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Abstract

This Essay points out the major legal issues related to the development of the Computerized Reservation Systems ("CRS") and evaluates whether the EC approach has achieved satisfactory results, mainly from the standpoint of consumer protection. My critique is essentially that the EC has ruled the CRS by means of legislation that tends to be hyper-technical, difficult to interpret, and, at the same time, extremely vague when it comes to defining unlawful conduct and potential sanctions. This Essay argues that more in-depth regulatory reform should be undertaken by the EC, in order to enhance competition and benefit travellers. This Essay is structured in two conceptually interdependent sections. Part I focuses on a synthetic description of CRS and evaluates its potential to adversely impact a market based on free competition, specifically by violating the antitrust rules of the Treaty of Rome ("EEC Treaty"). Part II is devoted to an analysis of the most recent EC regulations in this area, with particular reference to Commission Regulation No. 83/91 of December 5, 1990. Regulation No. 83/91 gives a basic description of the CRS system within the framework of EC legislation. The minimal action undertaken thus far by the EC has been guided by two considerations. First, the area of Computerized Reservation Systems is still legally unstable and is characterized by gray areas and gaps in the rules that should be resolved by future EC legislation. Second, in the absence of a line of judicial precedents within the EC, a theoretical debate appears fruitless in light of the lack of a substantially consolidated position within the EC.

ESSAY

COMPUTERIZED RESERVATION SYSTEMS FOR AIR TRANSPORT: REMARKS ON THE EUROPEAN COMMUNITY LEGISLATION

*Raffaele Cavani**

INTRODUCTION

Over the last few years, one of the more interesting issues in the international air transportation industry has been the major technological advances in information processing and the transmission of data by telecommunication systems.[1] These technological improvements have impacted the air transportation industry in two major ways. First, from a practical stand point, these developments have stressed the need for a more sophisticated formation of operation panels according to specialized criteria. This peculiar industry need has emphasized the necessity for air carriers and the other related enterprises to enact business policies with massive economic investments in advanced technology and in service distribution networks.[2] Second, from a legal perspective, this "technological revolution" has given rise to a series of complex technical and theoretical issues that have prompted doctrinal and legislative intervention, specifically in the most recent European Community ("EC" or

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1. F.A. van Bakelen, *Aviation Wizards—Terminal Hazards. Airlines' Computerized Reservation Systems (C.R.S.): A Benefit or a Burden?*, 13 AIR L. 77 (1988); Jerome Ellig, *Computer Reservation Systems, Creative Destruction and Consumer Welfare: Some Unsettled Issues*, 19 TRANSP. L. J. 287 (1991).

2. *See generally* Fabio Carlucci, *Trasporto Aereo: Liberalizzazione Comunitaria in una Visione di Industria "Contestabile"*, 50-52 TRASPORTI 190 (1990) (interpreting doctrine of contestable markets in relation to deregulation of air transport industry) *citing* G. Tucci, *Il Processo di deregolamentazione nel trasporto aereo: verso una teoria della sua origine, in* RIVISTA INTERNAZIONALE DI ECONOMIA DEI TRASPORTI 54 (1982); Michael Spence, *Contestable Markets and the Theory of Industry Structure: a Review Article*, 21 J. EC. LIT. 981 (1983) (providing general background on theory of contestable markets).

"Community") legislation.[3]

This Essay points out the major legal issues related to the development of the Computerized Reservation Systems ("CRS") and evaluates whether the EC approach has achieved satisfactory results, mainly from the standpoint of consumer protection. My critique is essentially that the EC has ruled the CRS by means of legislation that tends to be hyper-technical, difficult to interpret, and, at the same time, extremely vague when it comes to defining unlawful conduct and potential sanctions. This Essay argues that more in-depth regulatory reform should be undertaken by the EC, in order to enhance competition and benefit travellers.

This Essay is structured in two conceptually interdependent sections. Part I focuses on a synthetic description of CRS and evaluates its potential to adversely impact a market based on free competition, specifically by violating the antitrust rules of the Treaty of Rome ("EEC Treaty").[4] Part II is devoted to an analysis of the most recent EC regulations in this area, with particular reference to Commission Regulation No. 83/91 of December 5, 1990.[5]

Regulation No. 83/91 gives a basic description of the CRS system within the framework of EC legislation. The minimal action undertaken thus far by the EC has been guided by two considerations. First, the area of Computerized Reservation Systems is still legally unstable and is characterized by gray areas and gaps in the rules that should be resolved by future EC legislation.[6]

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3. *See, e.g.*, Commission Directive No. 90/388, O.J. L 192/10 (1990), (on concurrence in markets of telecommunications services); Council Decision No. 91/691, O.J. L 377/41 (1991) (adopting program for establishment of information services market).

4. Treaty Establishing the European Economic Community, arts. 85 and 86, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (cmd. 5179-II), 298 U.N.T.S. 3, 47-49 (1958) [hereinafter EEC TREATY]. The leading philosophy of the European Economic Community on the subject of competition has been described as an "absolute faith in the values of competition." RENÉ JOLIET, THE RULE OF REASON IN ANTITRUST LAW 59 (1967). *See generally* ALDO FRIGNANI & MICHEL WAELBROEK, DISCIPLINA DELLA CONCORRENZA NELLA CEE (1983); CHRISTOPHER BELLAMY & GRAHAM CHILD, COMMON MARKET LAW OF COMPETITION (4th ed., 1993); DOEUWE J. GIJLSTRA & DAVID F. MURPHY, LEADING CASES AND MATERIALS ON THE COMPETITION LAW OF THE EEC (3d ed., 1984); MARC VAN DER WOUDE ET AL., EEC COMPETITION LAW HANDBOOK (1990); IVO VAN BAEL & JEAN-FRANÇOIS BELLIS, COMPETITION LAW OF THE EEC (2d ed., 1990) (providing background on competition law of the EEC).

5. Commission Regulation No. 83/91, O.J. L 10/9 (1991).

6. For critical remarks and observations of a different nature, *see* JOHN BALFOUR, AIR LAW AND THE EUROPEAN COMMUNITY 14 (1990); John Roland Mietus, Jr., *European Community Regulation of Airline Computer Reservation Systems*, 21 LAW & POL'Y INT'L BUS.

Second, in the absence of a line of judicial precedents within the EC, a theoretical debate appears fruitless in light of the lack of a substantially consolidated position within the EC.

I. *GENERAL STRUCTURE AND FUNCTION OF COMPUTERIZED RESERVATION SYSTEMS*

Computerized Reservation Systems ("CRS") are among the most dynamic instruments for the globalization and improvement of services offered by the aeronautic industry and, more generally, by the tourism industry. Information provided by CRS will make a wide spectrum of services available to the public. The majority of services sold within the travel industry are those directly linked to the air transportation industry. The visualization on computer terminal screens of data concerning specific air traffic routes permits the traveller to organize and reserve the type of trip best suited to his needs. For example, data screens reveal the presence of multiple carriers, the possibility of direct flights, the availability of specific seats, and the updating of fares.[7]

In addition, CRS provide information about complementary travel services, including hotel reservations, tickets for connections with surface transportation, the organization of recreational activities, automobile rentals, and the purchase of tickets for cultural events and performances. CRS do not only constitute a complete data bank for flights and rates for international air carriers,[8] but, according to a doctrinal interpretation,[9] they act as "authentic cartels, and are governed by groups [such as airlines, travel agents, hotel and car rental chains, and advertis-

93 (1989); Bruno Lejeune, *CEE: systèmes informatisés de réservation pour des transports aériens*, 4 COMPUTER & TELECOMS L. REV. 72 (1988); Jacques Derenne, *Les systèmes de réservation informatisés pour les transports aériens: un nouveau règlement d'exemption de la Commission*, 2 COMPUTER & TELECOMS L. REV. 71 (1991); Silvio Busti, *La disciplina comunitaria dell'informatica sul trasporto aereo, in* L'INFORMATICA NEL TRASPORTO AERO 199 (1991); Silvio Busti, *I sistemi telematici di prenotazione per il trasporto aereo nella disciplina comunitaria*, 1 DIRITTO DEI TRASPORTI 15 (1992).

7. *See* BALFOUR, *supra* note 6, at 14-16 (describing data processing within Computerized Reservation Systems [hereinafter CRS]); "Ticketing Merger is Set," N.Y. TIMES, Mar. 6, 1992, at D5 (describing functions of CRS); Derenne, *supra* note 6, at 71 (describing major European CRS).

8. Derenne, *supra* note 6, at 71.

9. *See* Busti, *La disciplina comunitara dell'informatica sul trasporto aero, supra* note 6 at 200; *La nuova disciplina della concorrenza nel trasporto aereo comunitario, in* DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI 693 (1989).

ing and public relations agencies] in a way they can exploit a dominant position on the market with respect to outsiders."[10]

Travel agents distribute and sell commercial products related to the airline industry using telecommunications equipment. Travel agencies therefore act as system terminals. The practical effect of such "channeling" of public demand results in preferential marketing of those services that are first indicated on the computer screen, regardless of their actual quality or the practical needs of consumers.[11]

Analogous situations are likely to arise with respect to those services that are complementary to the airline industry. In evaluating the structure of CRS, one should note that within the industry there exists a service distribution network rigidly blocked by entrance barriers, a type of monopoly. The strength of these barriers is directly proportional to the economic power of the operators of such CRS.[12] In other words, groups of competing businesses in a common computer information system may divert demand for air travel and related services to the exclusive advantage of the businesses, in the form of a monopoly. The practical mechanism for directing this demand may be very simple. It may, for example, consist of accelerating or slowing down the visual information on the computer screen, or even canceling possible options offered by outside competitors.[13]

Thus, there is the potential for and, hypothetically, evidence of anti-competitive activity. In fact, a potential consumer may, in some cases, receive incomplete or misleading information, or, in other cases, not be informed at all. In simple terms, the subscription to CRS functions as an instrument of market selection. The telecommunications operator, in most cases the travel agent, is able to block information concerning alternative services offered by outside competitors, a form of censorship that directs and often controls the choices available to the consumers.[14]

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10. Busti, *La disciplina comunitara dell'informatica sul trasporto aero*, *supra* note 6, at 200 (original in Italian).

11. *See id.*; van Bakelen, *supra* note 1, at 78 (discussing marketing of air transport services).

12. *See* Derenne, *supra* note 6, at 71 (describing major European CRS operators).

13. *Id.*

14. For a detailed survey of the general problems and possible abuses of "interline agreements" and the practice of code sharing, *see* Guido Rinaldi Baccelli, *La liberalizzazione del trasporto aereo in Europa*, *in* TRASPORTI 150, 197 n.116 (1987). Baccelli examines

Exploitation of CRS by system operators will most likely lead to anti-competitive practices. Potential abuses include agreements aimed at controlling or sharing the market of consumer services related to air transportation. Such strategies will result in a distortion of market competition, which creates a series of oligopolies. These oligopolies give rise to a series of normative measures, mostly within the EC, designed to minimize the risks of anti-competitive activities. The exploitation of CRS has been of considerable concern within the United States as well, where anti-competitive abuse of CRS foreshadowed the European experience.[15]

A. *U.S. Reaction to Antitrust Issues Concerning CRS*

The North American market of telecommunications systems is actually dominated by two system leaders, Sabre (managed by American Airlines) and Apollo (managed by United Airlines). These two corporations have garnered control over approximately eighty percent of the tickets sold for domestic air travel.[16]

In 1978, the Carter Administration launched its airline deregulation policy with the adoption of the Airline Deregulation Act ("ADA").[17] The ADA's objective was to minimize public control of the domestic airline industry and to allow the consumer to benefit from the diversity of services that results from a fair play of market forces. The effect of the policy, however, has been less than successful. By the mid-1980's, the Civil Aeronau-

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the possibility of an airline company absorbing traffic demands of a "legitimate" carrier, who does not have the traffic rights to a route but nevertheless hires aircraft and equipment of other carriers. *Id.*

15. In the United States, CRS is defined as

> a system offered by a carrier to subscribers for use in the United States that contains information about schedules, fares, rules, and availability of other carriers and that provides subscribers with the ability to issue tickets.

Advance Notice of Proposed Rulemaking—Airline Computer Reservation Systems, U.S. Civil Aeronautics Board, Ec. Reg. Docket No. 41,686 (Nov. 1983) (comments and proposed rules of the U.S. Dept. of Justice), *codified at* 14 C.F.R. § 255 (1993) (defining regulations for carrier-owned computer reservation systems in United States).

16. Collins, *Games Airlines Can Play with Reservation Systems*, THE TIMES, Jan. 1, 1987; Richard J. Fahy, *Regulation of Computerized Reservation Systems in the United States and Europe*, 11 AIR L. 232 (1986). Other CRS of minor mention, commercialized by Eastern Airlines, TWA and Delta Airlines are called, respectively, Soda, Pars and Dasata. van Bakelen, *supra* note 1, at 79.

17. Airline Deregulation Act, 49 U.S.C. § 1301-1384 (1988 & Supp. III 1991).

tics Board ("CAB"),[18] faced a series of claims from carriers, who were not associated with CRS, which denounced the anti-competitive behavior concerning the release of information on airline fees, connecting flights, and reservations.[19] In an August 1984 decision, the CAB outlined specific practices that displayed anti-competitiveness and unfair bias.[20]

B. *Europe's Reaction to Antitrust Issues Concerning CRS*

The European information industry in the air transport sector is characterized by two oligopolistic structures that share the relevant market. This market situation seems incompatible with the principles of free competition fostered by the EC and, more specifically, appears to conflict with the principles dictated by Articles 85[21] and 86[22] of the EEC Treaty.

It is notorious, in fact, that the economic system embodied by the EEC Treaty rests on the principles of a free market economy. The maintenance of adequate competition is a major consideration governing both the functions of the Common Market

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18. The Civil Aeronautics Board ("CAB"), a governmental unit that controlled and regulated air traffic, was created in 1958 by Pub. L. No. 85-726, 72 Stat. 731 (1958), was terminated in 1984. 49 U.S.C. App. § 1551 (1988).

19. *See* United Airlines Inc. v. Civil Aeronautics Board, 766 F.2d 1107 (7th Cir., 1985) (upholding CAB rules on Carrier-owned C.R.S.); Carrier-owned CRS 14 C.F.R. § 255 (1993); Patricia Barlow, *Aviation Antitrust-International Considerations After Sunset*, 12 AIR L. 68, 75 (1987).

20. Carrier-owned C.R.S., 49 Fed. Reg. 32,540 (1984) (codified at 14 C.F.R. § 255 (1993)). These practices include discrimination in the publication of data collected from various carriers according to their subscription to a data information system. *Id.*

21. EEC Treaty, *supra* note 4, art. 85(1), provides that:

> The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreements between enterprises, any agreements between undertakings, decisions by associations of enterprises and concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition *within the Common Market* . . . .

Id., 298 U.N.T.S. at 47-48 (emphasis added).

22. EEC Treaty, *supra* note 4, art. 86, provides in relevant part:

> [Any]. . . action by one or more enterprises to take improper advantage of a dominant position *within the Common Market* or within a substantial part of it shall be deemed incompatible with the Common Market and shall hereby be prohibited.

Id., 298 U.N.T.S. at 48 (emphasis added).

Articles 85 and 86 provide the basic rules on competition in the European Community, and follow Sections 1 and 2 of the Sherman Antitrust Act. 15 U.S.C. §§ 1-2 (1988). Sections 1 and 2 of the Sherman Antitrust Act prohibit practices in interstate commerce and in trade or commerce "with foreign nations." *Id.*

and the economies of the Member States. Articles 85 through 89 contain competition rules applicable to private enterprises.[23] These rules aim at ensuring that the creation of effective conditions of competition in the Common Market is not hindered by the erection of private barriers or restrictions. The maintenance of competition thus constitutes an essential canon of the Community's economic and legal order. Accordingly, the Court of Justice has traditionally held that articles 85 and 86 must be interpreted and applied in light of articles 2 and 3(f) of the EEC Treaty.[24]

With specific regards to the CRS, the EC reaction to practices or conduct that seem inconsistent with the relevant antitrust provisions concentrates essentially on a system of regulatory measures, such as Regulations No. 2672/88, No. 2299/89, and No. 83/91.[25] To varying degrees, these regulations aim to guarantee complete and nondiscriminatory information, fair access to the computer systems for all air carriers, and a policy to protect free market equilibrium.

II. *BASIC PRINCIPLES OF EC LEGISLATION ON CRS: REGULATIONS NO. 2672/88, NO. 2299/89, AND NO. 83/91*

Legal analysis of the consequences of CRS has only recently become the object of evaluation and legislative reaction by the Community institutions. The EC response has been limited to

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23. EEC Treaty, *supra* note 4, arts. 85-89, 298 U.N.T.S. at 47-49.

24. EEC Treaty, *supra* note 4, arts. 2 and 3(f), 298 U.N.T.S. at 15-16. Article 2 states:

> It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its member states.

Id. art. 2, 298 U.N.T.S. at 15.

Article 3(f) states that the European Community's activities shall include, "the establishment of a system ensuring that competition shall not be distorted in the Common Market." *Id.* art. 3(f), 298 U.N.T.S. at 16. *See* Europemballage and Continental Can Co. Inc. v. Commission, Case 6/72, [1973] E.C.R. 215, [1973] C.M.L.R. 199, 219. *See generally* Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L.J. 55 (1992) (providing brief analysis of EC competition law).

25. Commission Regulation No. 2672/88, O.J. L 239/13 (1988); Council Regulation No. 2299/89, O.J. L 220/1 (1989); Commission Regulation No. 83/91, O.J. L 10/9 (1991).

those aspects of CRS that are able to interfere with the free movement of services within the EC.[26] The direct impact of Articles 85 and 86 on agreements between corporations interested in the organized growth of telecommunication systems within the airline industry is the cornerstone of EC legislation in this area.[27]

Council Regulation No. 3976/87 of December 14, 1987[28] entitles the Commission to apply Article 85, paragraph 3 of the EC Treaty to certain categories of agreements and practices within the air transportation industry.[29] Block exemptions to agreements, which improve the production and distribution of consumer services and enhance the technical aspects of the industry's products, benefit parties willing to utilize CRS for scheduling flights, making reservations, and issuing tickets by carriers. Block exemptions, however, operate on the presumption that carriers of the Member States have equal access to the computer information systems. This includes the presumption that the services offered by participating carriers are not part of any anti-competitive scheme and that every participant is entitled to terminate his subscription to CRS with reasonable notice.[30]

On the basis of Article 2 of Regulation No. 3976/87,[31] the Commission, in 1988, enacted Regulation No. 2672/88,[32] which

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26. *See* EEC Treaty, *supra* note 4, arts. 74-84, 298 U.N.T.S. at 44-47 (setting out Community transport policy).

27. The main issues of the debate concerning air transportation and computerized systems are summarized in Busti, *La disciplina communitara dell'informatica sul trasporto aero*, *supra* note 6, at 20. *See* Re Olympic Airways AE, [1985] 1 C.M.L.R. 730, Commission Decision 85/121, O.J. L 46/51 (1985); Council Regulation No. 17/62 O.J. L 204/62 (1962). The inapplicability of Regulation Number 17/62 in a real sense to the air transport sector, aimed at the transfer of things and/or people from one place to another, is provided by Council Regulation No. 141 O.J. L 2751/62 (1962).

28. Council Regulation No. 3976/87, O.J. L 374/9 (1987).

29. *See* EEC Treaty, *supra* note 4, art. 85(3), 298 U.N.T.S. at 48 (providing, *inter alia*, exceptions to EC competition rules for practices which improve production and distribution of goods or promote technical and economic progress). Commission Regulation No. 3652/93, O.J. L 333/37 (1993), expressly confirmed the applicability of EEC Treaty article 85(3) to some categories of agreements among undertakings concerning the CRS.

30. Council Regulation No. 3976/87, art. 2, O.J. L 374/9, at 10 (1987). The possibility of exemptions through regulations, according to Article 85(3) of the EEC Treaty, was originally set at January 31, 1991. *Id.* art. 3, O.J. L 374/9, at 10 (1987). This deadline was subsequently extended to December 31, 1992. Council Regulation No. 2344/90, art. 1, O.J. L 217/15 (1990).

31. Council Regulation No. 3976/87, art. 2, O.J. L 374/9, at 10 (1987).

32. Commission Regulation No. 2672/88, O.J. L 239/13 (1988).

sought to improve the distribution of these services and reduce the costs resulting from a system of block exemptions.[33] The Regulation sets out fundamental guidelines for the identification of conduct that is exempted. For example, Article 1 of Regulation No. 2672/88 declares that the nullity sanction of Article 85, paragraph 1, of the EC Treaty is inapplicable to agreements among competing parties that have as their object: (a) the acquisition and common development of a CRS; (b) the establishment of a CRS that functions as "the seller of the system," whereby the sale and management of the CRS are assimilated, for its commercialization; and (c) the management of the distribution functions for sale and resale.[34]

Article 2 of Regulation No. 2672/88 outlines the obligations imposed on carriers participating in CRS, as well as on sellers of the CRS.[35] These obligations aim at preserving fair competition in the disbursement of information. The obligations created by Regulation No. 2672/88 can be summarized in the following terms: guarantee of equal access to CRS for all interested carriers, without imposing unnecessary conditions precedent to acceptance into CRS;[36] "neutral presentation" on the computer screen of data furnished to the subscribing carriers with an absolute prohibition against furnishing inexact or misleading information;[37] clarity in the presentation of information;[38] reciprocity among carriers associated with other CRS;[39] the possibility of terminating one's subscription to a CRS with adequate notice that includes the prohibition of exclusive contracts with subscribers;[40] and the prohibition of anti-competitive agreements among

33. *Id.* art. 1, O.J. L 239/13 at 14 (1988).

34. EEC Treaty, *supra* note 4, art. 85(1), 298 U.N.T.S. at 47-48 (listing anti-competitive practices which are incompatible with common market). Article 85, however, leaves unprejudiced the possible profile of an abuse of dominant position according to Article 86. *Id.*, art. 86, 298 U.N.T.S. at 47-48.

35. Commission Regulation No. 2672/88, art. 2, O.J. L 239/13, at 14 (1988).

36. *Id.* art. 3, O.J. L 239/13 at 14 (1988) (setting guidelines for access to CRS).

37. *Id.* art. 4, O.J. L 239/13 at 14-15 (1988) (setting guidelines for information to appear on display).

38. *Id.* art. 5, O.J. L 239/13 at 15 (1988) (mandating non-discrimination in care and timeliness of information loading onto CRS).

39. *Id.* art. 7, O.J. L 239/13 at 15 (1988) (setting parameters for reciprocity among carriers).

40. *Id.* art. 8, O.J. L 239/13 at 15 (1988) (detailing contractual rights of subscribers).

CRS vendors.[41] Furthermore, the Regulation subordinates the benefit of the exemption to fundamental guarantees, such as the maintenance of effective competition in the CRS market or that "of other services that are connected to travel."[42] Finally, the Regulation encourages parity of treatment in price fixing by CRS vendors and in determining contractual conditions for the use of CRS by subscribers.

Along the same rationale, Regulation No. 2299/89, passed by the Council on July 24, 1989,[43] instituted a binding "code of conduct" in the area of CRS telecommunications. Article 1 defines the Regulation as applying only to CRS "offered for use and/or utilization in the territory of the [EC]," regardless of the status or nationality of the CRS vendor, the identity of information source, the location of the central data processing unit, or the geographic location of the airline service.[44] The Regulation uses a simple standard for identifying the CRS that comes within the Regulation's meaning.[45]

The Regulation described above is aimed not so much at curbing the effects of anti-competitive activity as it is aimed at preventing future harm by regulating the phase in which the information has developed. Moreover, chartered services are excluded from "airline services," for purposes of the Regulation;[46] services rendered by non-EC carriers are also excluded, with the exception of the possible application of the reciprocity clause granted by article 7 for carriers of non-EC countries.[47] Such exclusions highlight a gap in the rules on cabotage in inter-Community traffic, as well as extra-Community traffic, which remains basically unregulated, although such traffic may adversely affect trade within the Community.[48]

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41. *Id.* art. 10, O.J. L 239/13 at 15 (1988) (proscribing anti-competitive agreements between system vendors).

42. *Id.* art. 11, O.J. L 239/13 at 15 (1988) (listing situations in which carriers are in possible violation of Article 85).

43. Council Regulation No. 2299/89, O.J. L 220/1 (1989). The regulation constitutes a Code of Conduct governing CRS. *Id.*

44. *Id.*

45. A conforming opinion is expressed by Busti *in I sistemi telematici di prenotazione per il trasporto aereo nella disciplina comunitaria, supra* note 6, at 27.

46. Council Regulation No. 2299/89, O.J. L 220/1 (1989).

47. *Id.* art. 7, O.J. L 220/1, at 3 (1989).

48. Other competition issues concerning the air transportation industry can be found in Ahmed Saeed Flugreisen and Silver Line Reiseburo Gmbh v. Zentrale Zur

In Regulation 2299/89, the concepts mentioned in Regulation No. 2672/88 re-appear and pinpoint concepts such as "seller of the system," "associated carriers," "subscriber," and "primary display," where the need for equal access to system structures is constantly emphasized. Moreover, Articles 11 through 20 of Regulation No. 2299/89 prescribe monetary sanctions to condemned parties, in the event of an antitrust violation, submitted to the Court of Justice by the Commission.[49]

One weakness in Regulation 2299/89 is the lack of a provision controlling the terminal point of the CRS, which is controlled by travel agencies. It is in this micro-distributive phase that possible anti-competitive abuses may unfairly influence consumer demand.[50] Article 9, paragraph 5 of Regulation No. 2299/89 implicitly refers to this problem,[51] but contains no effective sanction (provided by the Community legislator so that the seller of the system is able to guarantee correct information that is neither deceptive nor discriminatory in use). Vague concepts such as "technical means" or "subscription contract," which are contained in the Regulation, could hardly have binding effects on Member States. One of the goals of the EC is to guarantee a "neutral" presentation of data by travel agents through a fair display of the data in their possession. Since Regulation No. 2299/89 provides no penalties against the agent for

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Bekampfung Unlauteren Wettbewerbs Ev, Case 66/86, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102.

49. Council Regulation No. 2299/89, arts. 11-20, O.J. L 220/1 at 4-6 (1989) (detailing complaint and investigation procedures).

50. Airlines provide a vast range of services that may be booked and sold through travel agencies. In order to obtain relevant information concerning fares, routes and complementary services, the travel agent subscribes to a CRS, which is owned and managed by a pool of airlines. Subscription contracts generally contain exclusivity clauses that prevent travel agents from participating in other systems. Subscribers, therefore, only have access to the information contained in the specific CRS to which they subscribe. Customers, in turn, purchase travel services suggested by the travel agent, without further inquiring whether the services offered are really the best option or whether other possibilities exist (e.g., those offered by competitor CRS). In short, a CRS may serve as a tool to eliminate competitors from the market of information data.

51. Council Regulation No. 2299/89, art. 9, ¶ 5, O.J. L 220/1, at 4 (1989), states:

> 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 the subscriber does not manipulate material supplied by the CRS in a manner that would lead to inexact, false or discriminatory presentation of information to consumers . . . .

Id.

failure to provide a neutral presentation, the Regulation is likely to have little effect. Therefore, the binding effect of this Regulation is considerably weak in these aspects.

Gaps in the Code of Conduct induced the Commission to promulgate an explanatory note for the integration and actualization of Regulation No. 2299/89.[52] This explanatory note focuses on the behavior of travel agents and on the need to furnish the buyer with global information in CRS that is both precise and reliable.[53] Nevertheless, to date, there has been no appreciable change within the EC. On the other hand, Regulation No. 83/91,[54] passed by the EC Commission on December 5, 1990, which returns to and updates Regulation No. 2299/89, merits reconsideration.[55]

The primary structure of Regulation No. 83/91 connotes a general goal to which the Commission seems oriented. Regulation 83/91 touches many of the major antitrust issues of the EC (such as the need to foster fair competition and the freedom of access to the market without discrimination) and could therefore be interpreted as an application to the specific issue of the CRS of the general principles underlying articles 85 and 86. Nevertheless, the retroactive effect of Regulation No. 83/91, confirmed by Article 13, paragraph 2, is applicable to agreements, decisions, and concerted practices existing at the time it entered into force, provided all requirements for exemptions were met.[56] Regulation No. 83/91 reaffirms the need to prevent a division of the market through anti-competitive practices. The Regulation, however, does not differ significantly from the Code of Conduct, with the exception of a few minor variations in terminology that are irrelevant.

There are, however, problems of interpretation of Article 8 of this Regulation, which instills the principle of reciprocity among air carriers of third countries where, at the same time, "equal treatment" is assured to EC air carriers. The concept of "equal treatment," which is vague in its breadth, has its central idea in Article 8 Paragraph 2, which uses the same definition

52. Council Regulation No. 2299/89, O.J. L 220/1 (1989).

53. Explanatory Note on the EEC Code of Conduct for Computerized Reservation Systems, O.J. C 184/2 (1990).

54. Commission Regulation No. 83/91, O.J. L 10/9 (1991).

55. Council Regulation No. 2299/89, O.J. L 220/1 (1989).

56. Commission Regulation No. 83/91, O.J. L 10/9 (1991).

that the Code of Conduct articulated by the phrase "CRS controlled by air carriers of a third country."[57]

The carriers in question are exempt from Article 10, which prohibits the imposition on subscribers to CRS, of exclusive duties for the sale of air transportation services through CRS with which the same subscriber is associated. The concept of control by air carriers from third countries does not have a uniform definition.[58] However, it remains to be seen whether such control refers to a simple share participation in the subscriptions to CRS, whether it extends to include a "functional" control, or whether it involves a threshold limit that delineates the boundaries of control. Furthermore, the concept of control delineated in Regulation No. 83/91 does not define clearly the related concept of "dominant position," the abuse of which is sanctioned by EC Treaty Article 86, but is not mentioned among the "exemptions" of Regulation No. 83/91.[59]

The EC approach to the CRS does not provide effective protection for travellers. The regulations scrutinized above simply miss this goal. While they attempt to prevent practices of unfair competition and abuse of dominant positions of CRS vendors, they do not grant specific legal remedies to consumers. The major legal steps that have been taken in this regard rest on the Commission's initiative under the normal antitrust procedures.[60] At least two solutions seem likely to fulfill such lack of protection; the radical solution would allow for direct action against CRS vendors by individual consumers and consumers organizations. In order to grant such actions, European courts should probably reconsider (or at least interpret in a broad fashion) the concept of "privity of contract." Only CRS vendors and travel agents are bound by subscription contracts, while consumers are third parties. This would imply the formal recognition of a right to the fair information, protected as such, regardless of the identity or the cause of action of the plaintiff.

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57. *Id.* art. 13, O.J. L 10/9, at 12 (1991).

58. *See* Busti, *La disciplina comunitaria dell'informatica sul trasporto aereo*, *supra* note 6 at 220; Derenne, *supra* note 6, at 73 (analyzing controls on air carriers by third countries).

59. Commission Regulation No. 83/91, art. 1, O.J. L 10/9, at 10 (1991).

60. *See* BELLAMY & CHILD, *supra* note 4, supp., at 1 (providing analysis of major provisions and cases on EC competition law); GIJLSTRA & MURPHY, *supra* note 4 (analyzing developments in EC competition law).

Nevertheless, I would opt for a less extreme approach. This would imply that the EC should further regulate the CRS, and spell out the rights and remedies even of the third parties (such as consumers) vis-à-vis CRS vendors and travel agents. By doing so, the process towards optimization of consumers' benefits could be enhanced from three different viewpoints: (i) there would be a clear identification of the applicable set of rules and of the competent jurisdiction; (ii) travel agencies would presumably reduce display bias practices and therefore a system of more accurate information could be fostered; and (iii) consumers would play a major role in the overall legal scenario. They could be granted the power, hypothetically, to file a complaint, even in the absence of actual damages to a specific traveller.[61] Such goals call for a more detailed regulatory reform of the CRS to be carried out by the EC institutions.

III. *RECENT DEVELOPMENTS IN EC LEGISLATION ON CRS: REGULATIONS NO. 3089/93, AND NO. 3652/93*

Rather significant changes have recently been enacted in the EC legislation on CRS, after the promulgation of Council Regulation No. 3089/93,[62] of October 29, 1993, and Commission Regulation No. 3652/93,[63] promulgated December 22, 1993. Regulation No. 3089/93 has modified Regulation No. 2299/89,[64] providing for a new, amended Code of Conduct among CRS vendors in the Community, whereas the second has expressly confirmed the applicability of the procedure of exemption, according to Article 85, paragraph 3 of the Treaty of Rome,[65] to certain agreements or concerted practices among undertakings with regard to CRS for air transportation.[66]

The new "code of conduct" was introducted by an opinion

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61. For example, the role of organizations such as the International Foundation of Airline Passengers' Association (IFAPA) should be fostered. IFAPA, a non-profit organization established in Switzerland, promotes, researches, and represents the interests of airline passengers with governments, airlines, and the travel industry at international, regional and national levels. *See* NIKOLAI EHLERS, COMPUTERIZED RESERVATIONS IN THE AIR TRANSPORT INDUSTRY 63 (1988).

62. Council Regulation No. 3089/93, O.J. L 278/1 (1993).

63. Council Regulation No. 3652/93, O.J. L 333/37 (1993).

64. Council Regulation No. 2299/89, O.J. L 220/1 (1989).

65. EEC Treaty, *supra* note 4, art. 85(3), 298 U.N.T.S. at 48.

66. Council Regulation No. 3089/93, O.J. L 278/1 (1993).

of the Economic and Social Committee,[67] which explained the main arguments in favor of a substantial amendment to Regulation No. 2299/89. Among these, such opinion expressly refers to the suggestions made by the EC Commission for a new drafting of the existing code of conduct. Four points constituted the backbone of the Commission's argument:

> (i) the rapid development of the CRS, from both a commerical and technological standpoint, and the fairly questionable effectiveness of the existing code;
> (ii) the enactment of the so-called "Third package implementing the final phase of aviation liberalization";[68]
> (iii) the risk that CRS vendors may prevent other CRS from entering the relevant market by refusing to share with them the information in their possession;
> (iv) the risk that a carrier may provide more accurate and detailed information concerning its schedules, fares and availability of seats to its own CRS alone, therefore granting an unjustified, unfair benefit to such system and violating the principles of fairness and "neutrality" while displaying data.[69]

A crucial provision of Regulation No. 3089/93, which is set forth in Article 1, applies to all CRS used within Community territory, regardless of their nationality, their sources of information, and the airports used for specific traffic routes.[70] Equally relevant are the preliminary considerations to Regulation No. 3089/93, which expressly refer to the increasing business impor-

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67. Opinion of the Economic and Social Committee, O.J. C 108/16 (1993).

68. *See, e.g.*, GIEMULLA, SCHMID & MOLLS, EUR. AIR L. 62 (1993) (summarizing "Third package," adopted by EC Council in June 1992, permitting greater freedom in pricing, and increasing market access). For an in-depth analysis of the main antitrust issues related to air transportation in the EC, *see* John Temple Lang, *Air Transport in the EEC — Community Antitrust Law Aspects*, *in* 1991 FORDHAM CORP. L. INST. 287 (B. Hawk, ed. 1992).

69. This technique is commonly known as "dehosting."

70. Council Regulation No. 3089/93, art. 1, O.J. L 278/1 at 2 (1993). Article 1 states:

> This Regulation shall apply to computerized reservation systems to the extent that they contain air transport products, when offered for use and/or used in the territory of the Community, irrespective of:
> — the status or nationality of the system vendor,
> — the source of the information used or the location of the relevant central data processing unit,
> — the geographical location of the airports between which air carriage takes place.

Id.

tance of charter flights in the European tourism industry, and require an equal consideration of scheduled and non-scheduled flights, in terms of guarantees of fair and impartial information provided to consumers.[71]

Less significant, in my view, are the changes in Regulation No. 3652/93.[72] These changes closely follow the path already taken by Regulation No. 83/91,[73] in the sense of the applicability of EEC Treaty article 85, paragraph 3[74] to CRS.[75] Interestingly enough, the fifth preliminary consideration of such legislation outlines an economic justification for the exemptions.[76] "Cooperation" seems to be the crucial word.[77] It is questionable, at this early stage, and absent any doctrinal interpretation on this very point, whether the Commission had in mind a legal scenario of joint ventures among European carriers, or whether it was merely referring to the need for a closer, yet infrequent, exchange of information and technical data among EC undertakings.

CONCLUSION

The issues discussed above are not merely theoretical, in light of the possibility of EC and non-EC air carriers growing by joint ventures into one system. Potential dangers in this area include uncertainty in the regulatory field and difficulty in sanctioning anti-competitive practices of non-EC parties outside the EC with EC legal structures. In summary, with Regulation No. 83/91, the EC has affirmed the trend of recent years, by attempting to protect free competition and to guarantee impartial use of CRS as well as insuring accuracy and availability of information

71. *Id.*

72. Commission Regulation No. 3652/93, O.J. L 333/37 (1993).

73. Commission Regulation No. 83/91, O.J. L 10/9 (1991).

74. EEC Treaty, *supra* note 4, art. 85(3), 298 U.N.T.S. at 48.

75. Article 15 of Regulation No. 3652/93 has extended the expiration date of the exemption to June 30, 1998. Commission Regulation No. 3652/93, art. 15, O.J. L 333/37 (1993).

76. Commission Regulation No. 3652/93, O.J. L 333/37 at 37 (1993). The fifth preliminary consideration states in relevant part:

> 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.

Id.

77. *Id.* "Cooperation in this field should therefore be permitted. A block exemption should therefore be granted for such cooperation." *Id.*

to the public. Nevertheless, this regulatory effort is often limited to vague principles devoid of any real regulatory bite.

The overall efficiency of the system could be improved through tighter control of travel agencies working in the industry. Travel agencies act as the very last distributors of services offered by CRS. Nevertheless, their behavior is not heavily regulated. EC legislation refers to them only incidentally and appears to undervalue their role in the distribution of CRS services. The real question is not whether a deregulated CRS market is preferable to a strictly regulated one. What is essential to address is not the quantity, but the quality of the EC legislation involved, i.e., the enforceability level within the EC as well as in Member States.

Finally, absent any clear provision in EC legislation, one may ponder the possibility of a consumers' action against air carriers and travel agencies, should anti-competitive acts take place within a CRS. My view is that only an action in tort, specifically on the grounds of non-contractual liability, should be granted to consumers. Given the doctrine of privity of contract, it does not seem technically correct to grant the public the right to file a direct claim against the vendors or operators of the systems.