of CRS operations since the entry into force of the amended Code will only be submitted in the first quarter of 1995. The Commission has so far only received one report.

The audit reports are considered to be a prime source of information for the Commission when drafting its report to the Council required by Article 23. Given the present situation for the submission of the technical auditors' reports, the Commission considers that an important element of the information necessary for the preparation of the report on which the Council

is due to base its review is absent.

The Commission has only received one complaint relating to infringements of either Article 4a or 6(3) since the entry into force of the Code. The complaint concerns the confidentiality of passenger information contained in ticketing data, and was submitted to the Commission in October 1994. The complaint is currently being investigated by the Commission. It is not considered that this complaint can form an adequate basis on which to draft the report.

Conclusion

In the absence of a more substantial volume of information on which the Commission can base its examination of the impact of Article 4a and 6(3) on the operation of CRSs, it is not considered possible to produce a comprehensive report on which the Council can, in turn, base its own review.

For this reason, and because only one report has been received, it is therefore proposed that a second report on which the Council shall base its review of Articles 4a and 6(3) of the Code, shall be submitted by the Commission by 31 December 1995.

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