Migrating to the Web:
the legal dimension of the e-travel revolution

by

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A thesis submitted to the Faculty of Graduate Studies and
Research in partial fulfilment of the requirements of the degree
of Master of Laws (LL.M.)

April 2001

ABSTRACT

The ticket distribution industry is changing rapidly. The traditional travel distribution chain comprised airlines, travel agents, and computer reservation systems (CRSs). With the current migration of travel distribution to the Internet, the way in which these actors interact has been radically altered.

After deregulation, the airlines' dependence on travel agents and CRSs led to high commission and booking fees respectively. The Internet now offers airlines a means to directly distribute their product to the travelling public with minimal expense. The airlines are eagerly shifting as many of their distribution activities as possible to different forms of web-based distribution, hoping to bypass both travel agents and CRSs. This has allowed them to reduce the commission fees they pay to travel agents. Travel agents too are going online, competing vigorously with the airlines. The combined effect of these (r)evolutions has put the airlines firmly in charge of their own distribution system.

Any such a fundamental change in a sector of industry is bound to raise anticompetitive concerns, especially for those who stand to lose the most. These concerns are at the centre of this thesis. After their examination and evaluation, I conclude that anticompetitive concerns do indeed exist and that the regulatory or antitrust authorities have the unenviable task of preserving competition, not competitors, in a new and rapidly evolving market.

RESUMÉ

L'industrie de la distribution de billets aériens est en période de mutation. Traditionnellement, la chaîne de distribution de voyage était formée par les lignes aériennes, des agents de voyage et des systèmes informatisés de réservation (SIR). Avec « la migration » actuelle de la distribution de voyage vers l'Internet, la façon dans laquelle ces acteurs interagissent se modifie radicalement.

Après la déréglementation, les lignes aériennes dépendaient des agents de voyage et des SIR pour la distribution, ce qui a mené au paiement de commissions et d'indemnités de réservation très élevées. L'Internet offre maintenant aux lignes aériennes le moyen de distribuer leur produit directement au public à un coût minimal. Les lignes aériennes se servent autant que possible de différentes formes de distribution en ligne, espérant ainsi contourner les agents de voyage et les SIRs. et réduire les commissions à payer. Les agents de voyage ont, eux aussi, commencé la distribution en ligne et font vigoureusement concurrence aux lignes aériennes. Dans l'ensemble, ces (r)évolutions offrent aux lignes aériennes la possibilité de contrôler leur propre système de distribution à un niveau sans précédent.

Un changement aussi fondamental dans un secteur économique ne peut que soulever des inquiétudes concernant les pratiques anti-concurrentielles, au moins du coté de ceux qui risquent de perdre le plus. Cette problématique se trouve au centre de ma thèse. Je conclus que certaines des craintes sont en fait fondées et que les autorités compétentes ont la tâche difficile de protéger la concurrence, et non les concurrents, dans ce nouveau marché en pleine évolution.

ACKNOWLEDGMENTS

The idea for this thesis goes back to the classes of Professor Richard Janda at the Institute of Air and Space Law of McGill University, covering the field of government regulation of air transport. His clear analysis of the regulatory problems connected to Computer Reservation Systems (CRSs) inspired me to read up on the subject.

Professor Janda's unwavering enthusiasm encouraged me to commence and continue my research, even when, in particular at the beginning, I thought the topic might be too exotic and the legal analysis would prove to be too daunting a task.

In a nutshell, the preparation of this thesis would have entirely impossible without the assistance, guidance, and dedication of my thesis supervisor, Professor Richard Janda. Therefore, Professor Janda, thank you!

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I am also enormously indebted to Ms. Melissa Knock, whose linguistic skills and tenacity in correcting the innumerable errors proved to be both necessary and invaluable.

Sincere thanks go to Ms. Ginette van Leynseele, Graduate Programs Co-ordinator, for her help on all matters academic and practical during my stay at McGill University.

Appreciation must also be extended to certain individuals whose ideas, insights, and remarks were most helpful in exploring the topic of my thesis, such as John Pittman of the Association of American Travel Agents and Francis Morgan, Desk Officer of the European Commission (DG Transport & Energy). Their valuable feedback was most appreciated.

The writing of this thesis would not have been possible without the generous financial assistance of the Faculty of Graduate Studies and Research, and the Fernand Lazard Foundation. I therefore thank them.

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Finally I wish to thank my loving parents and my brother, for their support during my entire legal education, and my beloved Véronique, for her understanding, support, and encouragement during the writing of this thesis. To all of them this thesis is dedicated.

TABLE OF CONTENTS

INTRODUCTION

The ticket distribution industry is changing rapidly. The traditional links between airlines, travel agents, and CRSs seem to be under pressure due to several factors, one of the most important being the migration of travel distribution to the Internet, which has radically altered the way the players in the ticket distribution market interact. The combined effect of these factors seems to boil down to the airlines having taken over control of the distribution chain.

Such a fundamental change in a sector of industry is bound to raise some anticompetitive concerns, especially for those who stand to lose the most. This thesis will examine the contribution of online travel distribution to this profound transformation, the legal dimension of web-based distribution, and the links and interactions with other changes in the airline distribution industry, such as commission fees.

Any analysis of the Internet as a means of distribution for the travel industry needs to start with an examination of the structure of the ticket distribution industry as it stood until a few years ago. This is the aim of the first part of this thesis. In Chapter 1, the historical developments leading or contributing to the creation or development of the CRS industry will be described, as will the key industry players. Then, in Chapter 2, the concerns that have been voiced over the years concerning the particular structure of the travel distribution industry will be discussed.

I will argue that the need for stringent and detailed regulation of CRSs has probably diminished somewhat due to the recent (partial) divestiture by the airlines of their ownership interest. Those competitive concerns voiced in the past do not however stand at the centre of this thesis. Still, they will allow for a better understanding of the evolutions that are occurring.

Part II will describe the major changes in the industry brought about by the emergence of web-based travel distribution, and will examine the legal dimension

behind this sweeping change. The first chapter will offer some insight into the complex online travel distribution market. Chapter 2 will analyse to what degree the current CRS regulations govern the behaviour of players in the online distribution market. It will include an examination of what regulatory change, if any, is desirable. I will take the standpoint that the regulations should refocus on the concept of "biased information" and impose a legal duty to be impartial and unbiased upon all actors in the travel industry that hold themselves out to be neutral providers of such information, such as CRSs and travel agents. The third chapter will examine a new phenomenon in online travel distribution: the emergence of airline-owned online travel distributors, which combine aspects of CRSs and travel agencies. It will become evident that this type of cooperation and the potential market power of these new distributors warrants close antitrust scrutiny, and maybe, as some would argue, regulation. I will conclude that some intervention by the antitrust authorities might be necessary to preserve and develop a healthy online marketplace.

Finally, the steady decline in commission fees has raised some antitrust concerns. One can legitimately ask, for example, whether this evolution would have been possible without some form of tacit collusion on the part of the airlines. This trend, by some described as non-price predation by the airlines to drive travel agents out of business, and the antitrust litigation that followed, will be concisely analysed in Part III.

Part IV, the conclusion of this thesis, will attempt to recapitulate the different trends that have been prevalent in the travel distribution industry and conclude that for the first time in history, the Internet provides airlines with a viable alternative to costly travel agents and CRS subscription fees.

The consequences of the Copernican distribution revolution that the Internet has triggered or at least facilitated are not clear yet. Direct distribution through airline-owned websites is leading us to a new business model where the traditional distribution chain is "deconstructed" and replaced by a constellation where at least the travel agent, and possibly the CRS provider, is no longer in the picture. Then there is another trend: declining commission fees. These trends, *viz.* the emergence of low cost distribution through the Internet and the decline in commission fees, are interacting and reinforcing each other, leading to a fundamental change in the way ticket

and reinforcing each other, leading to a fundamental change in the way ticket distribution takes place. The migration of travel distribution to the Internet is not devoid of antitrust concerns, in particular with respect to joint airline-owned online distributors. In addition, the decline in commission fees has raised more than a few antitrust eyebrows. The antitrust and regulatory authorities will have to keep a close eye on these trends, in order to ascertain that competition in the online travel marketplace remains healthy, while at the same time exercising prudence so as to protect competition, not the competitors.

PART I. STATE OF THE TICKET DISTRIBUTION INDUSTRY

CHAPTER I. DEVELOPMENT AND OPERATION OF THE TICKET DISTRIBUTION INDUSTRY

I) THE TRAVEL DISTRIBUTION CHAIN

The distribution of travel in general, and air travel in particular, is a complex process, since, by definition, consumers and suppliers are dispersed. Distribution has always been an essential part of running an airline. Even in the early days of commercial aviation, it was important for the embryonic airlines to be able to distribute their product to as many consumers as possible, and so they developed selling outlets. In addition, so as to allow retail customers access to a personalised source of tickets even in small markets where it would be uneconomical for each airline to operate it own selling outlets, airlines authorised travel agents to act as marketing and ticketing intermediaries.[1]

In order to keep track of reservations, airlines used complex manual filing systems. The computer technology developed during and immediately after the Second World War allowed airlines to automate their internal tracking systems during the 1960's[2] and early 1970's.[3] This however did not allow travel agents to check availability of flights on a real-time basis and without making time-consuming phone-calls to the airlines in question. During the late 1960's and early 1970's several attempts were made to create a neutral, industry-wide system that would automate the manual process of checking flight availability and fare information, and that would allow

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[1] See A. Vyssotskaia, *Role of E-Commerce in Travel Business: Web Site as Alternative Distribution Channel for Airlines* (MBA Thesis, Montreal: MBA International Aviation, Concordia University, 1999) at 31 [unpublished].

[2] *E.g.*, Sabre, which began in 1964 as the in-house reservation system of American Airlines. See P.N. Ehlers, *Computerized Reservation Systems (CRS)* (LL.M. Thesis, Montreal: Institute of Air and Space Law, McGill University, 1989) at 7.

[3] See "Legal and Regulatory Implications of Airline Computer Reservation Systems" Note (1990) 103 Harv. L. Rev. 1930 at 1931 [hereinafter "Legal and Regulatory Implications"].

agents to print out tickets and boarding passes for airlines subscribing to the system.[4] But due to a lack of agreement and funding, and antitrust concerns,[5] these initial attempts to create an industry-wide computerized reservation system (CRS) failed.[6] Thereafter, both United Air Lines and American Airlines started offering their in-house ticket reservation systems[7] directly to travel agents, and these were expanded to include information from third airlines. TWA soon followed their lead and developed the PARS CRS, and Eastern Airlines and Delta Air Lines entered the CRS market in 1981, by developing System One and Datas II respectively.[8]

The introduction of the CRSs led to a dramatic increase in travel agent productivity by allowing them to make reservations in one-third of the time previously required.[9] It is therefore no wonder that travel agents quickly embraced the new technology, regardless of the high costs linked to rental of computer terminals and ticket printers provided by the CRS providers. In 1981, 68% of all travel agents in the United States were linked to one or more CRSs.[10] By 1983, this figure had risen to 80%.[11] In 1987, 95% of all US agencies were hooked up. Nearly all travel agents now operate with and

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[4] See *ibid.*

[5] ATARS, or Automatic Travel Agency Reservations System, is an example of a promising program, commonly sponsored by travel agents and airlines, that failed to receive antitrust immunity from the Civil Aeronautics Board (CAB) in 1967. See M.P. Leaming, "Enlightened Regulation of Computerized Reservations Systems Requires a Conscious Balance Between Consumer Protection and Profitable Airline Marketing" Note (1993) 21 Transportation L.J. 469 at 471.

In the 1980's further attempts to create a neutral booking system also failed:

MAARS, or Multi-Access Agent Reservation Systems, was another effort to create an industry-wide system. This system, created by some smaller airlines and the American Society of Travel Agents, had a market share of only 2% in 1983. See Leaming at 472.

The NIBS, or the Neutral Industry Booking System, was a project by a joint venture of over 30 carriers, including all major non-CRS owners in the United States and the major foreign airlines serving the United States, established within the framework of IATA in 1985.

[6] See "Legal and Regulatory Implications", *supra* note 3 at 1931.

[7] Respectively named Apollo and Sabre. See Ehlers, *supra* note 2 at 7.

[8] See P. Fair, "Anti-Competitive Aspects of Airline Ownership of Computerized Reservation Systems" (1989) 17 Transportation L.J. 321 at 328.

[9] See "Legal and Regulatory Implications", *supra* note 3 at 1931.

[10] See L. Harris, "Study", *Travel Weekly* (May 1982) 46.

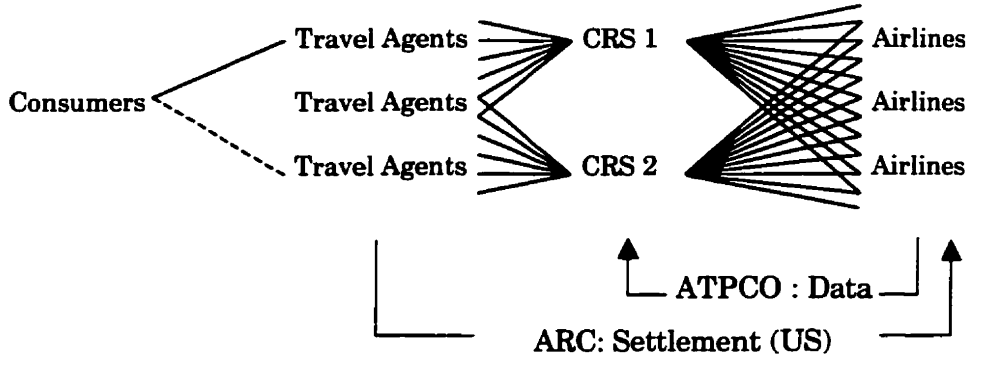
[11] See *CRSs - Alleged Competitive Abuses and Consumer Injury*, 48 Fed. Reg. 41171 at 41173 (1983).

through CRSs, making them the nodal point for the flow of information and revenues in the distribution industry.[12]

Deregulation coincided with, accelerated, and necessitated the development of CRSs. Carriers, in establishing their hub-and-spoke networks, had to expand beyond their routing structure, and could therefore no longer rely on their network of sales offices as the principal means of distributing their product.[13] This increased their dependence on travel agents. Before deregulation, travel agents only accounted for approximately 50% of total US domestic sales. After deregulation, this figure rose to 75% by 1986. The development of hub-and-spoke networks, in addition to the sharply increased complexity in pricing, as a result of advanced yield management, has been a key factor in the success and development of CRSs.

The development of CRSs led to the following distribution chain (Figure 1):

Figure 1. The Travel Distribution Chain



[12] See L.G. Locke, "Flying the Unfriendly Skies: The Legal Fallout Over the Use of Computerized Reservations Systems as a Competitive Weapon in the Airline Industry" Note (1989) 2 Harv. J. Law & Tech. 219 at 221, online: WL (TP-ALL).

[13] See P.V. Mifsud, "Computer Reservations Systems and Automated Market Distribution in a Deregulated Aviation Industry" Endnote (1986) 1 J.L. & Tech. 143 at 145.

At the top of the distribution chain stand the airlines, who have to provide flight information to multiple CRSs to reach as many customers as possible. Most airlines therefore contract with the major CRSs, who in turn collect fees from the airlines for every flight segment booked through their system.

The dissemination of fare information to CRSs is handled by a jointly-held airline company, the Airline Tariff Publishing Company (ATPCO), which is owned by 24 US and international airlines.[14] In the United States, payment for travel agencies' ticket sales is settled through the Airlines Reporting Corporation (ARC), an airline joint venture owned by thirteen airlines shareholders.[15] The ARC transfers travel agency payments (less the commissions) to the more than 140 US and international carriers that participate in its settlement program.[16]

The CRSs' second and minor stream of revenue consists of the subscription fees paid by the travel agents, who stand at the lower end of the distribution chain. Whereas these fees were once a burden on travel agencies,[17] effectively limiting their ability to subscribe to more than one CRS,[18] they now tend to be low, or even nothing, as many agencies receive volume discounts.

Travel agents depend for income on commission fees they collect from the airlines when they sell a flight. These commissions increased after deregulation,[19] until the mid nineties, when they reached more than 10%. Since then there has been a steady

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[14] See online: ATPCO Website <http://www.atpco.net/set_about.htm> (date accessed: 10 March 2001).

[15] For more information on ARC, see online: ARC Website <http://www.arccorp.com> (date accessed: 10 March 2001).

[16] See US General Accounting Office, *Domestic Aviation – Effects of Changes in How Airline Tickets Are Sold*, GAO/RCED-99-221, online: GAO Website <http://www.gao.gov/> at 4 [hereinafter *GAO Airline Ticket Report*] (date accessed: 10 March 2001).

[17] The subscription fees were substantially increased after the adoption of the CRS regulations, prohibiting bias of CRSs. See "Legal and Regulatory Implications", *supra* note 3 at 1932.

[18] This possibility was also limited by contractual provisions. See Chapter II, below.

[19] Before deregulation, airlines jointly fixed commissions. In 1977 the Civil Aeronautics Board withdrew antitrust immunity from this practice. See US Senate, Committee on Commerce, Science, and Transportation, *Hearing on Aviation and the Internet, Testimony of the American Society of Travel Agents*, at 14, online: US Senate Website online: US Senate Website <http://www.senate.gov/~commerce/issues/aviation00.html> (date accessed: 10 March 2001). [hereinafter *Aviation & Internet Senate Hearings*, [submitter of testimony] Testimony].

decline in commission fees.[20] To compensate for this loss, many travel agencies are now charging their customers "service fees" for processing tickets.

Prospective travellers usually visit only one travel agency, as it is assumed that travel agents have access to nearly all airlines' information, and that they are providers of independent, neutral advice.

II) OPERATION OF CRSs

CRSs can be characterized as giant database systems that allow travel agents to quickly browse through fares, conditions, and other types of information, make reservations for airlines, car rentals, and hotels, and process and print tickets.

Initially, CRSs only displayed information provided by their owners. But in the late 1970's, to make their systems more attractive to travel agents, proprietor airlines began to allow other airlines to provide flight information to the CRSs, and have reservations made and tickets sold through their systems.[21] This service was initially provided at no cost to the hosted airlines.[22] Consequently, subscriber airlines had little incentive to make the massive investments that the proprietor airlines had done to develop their systems.[23] Moreover, the cutthroat competition of the early 1980's did not give the airlines much financial leeway. This led to a situation where only a handful of CRS providers dominated the market.

Another problem soon emerged: A search query by a travel agent can generate a great number of flight possibilities. CRS software is equipped with an algorithm to determine in which order flights satisfying the query will be displayed. Possibilities abound. Flights can be displayed (1) at random, (2) with proprietor airlines' flights

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[20] This has been less the case in Europe. The subject of commission fees will be examined in Part III, below.

[21] See Locke, *supra* note 12 at 219.

[22] See *ibid.* at 220.

[23] In 1986, American Airlines invested USD 100 million to develop and expand Sabre further, after an initial investment of USD 160 million and an additional development expenditure of USD 190 million until 1985. United Airlines claims to have spent USD 500 million on the development of its Apollo System by 1984. See *CRSs - Alleged Competitive Abuses and Consumer Injury*, *supra* note 11 at 41173.

first, (3) alphabetically, according to the airlines' names, (4) non-stop flights first, (5) following elapsed journey time, (6) following price criteria, etc. Studies indicate that 90% of the time flights are booked from the first display.[24] And 50% of the time, the flight displayed first is chosen.[25] Consequently, if the criterion is to be chosen freely by the proprietor airline, it will chose the ranking algorithm that best satisfies its needs. The competitive concern is evident: an airline owning a dominant CRS could use this dominance in one market (CRS distribution) to establish and strengthen dominance in another market. These legal problems, and the regulatory answers given, will be studied in Chapter II.

III) CRS PROVIDERS

Several CRS companies, each providing similar products and services to their subscribers, exist globally. Among the more known systems are: (1) Abacus Distribution Network, (2) Amadeus, (3) Apollo/Galileo, (4) Axess International Network, (5) Infini Travel Information, (6) Sabre, and (7) Worldspan.[26] The five largest systems, which process the lion's share of travel reservations, will be briefly described below.

1) Sabre Holdings

SABRE,[27] headquartered in Dallas, Texas, was developed as the in-house inventory system of American Airlines. It claims to be the world's largest CRS, providing booking services to 42,000 travel agents globally,[28] using 175,000 terminals. Until recently, it was solely owned by AMR, the owner of American Airlines. In early 1996,

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[24] See Leaming, *supra* note 5 at 486.

[25] See "Legal and Regulatory Implications", *supra* note 3 at 1932.

[26] See J.S. Ader, *et al.*, Bear Stearns Consumer Equity Research, "Internet Travel – Point, Click, Trip – An Introduction to the On-Line Travel Industry" (12 April 2000), online: Docket Management System OST-1997-2881-130 <http://dms.dot.gov> at 19 [hereinafter *Bear Stearns Report*].

[27] The acronym SABRE stands for "Semi-Automated Business Research Environment". See Ehlers, *supra* note 2 at 6.

[28] See Webtravelnews, News Release, "Stocks, Revenues Soar in Online Travel Industry" (7 February 2000), online: <http://www.webtravelnews.com/archive/article.html?id=404> (date accessed: 10 March 2001).

it made an initial public offering (IPO) for 20% of its shares. The remaining 80% of the shares were spun off by AMR in March 2000. Consequently, Sabre, traded on the NYSE (TSG), is now the only fully independent CRS provider.

In 1999, 370 million reservations were booked through the Sabre system, and its joint venture partners[29] booked 69 million reservations. Total reservations processed through the Sabre system thus amounted to 439 million.

Sabre is active in the online distribution market via its subsidiary Travelocity.com, to which it supplies inventory. It also acquired Preview Travel, which recently merged with Travelocity. Sabre owns 70% of the new company,[30] with the remaining 30% owned by former Preview Travel stockholders and by the public.[31] Another website developed by Sabre is VirtuallyThere.com, which allows customers of travel agencies to review itineraries online by entering Sabre's reservation number.[32]

Sabre has formed a strategic alliance with Abacus, the Asian-Pacific CRS, by taking a 35% equity investment in Abacus. In the summer of 2000, the Sabre system was also adopted by Infini, the Japanese CRS formerly operated by All Nippon Airways (ANA).[33]

2) Apollo / Galileo

The Apollo system was originally developed by United Air Lines. Now owned by Galileo International, which is headquartered in Rosemont, Illinois, this company is 73.2% publicly traded on the NYSE (GLC). United Airlines owns 17.6% and Swissair

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[29] Abacus and Infini. See *infra* at 13-14.

[30] See Webtravelnews, News Release, "Galileo Buys Remaining 80% in TRIP.com for $269 Million" (8 February 2000), online: <http://www.webtravelnews.com/archive/article.html?id=407> (date accessed: 10 March 2001) [hereinafter "Galileo buys remaining 80%"].

[31] See Webtravelnews, News Release, "Travelocity and Preview Travel Pass Antitrust Review" (16 November 1999), online: <http://www.webtravelnews.com/archive/article.html?id=345> (date accessed: 10 March 2001).

[32] See *Bear Stearns Report*, *supra* note 26 at 20.

[33] See online: Infini Website <http://www.infini-trvl.co.jp/contents/english/information/i_index_e.html> (date accessed: 10 March 2001).

7.7%, and nine other airlines own 1.5% combined.[34] Galileo International also owns the Galileo system, which is oriented towards the European market. Galileo has stated that the company is the fastest growing CRS, and is used by more travel agencies than any other system, with over 40,800 travel agents connected to its system in 106 countries, using 167,000 terminals.[35] In 1999, 351 million reservation were processed through the Galileo reservation system.[36]

Galileo is active in the online distribution market through wholly owned subsidiary online travel agency Trip.com. In 1999 Galileo acquired 20% of Trip.com. Then on 8 February 2000, Galileo announced that it would acquire the remaining 80% for USD 269 million.[37] According to J.E. Bartlett, CEO of Galileo International, it is possible that part of Trip.com will be sold in a public offering.[38] Galileo will also provide its CRS as a booking engine to a new Spanish language travel website, Viajo.com.[39] Another site, Travelpoint.com, will allow customers booking a ticket through Galileo's system to change itineraries online by accessing the site with a password provided by the travel agent, in much the same way as Sabre's Virtuallythere.com allows.[40]

3) Amadeus / System One

System One was originally developed by Eastern Airlines. Subsequently, it was taken over by System One Holdings, Inc., a subsidiary of the former Texas Air Group (which

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[34] These are US Airways, Air Canada, Alitalia, KLM, BA, Austrian Airlines, Air Portugal, Aer Lingus, and Olympic.

[35] See Galileo International Inc., *Annual Report 1999*, online: Galileo Investor Relations <http://www.galileo.com/investor/invann.htm> (date accessed: 10 January 2001) at 23 [hereinafter *Galileo Annual Report 1999*]. One source mentions 45,000 travel agency locations. See Webtravelnews, News Release, "Amadeus Announces Alliance Specific Display" (7 July 1999), online: <http://www.webtravelnews.com/archive/article.html?id=181> (date accessed: 10 March 2001). Another mentions 48,000 connections. See Webtravelnews, News Release, "Amadeus Listed on Frankfurt Stock Exchange" (29 December 1999), online: <http://www.webtravelnews.com/archive/article.html?id=374> (date accessed: 10 March 2001).

[36] See *Galileo Annual Report 1999, ibid.*

[37] See "Galileo Buys Remaining 80%", *supra* note 30.

[38] See *ibid.*

[39] See Webtravelnews, News Release, "Galileo and Viajo.com Create Latin American Site" (15 December 1999), online: <http://www.webtravelnews.com/archive/article.html?id=363> (date accessed: 10 March 2001).

included Eastern Airlines, Continental and others). System One Holdings itself was acquired by Amadeus, a European CRS company. System One was replaced in the United States by the Amadeus system in 1997.[41] Subsequently, Continental decided to leave the partnership, and 25% of the shares were offered to the public.

Until recently, Amadeus was owned by Air France, Iberia, Lufthansa, and the public (each holding a 25% stake). It was announced on 18 May 2000 that another 23% would be offered to the public,[42] and that after the offering, Air France would hold 22.5%, Iberia 14.75%, Lufthansa 14.75%, and the public 48%. Voting rights however would remain such that the interests of the three main shareholders would be protected.[43] On 13 June 2000, a first *tranche* of shares was sold, bringing the shareholdings structure to 23.36% for Air France, 18.28% for Iberia, 18.28% for Lufthansa, and 40.08% for the public.[44] The stock trades on the Madrid, Barcelona, Paris and Frankfurt exchanges.

Amadeus has subscribers in more than 130 countries. In 1999, Amadeus processed 371 million bookings.[45] It maintains a strong European focus, still holding market shares of more than 75% in certain key European markets such as Germany, France, and Spain. As Amadeus is focused on the European market, it is available in seven languages.

Amadeus has an online business presence through Amadeus.net, which in and of itself is not a travel agency, but connects consumers with online travel agents using Amadeus.

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[40] See *Bear Stearns Report*, *supra* note 26 at 20.

[41] See K.J. Johnson, "Computer Reservation System Participation: Is It Still Necessary for Smaller Carriers?" (1997) 11 Air & Sp. L. 1 at 9, online: WL (TP-ALL).

[42] See Amadeus, Press Release, "Amadeus and its Airline Shareholders Announce a Secondary Offering of Shares" (18 May 2000), online: <http://www.global.amadeus.net/news/press/2000/86336.html > (date accessed: 10 March 2000) [hereinafter "Amadeus and its Airline Shareholders"] .

[43] Air France holds 38.37% of the voting rights, Iberia 25.15%, Lufthansa 25.15%, and the public 11.33%.

[44] See Amadeus, News Release, "Amadeus Free Float Raised to Above 40 Per Cent" (13 June 2000), online: <http://www.global.amadeus.net/news/press/2000/86331.html> (date accessed: 10 March 2000) [hereinafter "Amadeus Free Float Raised"].

4) Worldspan[46]

Worldspan was created on 8 February 1990 through the merger of Datas II (the CRS developed by Delta Airlines) and Pars Marketing Corporation (the CRS developed by TWA, and then jointly owned by TWA and Northwest).[47] It is headquartered in Atlanta, Georgia. Currently, Delta Air Lines owns 40% of the system, Northwest 34%, and TWA 26%.[48]

Worldspan's CRS supplies inventory to approximately 20,250 travel agency customers in more than 60 countries and territories, including 10,000 in the United States.[49] Its market share is approximately 20% in the US and 12% worldwide. Its system processes about 170 million flight segments a year.[50]

Worldspan is active in the online distribution market and claims to process over half of all online agency travel bookings.[51] It provides inventory to Expedia.com, the online travel service controlled by Microsoft Corporation.

5) Abacus Distribution Network

Established in May 1988 by Cathay Pacific and Singapore Airlines, Abacus has become the leader in providing CRS services specifically tailored for customers in the Asia-Pacific region.[52] Since 1998, Abacus has been jointly owned by Abacus

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[45] See online: Amadeus Website <http://www.global.amadeus.net/investor/31321.html> (date accessed: 11 May 2000).

[46] See Webtravelnews, News Release, "Worldspan Will Power New Expedia Pricing" (28 February 2000), online:<http://www.webtravelnews.com/archive/article.html?id=426> (date accessed: 10 March 2001) [hereinafter "New Expedia Pricing"].

[47] See "Legal and Regulatory Implications", *supra* note 3 at 1931.

[48] See *Bear Stearns Report*, *supra* note 26 at 20.

[49] See online: Worldspan Website <http://www.worldspan.com/about/profile.asp> (date accessed: 10 March 2001).

[50] During the first 9 months of 1998, 135 million segments were processed. See *Bear Stearns Report*, *supra* note 26 at 20.

[51] See "New Expedia Pricing", *supra* note 46.

[52] See online: Abacus Website <http://www.abacus.com.sg/corporate/profile/index.htm> (date accessed: 10 March 2001).

International Holdings, a joint venture of eleven airlines,[53] which holds a 65% stake, and by Sabre, which holds 35%. Abacus international also holds 40% of the Japanese Infini CRS.[54]

Abacus, headquartered in Singapore, is the market leader in its partners' home markets and today has some 9,300 agency locations and more than 23,300 terminals in eighteen countries.[55]

IV) Structural Changes within the CRS Industry

CRSs were initially developed and owned by airlines. The investment required to develop a CRS is considerable, and there is an enduring shortage of skilled programmers.[56] Thus, only a few airlines were able to develop CRSs, and the other airlines had no choice but to subscribe to one already in existence.

The first structural change started in the late eighties and continued into the nineties. The first CRSs were developed by single airlines (Sabre and Apollo, by American Airlines and United Air Lines respectively). These CRSs enjoyed significant competitive advantages, as other airlines had to enter the distribution market under far less favourable circumstances, notably during the post-deregulatory years of cutthroat competition. Consequently, it was difficult for the latecomers to develop and maintain CRS systems on their own, and as a result, mergers such as the one between Datas II of Delta Airlines and Pars of TWA and Northwest Airlines became unavoidable.

In Europe the situation was different. A unified air transport market did not exist in the 1980's and the beginning of the 1990's, and CRSs enjoyed *de facto* monopolies in

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[53] These are: All Nippon Airlines, Cathay Pacific Airways, China Airlines, EVA Airlines, Garuda Indonesia, Hong Kong Dragon Airlines, Malaysia Airlines, Phillipine Airlines, Royal Brunei Airlines, SilkAir, and Singapore Airlines.

[54] Infini is a smaller Japanese CRS that has a 45% market share in Japan. It was established in June 1990, and is jointly owned by All Nippon Airways (60%) and Abacus International (40%). See online: <http://www.infini-trvl.co.jp/contents/english/corporate/c_index_e.html#c1> (date accessed: 10 March 2001).

[55] See online: Abacus Website <http://www.abacus.com.sg/> (date accessed: 10 March 2001).

[56] See Locke, *supra* note 12 at 219.

their respective national markets. Cooperation amongst airlines to develop CRSs was present from the start, as the US systems had an operational and technological head start, and it was feared that they would take over the market.

In addition, in the second half of the 1980's CRS owners started to offer some of their stock to other airlines. For new partner airlines, participation offered a possibility of at least some control over the business decisions of the CRSs. At that time, CRSs were subject to increasing regulatory scrutiny,[57] and their attractiveness from a competitive standpoint diminished. The trend towards multiple ownership of CRSs continued until only one continued to be solely owned by a single airline: Sabre, which was owned by American Airlines.

In the late 1990's a second structural change occurred in the CRS industry as several CRSs made an initial public offering (IPO) of part of their shares. Sabre spun off 20% of its shares in 1996. In December 1999, AMR, Sabre's parent, announced its intention to distribute its 83% ownership interest in Sabre, marking the beginning of Sabre as a 100% publicly traded company.[58] On 15 March 2000, AMR Corporation completed this operation by distributing its majority ownership stake in Sabre to AMR shareholders.[59] Galileo followed a similar path to public ownership and is now approximately 73% publicly owned. As for Amadeus, the situation is more complicated: In 1998 it was still directly or indirectly held by Air France (29.2%), Iberia (29.2%), Lufthansa (29.2%), and Continental Airlines (12.4%).[60] In the forth quarter of 1999, Amadeus completed an IPO with initial listings on the Madrid and Barcelona Stock Exchanges, and subsequent listings on the Frankfurt and Paris Exchanges.[61] As of 31 December 1999, Continental no longer held a share in Amadeus,

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[57] See Chapter II, below.

[58] See Sabre, *Annual Report 1999*, online: Sabre Investor Relations <http://www.sabre.com> (date accessed: 10 May 2000), introduction.

[59] See *ibid.* at 2.

[60] See Amadeus Global Travel Distribution S.A., *Annual Report 1999*, online: Amadeus Investor Relations <http:/:www.global.amadeus.net/investor> (date accessed: 11 May 2000) at 22.

[61] See *ibid.*

and the other three airlines and the public each held a 25% share.[62] On 18 May 2000 it was announced that another 23% would be offered to the public.[63] In June 2000, the free floating share was raised to 40% of shares.[64] The disappearance of Continental Airlines as a shareholder strengthens the power of the remaining three airlines.

The common understanding that the CRS industry is dominated by a limited number of CRSs owned by a limited number of airlines must therefore be seriously adjusted. The CRS industry emerged as an industry indeed dominated by a limited number of players, but today ownership varies among CRSs, from rather tight ownership by three airlines to 100% widely-held ownership.

This fact does not preclude the reality that the airlines still own significant voting power, often protected by "special voting shares", and therefore still control "their" CRSs. While the need for stringent regulatory intervention might have somewhat attenuated due to the abovementioned developments, some form of regulatory oversight could still remain advisable. This issue will be further explored in Chapter II.

The tables in Appendix F illustrate the CRS ownership situation in 1990 and 2000.[65]

V) THE ROLE OF ATPCO AND ARC IN THE TRAVEL DISTRIBUTION CHAIN

1) The Airline Tariff Publishing Company (ATPCO)

ATPCO is a company owned by 24 US and international airlines,[66] whose core business consists of collecting and distributing of airline fares and related data.

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[62] See *ibid.*

[63] See "Amadeus and its Airline Shareholders", *supra* note 42.

[64] See "Amadeus Free Float Raised", *supra* note 44.

[65] See Appendix F, below.

[66] Notably Air Canada, Air France, Alaska Airlines, Aloha Airlines, American Airlines, British Airways, Canadian International, Chicago Helicopter Airways, Continental Airlines, Delta Air Lines, Federal Express Corporation, Hawaiian Airlines, Iberia, Japan Airlines, KLM Royal Dutch Airlines, LA Helicopter, Lufthansa, Northwest Airlines, Reeve Aleutian Airlines, SAS, Swissair, Trans World Airlines, United Airlines, US Airways. See online: ATPCO Website <http://www.atpco.net/aboutoc.html> (date accessed: 10 March 2001).

ATPCO collects data from over 550 airlines and distributes the information to CRSs worldwide. ATPCO facilitates the flow of information through the distribution chain, as CRSs only need to access one source for all the fare information they need. Airlines have the advantage of only having to deliver their fare information to one centralized collection point.

2) The Airlines Reporting Corporation (ARC)[67]

After deregulation, ARC was established as a close corporation[68] in 1984, as the successor to the Air Traffic Conference of the Air Transport Association of America (ATA) and the administrators of the Standard Ticket and Area Settlement Plan. At this moment, ARC is owned by thirteen airlines. The latter must be members of the Air Transport Association of America.

The core business of ARC consists of providing travel transaction reporting and financial settlement services in the United States for its owner airlines, participating carriers, authorized travel agents, and customers. Additionally, ARC is responsible for travel agency accreditation in the United States.

In the third quarter of 1999, 44,901 travel agency locations, 24 accredited corporate travel departments, 143 carriers and three railroads operated through ARC. The sales that are processed annually through ARC amount to USD 75 billion.

VI) DIRECT OR "ALTERNATIVE" DISTRIBUTION CHANNELS

Airlines have never been happy about paying both the travel agent a commission and the CRS a fee per booked flight segment, and thus they have continually searched for alternative methods to distribute their travel services, without incurring the high cost of duplicating an entire distribution chain. The airlines have had to exercise caution so as not to upset travel agents, who could divert traffic to other carriers to retaliate against a particular airline.

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[67] See online: ARC Website <http://www.arccorp.com/> (date accessed: 10 March 2001).

[68] There cannot be more than 30 shareholders, and the stock is not freely transferable.

Several distribution strategies have been explored. First, airlines have developed -or already possessed- their own sales centres in major urban centres. Airline personnel book flights using the in-house inventory and reservations system. While this means of distribution has done away with commissions and fees, airlines' capital and personnel costs have increased.

Second, major corporate clients have been provided free of charge with a person from within the corporation to handle their travel needs. Here, capital costs such as renting a sales outlet are avoided, and customer fidelity can be closely monitored. However, the personnel costs could outweigh the potential benefits.

Third, in some airports automated ticket machines have appeared, reducing distribution costs dramatically. However, these systems have high initial development costs, and they need to be accepted by the consumer.

Fourth, in France, online booking has existed since the eighties through the very popular Minitel system,[69] a sort of rudimentary, character-based console linked to the telephone system, allowing consumers to book tickets, pay bills or consult newspages.

Fifth, and coinciding with the emergence of low-cost carriers such as Virgin Express, some airlines sell their services mainly through call-centres, eliminating both CRSs and travel agents from the distribution chain. The cost for the airline remains quite low as call centre personnel tends not to be very well remunerated and capital costs remain relatively low. Often, call centre operations are outsourced.

Finally, and most importantly, the development of a worldwide public data communications network, the Internet, has allowed for the development of a whole online travel distribution industry. The development of this industry, and the legal implications of this fundamental change in airline distribution techniques, will be at the core of this thesis.

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[69] The Minitel system has been one of the reasons for the very slow development of the Internet in France.

VII) CONCLUSION

Before deregulation, these alternative or direct distribution channels held a market share of slightly over 50%. From the sunset of regulation until the dawn of e-travel, travel agents managed to increase their market share at the expense of alternative and direct methods of distribution. Travel agents using CRSs were particularly well equipped to browse their way through the vast number of flight combinations that the emergence of hub-and-spoke networks and advanced yield management had engendered. As they became indispensable operators in the travel distribution industry, their commission levels grew accordingly, and slowly they became a burden on the balance sheet of many airlines. In this way, travel agency distribution became the traditional way to distribute tickets, involving three parties: the airlines providing data to the CRSs, which are accessed by travel agents.

The nodal point in the "traditional" distribution chain, the CRS providers, are limited in number. Although CRS companies vary in character and market share, a typical feature of CRS companies was, until very recently, airline ownership or –at least– control. The regulatory concerns connected with the ownership of the CRSs by the airlines will be the focus of the following chapter.

Facing ever-increasing distribution costs, the airlines have been on a continuous quest to lower such costs by distributing their product through alternative distribution channels. E-travel, the distribution of travel services directly to consumers through the Internet, is emerging as a potentially viable alternative to traditional "brick and mortar" travel agency distribution channels. Airlines have started using the Internet as a cheap and cost-effective distribution tool. Travel agents could get locked out of the picture or have to learn to live with substantially lower commission levels. These evolutions will stand at the centre of this thesis and will be explored further in Parts II and III.

CHAPTER II. THE COMPETITIVE ENVIRONMENT OF THE TRAVEL DISTRIBUTION INDUSTRY[70]

I) INTRODUCTION

The industry that was briefly depicted in the preceding chapter did not reveal itself as a perfectly competitive one. On the one hand, travel service suppliers (airlines) and travel information databases (CRSs) are limited in number, and until recently, CRSs were owned by just a few of those suppliers. On the other hand, travel agents are numerous and the consumers of the travel product are innumerable. The conduct of the players in the oligopolistic distribution market has given rise to a number of "anticompetitive concerns".

The undercurrent in the debate that started immediately after the advent of CRSs was that the airlines owning them used the distribution chain to their advantage in an unlawful manner by extracting monopoly rents from their systems. Accordingly, their dominance –or mere survival– in the air transportation market was secured during the post-deregulatory years of cutthroat competition. Their anticompetitive conduct was alleged to take place in various forms. Specifically, some airlines were accused of acting to the detriment of other airlines, CRSs, travel agents, and, ultimately, the consumer by abusing their dominant positions.

Nonetheless, airlines have also been accused of acting collusively to the detriment of travel agents and consumers, through non-price predation and horizontal price fixing respectively. Whereas the first form of anticompetitive behaviour seems to flow from the particular vertically integrated structure of the industry,[71] this does not appear to be the case for price fixing agreements.

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[70] Please note that the regulatory analysis of this chapter will focus primarily on US law and regulations, as the main anticompetitive concerns have been voiced in the United States.

[71] On the vertically integrated nature of the airline distribution industry, see Fair, *supra* note 8 at 332.

This chapter will begin by providing a concise review of the traditional *distinguo* between direct regulatory intervention and indirect regulation through antitrust law. Then, some essential elements of antitrust law and analysis will be briefly recalled. Finally, and most importantly, the focus will turn to the anticompetitive concerns that have arisen in the CRS context and the way in which these concerns have been answered by both direct regulatory intervention and antitrust law. Unfortunately, this chapter cannot be anything more than a brief and unavoidably superficial introduction to topics that have already been extensively probed. The bibliography offers the interested reader a number of sources for further reading.

II) THE REGULATORY DILEMMA: ANTITRUST OR ECONOMIC REGULATION

Where markets are not perfect, the question of government intervention to correct these imperfections arises. The lawmaker faces the difficult task of predicting whether the benefits of some kind of regulatory intervention will outweigh its costs. Once the decision to correct the market mechanisms has been taken, the lawmaker must decide whether intervention in the markets to rectify the inefficiencies that underlie a sub-optimal market functioning should be direct, through regulation of a particular market, or whether a safeguard mechanism, antitrust law, should be put in place to protect market functioning.

Direct market intervention seems to be more likely to correct serious market defects, which prevent a market from even being "workably" competitive, such as those deficiencies flowing from natural monopolies, external costs, serious asymmetries of information, and public goods.[72] Direct regulatory intervention has the advantage of allowing very precise regulation of the conduct of market players. However, the danger of misallocation of resources is never far away. In the regulated air transportation industry, for example, this misallocation of valuable resources, leading

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[72] See S.G. Breyer, "Antitrust, Deregulation, and the Newly Liberated Marketplace" (1987) 75 Calif. L. Rev. 1005 at 1006.

to high fares, excess capacity, and other operational inefficiencies, has been the main shortcoming that deregulation of the airline industry was meant to address.[73]

Conversely, intervention through antitrust law seems to be more apt to keep a workably competitive market healthy. This "restrain to be free" approach does not *a priori* intervene in the competitive process, but only serves as the "checks and balances" thereof. Under antitrust law, misallocation of resources is less probable, as decentralised individual market players are more likely to make economically-sound decisions, fostering market efficiencies and innovation, than a centralized administrative body, responsible for the implementation of the market regulations, would be able to do.[74]

Antitrust law, however, has the disadvantage of its inherent vagueness. Ephemeral concepts, such as "reasonableness" or "wilful acquisition", can lead to decisions based more on policy, or even politics, than on pure and sound legal reasoning. This danger appears even greater where antitrust law is administered by a decentralised court system, as is the case in the United States.

III) SOME ELEMENTS OF US ANTITRUST ANALYSIS

Three laws constitute the cornerstone of US antitrust law: the *Sherman Act*,[75] the *Clayton Act*,[76] and the *Federal Trade Commission Act*.[77] The *Sherman Act* analyses the competitive behaviour of one or more firms that are not merging or merged, whereas the *Clayton Act* precisely addresses the competitive ramifications of a merger between two or more corporate entities. The *Federal Trade Commission Act* is not directly relevant to the present analysis, as it expressly excludes the behaviour of air

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[73] See Fair, *supra* note 8 at 322.

[74] See Breyer, *supra* note 72 at 1006.

[75] See *Sherman Act*, 2 July 1890, ch. 647, 26 Stat. 209, codified as amended at: 15 U.S.C. §§1-7 (1994).

[76] See *Clayton Act*, 15 October 1914, ch. 323, 38 Stat. 730, codified as amended at: 15 U.S.C. §§12-27 (1994).

[77] See *Federal Trade Commission Act*, 26 September 1914, ch. 311, 38 Stat. 717, codified as amended in scattered sections of 15 U.S.C. (1994).

carriers from its scope.[78] For the purpose of the present analysis, the *Sherman Act* is the most relevant legislative source.

Section 1 of the *Sherman Act* deals with what may be deemed "behavioural offences", namely those agreements between competitors that antitrust law forbids. It reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[79]

To prove a Sherman Act Section 1 violation, three elements must be proven by the plaintiff.[80] The text of Section 1 mentions the two first requirements. The first element is direct or circumstantial proof of a contract, agreement, or conspiracy for the purpose of restraining trade. Restraints of trade can be horizontal or vertical. Horizontal restraints – concerted actions between entities on the same level of distribution, and therefore constituting actual or potential competitors – have traditionally been viewed as the most serious infractions of antitrust laws. Examples include: (1) horizontal price fixing, (2) allocation of markets and/or customers, and (3) concerted refusals to deal (boycott).[81] Generally speaking, vertical restraints – concerted actions flowing from relationships between suppliers and customers on different distributional levels – are seen as less dangerous to the health of the marketplace. Examples include: (1) vertical price fixing, (2) non-price vertical restraints (exclusive selling agreements, tying agreements, territorial or customers restrictions, and exclusive dealing agreements), and (3) vertical boycotts.

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[78] See 15 U.S.C. § 45(a)(2) (1994).

[79] 15 U.S.C. § 1 (1994).

[80] See *Fuentes* v. *South Hills Cardiology*, 946 F.2d 196 at 198 (3d Cir. 1991).

[81] The *US Antitrust Guidelines for Collaborations among Competitors* state the antitrust enforcement policy of the Antitrust agencies. This text aims to assist businesses in assessing the antitrust risks connected to horizontal agreements. See US FTC and DOJ, *Antitrust Guidelines for Collaborations Among Competitors*, 7 April 2000, online: FTC Website <http://www.ftc.gov/bc/guidelin.htm> (date accessed: 10 March 2001) at 2 [hereinafter *Competitor Collaboration Guidelines*].

The second element necessary to prove a Section 1 violation is that the restraint of trade must affect interstate commerce. The third element has been developed through case law and requires that the restraint must be proven to be unreasonable. If all restraints of trade were unlawful, any contract between firms would be unlawful, as a contract, by its very nature, restrains trade.[82]

Two rules have been developed by the US Supreme Court to test the unreasonable character of a contract, agreement, or conspiracy: the "per se rule" and the "rule of reason". The *US Antitrust Guidelines for Collaborations among competitors* briefly comment on these two types of analyses:

> Certain types of agreements are so likely to harm competition and to have no significant pro-competitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects.[83] Once identified, such agreements are challenged as per se unlawful. All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement's overall competitive effect. As the Supreme Court has explained, rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.[84]

Agreements that would normally be challenged under a *per se* analysis can be analysed under the rule of reason, provided it is established that the agreement is reasonably necessary for an efficiency-enhancing integration.[85] For such integration, participants directly or indirectly (*e.g.*, through a joint venture) collaborate to perform certain business functions, such as production or distribution, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation.[86]

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[82] See I.E. Pate, "In Re Travel Agency Commission Antitrust Litigation: A Case of Non-price Predation within the Travel Industry" Comment (1999) 64 J. Air L. & Com. 941 at 948, online: WL (TP-ALL).

[83] Generally, these are agreements of a type that (almost) always tends to raise prices or to reduce output. Examples of these hard-core cartel agreements include agreements among competitors "to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce". *Competitor Collaboration Guidelines*, *supra* note 81 at 3.

[84] See *ibid.*

[85] See *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 at 339 n. 7 & 356-357 (1982) (finding no integration). See also *Competitor Collaboration Guidelines*, *ibid.* at 8.

[86] See *Competitor Collaboration Guidelines*, *ibid.* at 8.

Section 2 of the *Sherman Act*, concerning individual (or coordinated) conduct to affect market structure, prohibits (attempted) monopolization.[87] It reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[88]

It is important to note that the act of monopolization is prohibited, not the very existence of a monopoly itself. In order to determine the existence of (attempted) monopoly, it is essential to properly construe structural concepts such as "relevant market" and "market share". Defining a relevant market[89] entails inquiring into the product market[90] and the geographic market[91] of a product.

The offence of monopolization has two elements. First, the corporation (or person) must be proven to possess market power in the relevant market. Market power is the power to control or raise prices, or to exclude competition, and a *prima facie* case can be established by measuring the firm's share of the relevant market. Second, the firm must be proven to have the purposeful conduct to acquire, maintain, or obtain a monopoly, except when the monopoly is attained by a superior product, business acumen, or historic accident, or when it is thrust upon the economic actor by a thin

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[87] For a more detailed analysis, see W.T. Lifland, "Monopolies and Joint Ventures" (2000) 1180 PLI/Corp 153.

[88] 15 U.S.C. §2 (1995).

[89] On the subject of market definition, see J. Faull & A. Nikpay, *The EC Law of Competition* (Oxford: Oxford University Press, 1999) at 43.

[90] Generally speaking, the product market is "the part of the relevant market that applies to a firm's particular product by identifying all reasonable substitutes for the product and by determining whether these substitutes limit the firm's ability to affect prices". *Black's Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999), *s.v.* "market". Consequently, if a firm can raise prices or cut production without causing the substitution of its product by other products, that firm is operating in a distinct product market.

[91] The geographic market is "the part of a relevant market that identifies the regions in which a firm might compete. If a firm can raise prices or cut production without causing a quick influx of supply to the area from outside sources, that firm is operating in a distinct geographic market". *Ibid.*, *s.v.* "market".

market.[92] Such purposeful conduct can, for example, consist of predatory pricing, refusal to deal, or monopoly leveraging.[93]

In addition, Section 2 prohibits companies that do not yet have monopoly power from engaging in anticompetitive conduct to achieve it. Three elements must necessarily be proven to condemn behaviour as "attempted monopolization": (1) a specific intent to achieve a monopoly, (2) the existence of predatory or anticompetitive behaviour, and (3) the existence of a dangerous probability that monopoly power would in fact be achieved.[94]

A third offence under Section 2 consists of conspiracy to monopolize. Although it is a separate offence, it is rarely proven separately.[95] Confronted with this type of behaviour, a plaintiff will probably prefer to sue under Section 1, as for conspiracies to monopolize, a specific intent needs to be proven, which need not be done for conspiracies to restrain trade.[96]

"Attempted joint monopolization" is the unusual combination of offences of the second and third type.[97] This was one of the allegations in an antitrust suit brought against American Airlines in 1984.[98]

The penalties for violations under both Sections 1 and 2 of the *Sherman Act* can be severe. Companies can be fined up to USD 10,000,000, while individuals can be fined USD 350,000 and/or sentenced to prison for up to three years. Given these harsh punishments, corporations often prefer to settle antitrust cases through court-

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[92] See S. Kimpel, "Antitrust Considerations in International Airline Alliances" (1997) 63 J. Air L. & Com. 480.

[93] See Lifland, *supra* note 87 at 184.

[94] See *Spectrum Sports* v. *McQuillan*, 506 U.S. 447 at 459 (1993).

[95] See Lifland, *supra* note 87 at 203.

[96] See *ibid.* at 203 *in fine.*

[97] See *ibid.* at 205.

[98] See *United States* v. *American Airlines, Inc.* 743 F.2d 114 (5th Cir. 1984).

approved agreements, "consent decrees", in which the corporation agrees to stop the practice violating the antitrust laws.[99]

IV) COMPETITIVE CONCERNS, ANTITRUST AND REGULATION: AN OVERVIEW OF US LAW

This section will explore the main competitive concerns that have arisen from the operation of CRSs. Initial regulatory intervention, and most of the antitrust litigation, took place in the United States. Therefore, in this section, the competitive concerns and their regulatory answers will be examined from a US standpoint. The next section will briefly examine how other countries or regions have developed their own regulations, partly copying the US rules when confronted with similar concerns, but all developing their own particular approach to accommodate their own concerns, traditions, and context.

1) CRS Technology as a Competitive Weapon[100]

As a result of deregulation of the US domestic air transportation industry, a double dependency developed: both travel agents and airlines increasingly needed CRSs to remain competitive in the deregulated marketplace. The proprietor airlines soon discovered the great competitive advantage their ownership of these systems entailed.

Two elements appear to be crucial in maximizing the advantage of CRS ownership: (1) the CRS, or its data, has to be configured to increase sales of flights on the proprietor airline, and (2) the market share of the CRS should be as high as possible.

At this point the potential antitrust problems become evident. There exists a danger that proprietor airlines will exploit their power in the CRS market to gain a competitive advantage in the air transportation services market itself ("monopoly leveraging"). But in order to be successful in this, they have to acquire as much market power in the CRS market as possible.

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[99] See Kimpel, *supra* note 92 at 480.

Another standpoint views CRSs as "essential facilities" to compete in the air transportation market. Abuse of "essential facilities" aims to disadvantage competitors in a market by denying them access to a facility that they need[101] in order to be able to compete in that market.[102] Under this "essential facilities" doctrine, non-owner airlines are said not to have reasonable access to CRSs, an essential facility controlled by the proprietor airlines.

Finally, as stated above, the intentional acquisition of monopoly power or the abuse of a dominant position in the CRS market could constitute a violation of antitrust laws in itself.

Under these three theories of recovery, several US regional airlines launched a suit against American Airlines and United Air Lines in 1987.[103]

i. The Monopoly Leveraging Claim

This first form of anticompetitive behaviour seems to flow from the particular vertically integrated structure of the industry. The air transportation industry can be subdivided in three sub-industries: (1) air transportation services, (2) reservation information distribution, and (3) air transportation sales.[104] The airline-owned CRSs

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[100] For a good analysis of this topic, see Locke, *supra* note 12 at 227; "Legal and Regulatory Implications", *supra* note 3 at 1930.

[101] The facility need not be indispensable but its denial must impose a severe handicap on the competitors. See *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), cert. denied, 436 U.S. 956 (1978).

[102] A typical example would be a situation where a long distance telecommunications provider needs the local telecommunications network controlled by a competitor, to reach its customers. If the long distance telecommunications provider were refused access at reasonable terms to the local network of its competitor, the Courts could apply the essential facilities doctrine. See *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 at 1133 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

[103] See *In re Air Passenger Computer Reservation Sys. Antitrust Litig*, 694 F. Supp. 1443 (C.D. Cal. 1988) [hereinafter *In re Air Passenger*]. For another lawsuit dealing (partially) with the same situation, see *United Airlines, Inc.* v. *Austin Travel Corp.*, 681 F. Supp. 176 (S.D.N.Y. 1988), aff'd *United Airlines, Inc.* v. *Austin Travel Corp.*, 867 F.2d 737 (2nd Cir. 1989).

[104] See Fair, *supra* note 8 at 332.

can under this analysis be qualified as vertical integrations of the first two categories.[105]

Monopoly leveraging in the CRS industry has been said to take place under various forms: proprietor airlines have been accused of (1) illegally biasing their displays and systems, in order to increase passenger bookings for proprietor airlines, (2) having full access to market-share data and sensitive competitor information through the study of data generated by the CRSs, data to which competitors had little or no access, (3) charging high booking fees to airline subscribers.

Monopoly leveraging leads to a transfer of income from non-proprietor airlines to CRS-vendor airlines.[106] The Department of Transportation (DOT) estimated that in 1988 these transfers to the two major CRS vendors, Sabre and Apollo/Covia, owned by American Airlines and United Air Lines amounted to USD 500,000,000 annually.[107]

The monopoly leveraging claim was dismissed in the suit against American Airlines and United Air Lines as the Court found that there was no danger of monopoly in the national air transportation market.[108]

ii. The "Essential Facilities" Doctrine

The "essential facilities" doctrine was also dismissed in the suit against American Airlines and United Air Lines, as the Court decided that there were several competing CRSs and that American's and United's market shares were too small to allow a claim that they wielded monopoly power in the air transportation market.[109]

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[105] See *ibid.*

[106] See *ibid.* In addition, Fair states that there will be a transfer of income from minor to major vendor-airlines.

[107] See *ibid.*, citing US Congress, Committee on Public Works and Transportation, *Hearing before the Subcommittee on Aviation on Competition in the Airlines Computerized Reservation System Industry*, 100th Cong., Second Session, 14 September 1988.

[108] See *In re Air Passenger, supra* note 103 at 1474-1475. The Court decided that for antitrust purposes the relevant markets were national in scope. *Ibid.* at 1467.

iii. The (Direct) Monopolization Claim

The claim of monopolization of the air transportation market was also dismissed referring to the market share of American Airlines and United Air Lines in the national air transportation market.[110] The claim of monopolization of the CRS market has been settled out of Court.[111]

2) Regulation[112]

CRSs dramatically increased the productivity of travel agents by allowing them to browse through massive amounts of data in a short time-span. This explains why they were willing to pay substantial fees for equipment rentals. By the early 1980's, CRSs had become essential for airline distribution.

Smaller airlines too were happy to use the newly developed CRSs, even though they were openly biased, as they lacked the financial means and technological know-how to develop them on their own. In addition, this service was originally provided free of charge to subscribing airlines, in order to enhance the system's attractiveness to travel agents by hosting as many airlines as possible.[113] However, in the late 1970's the vendor airlines asked subscriber airlines to pay a fee to avoid some of the screen bias. From 1981 on, vendor airlines steeply increased booking fees. Many of the smaller airlines grew increasingly dissatisfied with this situation. While they were struggling to survive, they now found themselves obliged to subsidize the powerful airlines as well. They also alleged that the vendor airlines were abusing the competitively sensitive data they generated in the system.

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[109] See *ibid.* at 1456.

[110] See *ibid.* at 1455-1456 & 1466-1467.

[111] See *Accord in re "Apollo" Air Passenger Computer Reservation Sys. (CRS)*, 720 F. Supp. 1068 (S.D.N.Y. 1989) at 1078-1079.

[112] For a more detailed but still concise account of the history of CRS regulation in the United States, see US DOT/OST, *Advance Notice of Proposed Rulemaking – Computer Reservation Systems (CRS) Regulations (Part 255) – Notice No. 97-7* (10 September 1997), online: Docket Management System OST-1997-2881-1 <http://dms.dot.gov> at 6-10, also published at 62 Fed. Reg. 47606 at 47607 [hereinafter *advance notice of proposed rulemaking*].

[113] See Locke, *supra* note 12 at 219.

But not only airlines were dissatisfied. Travel agents too grew unhappy with subscription costs and bias. Some of the increased productivity was bound to be lost, if a travel agent was really willing to provide his client with the best flight plan available, as this could mean browsing several biased screens before finding the flight best suiting the client's needs. To protect themselves, the vendor airlines started locking up travel agents in restrictive contracts on the one hand, and offering the same agents positive incentives to use a certain system on the other.[114]

The abovementioned restrictive contracts included: (1) minimum-use provisions; discouraging travel agents from maintaining more than one system;[115] (2) duration clauses, typically of five years;[116] (3) roll-over clauses, automatically renewing the contract if new equipment was leased or a new location equipped;[117] (4) liquidated damages clauses, requiring agents switching to other systems to pay the remaining lease payments;[118] (5) clauses hindering the use of third-party hardware or software;[119] etc. Positive incentives included: (1) cash payments equalling liquidated damages to entice travel agents to switch systems;[120] (2) free installation; and (3) reductions or waivers of subscription fees for large travel agencies.[121]

As complaints of abuses and discrimination increased, so too did the pressure on the authorities to do something about it. In 1982, both the Department of Justice (DOJ) and the Civil Aeronautics Board (CAB) commenced an inquiry into the use of CRSs as

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[114] See *ibid.* at 223.

[115] These minimum-use clauses often required the travel agent to book at least 50 % of all flights through the CRS. See J. Ellig, "Computer Reservation Systems, Creative Destruction, and Consumer Welfare: Some Unsettled Issues" (1991) 19 Transportation L.J. 287 at 291.

[116] See *ibid.*

[117] See *ibid.*

[118] And installation and other costs. See Leaming, *supra* note 5 at 487.

[119] See *ibid.* at 488.

[120] See Locke, *supra* note 12 at 223.

[121] See Leaming, *supra* note 5 at 487.

a competitive weapon. While the DOJ eventually decided not to file suit,[122] the CAB took action, and issued its CRS Rules in 1984.[123]

The main focus of the 1984 Rules was to remove bias from the systems by obliging CRSs to offer at least one unbiased display. Concerning display bias, the Rules stipulated that no factors directly or indirectly related to carrier identity could be used to rank information. Other factors had to be applied consistently to all carriers, including the system owner, and to all markets. This last provision was inserted to prevent tailoring the ordering criteria to local markets.

The Rules also required that each system allow all airlines to participate in non-discriminatory terms, and to "apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the loading of its own information".[124] In addition, the 1984 rules required each CRS system to make available to each participating airline any marketing and booking data concerning domestic flights generated from its system.

Finally, the CAB regulated or prohibited certain contractual terms that were felt to restrict the ability of travel agents to switch between systems. The maximum duration of any contract was fixed at five years. All contracts that conflicted with the 1984 Rules were void as of the date of the Rules.[125] This however allowed the CRS owners to impose new contracts upon participating airlines, with higher fees.[126]

After the demise of the CAB on 30 December 1984, the Department of Transportation (DOT) took over the regulatory powers of the CAB. The 1984 Rules were bound to expire on 31 December 1990. So while conducting a study on the effectiveness of the Rules and implemented a rulemaking procedure, the DOT extended the expiry date.

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[122] Despite findings that the CRSs were indeed used to weaken competition. See Locke, *supra* note 12 at 224.

[123] See 49 Fed. Reg. 32540 (1984). The CRS rules have been codified at 14 CFR § 255.

[124] 14 CFR §255.4(d) (1984).

[125] See Locke, *supra* note 12 at 226.

The DOT determined: (1) that the CRS Rules remained necessary to promote airline competition, (2) that market forces still did not discipline the price or level of service offered to participating carriers, and (3) that without the CRS Rules, airlines would abuse their control over the CRS systems, e.g. by biasing the displays.[127] Therefore, the DOT decided not only to maintain the Rules, but also to strengthen them. The general aim of the amendments was to promote competition in the CRS industry, thereby alleviating the need for detailed regulation.[128]

New rules were adopted giving travel agencies the right to use third-party hardware or software on a particular CRS and to access other CRSs through a terminal.[129] The Rules also prohibited CRSs to impede travel agents directly or indirectly from obtaining or using any other CRS.[130] In addition, rules were adopted requiring (1) mandatory participation in all other CRSs for any airline having a significant equity interest in a CRS,[131] and (2) availability at reasonable terms of marketing and booking data for both domestic and international flights.[132] Some valid concerns, such as high booking fees, could not be addressed, as no adequate remedy was at hand.[133]

The 1992 DOT Rules became effective at the end of 1992,[134] with an expiry date of 31 December 1997. But this date has been extended several times since, and is now set for 31 March 2002. Since 1992, the text of the CRS Rules has been amended on some minor points.[135]

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[126] Republic Airlines filed suit, alleging it had signed the new contracts under duress. See *Republic Airlines, Inc.* v. *United Air Lines, Inc.*, 796 F.2d 526 at 528 (D.C. Cir. 1993). The claim was dismissed on the merits.

[127] See 62 Fed. Reg. 47606 at 47608 (1997).

[128] See *ibid.*

[129] See 14 CFR §255.9 (1992).

[130] See *ibid.*, §255.8(b).

[131] See *ibid.*, §255.7(a).

[132] See *ibid.*, §255.10.

[133] See 62 Fed. Reg. 47606 at 47608 (1997)

[134] See 57 Fed. Reg. 43780 (1992). A copy of the rules is to be found in Appendix A, below.

[135] See 62 Fed. Reg. 59802 (1997); 62 Fed. Reg. 63847 (1997); 65 Fed. Reg. 16808 (2000). See on the latest extension of the rules: U.S. DOT/OST, *Extension of Computer Reservations (CRS) Regulations - Notice*

Pending before the DOT are rulemakings on specific CRS issues such as (1) the amendment of the display bias rules, and (2) the prohibition of "parity clauses", *i.e.*, clauses requiring airlines wishing to participate in a CRS to participate in that system at at least as high a level as the airline participates at in any other system.[136] Another issue that remains of concern is high booking fees.[137]

More fundamentally, the Rules are now undergoing a major review, in order to determine whether they still are adequate to govern a rapidly changing travel distribution environment. Several concurring and converging evolutions are shaking the structure of the travel distribution chain. First, as discussed in the previous chapter, there are structural changes within the CRS industry itself. CRSs are evolving from airline-owned to publicly owned and traded companies. Furthermore, the Internet is emerging as a major, vital channel to distribute tickets and other travel services. This trend is being reinforced by the evolution towards electronic ticketing and paperless travel. In this way, airlines are trying to bypass CRSs. Finally, CRSs are not the only ones that are being bypassed: so are travel agents. Their relationship with airlines is turning sour because of sharply declining commission rates. The review of these changes, and their impact on the regulatory framework governing the travel distribution industry will be at the core of Parts II and III of this thesis.

V) CRS Regulation by International Organisations or in Other Countries: An Overview

The United States was the first country to regulate the CRS industry. Before long, however, the problems encountered in the United States started surfacing in other parts of the world. Countries such as Canada and Australia, and international organisations such as the European Union, ICAO, and ECAC studied the regulatory framework in the United States and then adapted it to better suit their regulatory

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of Proposed Rulemaking – Final Rule (30 March 2001), Docket No. OST-2001-9054-13, also published 66 Fed. Reg. 17352..

[136] For more extensive information, see 62 Fed. Reg. 47606 at 47609 (1997).

[137] See *ibid.*

and statutory frameworks, legal cultures and traditions, and specific economic situations.

While a detailed comparison of the different CRS Regulations obviously goes beyond the scope of this limited text, a few introductory notes might be appropriate to get an impression of the different regulatory regimes governing the operation of CRSs around the world.

1) The International Civil Aviation Organization (ICAO)[138]

In 1991, ICAO adopted the CRS Code of Conduct. The ICAO Council can review the Code when circumstances (such as rapid technological change) warrant it, and thus it was replaced in its entirety by a new *Code of Conduct on the Regulation and Operation of Computer Reservation Systems (CRS)* in 1996. This step by the Council was meant to take into account the Code's application by ICAO Contracting States, to strengthen its effectiveness, to extend its scope of application to online services, and to address the implications of the General Agreement on Trade in Services,[139] whose Annex on Air Transport covers CRSs.

ICAO's CRS Code of Conduct has been developed for worldwide application and consequently reflects the critical need for harmonization of the various national and regional CRS regulations while recognizing that States may, consistent with the Code's principles, go beyond it in regulating certain aspects of CRSs. In addition, ICAO has developed two model CRS clauses for use in bilateral or multilateral air services agreements to reinforce or supplement the Code of Conduct.

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[138] For more information, see ICAO, *Code of Conduct on the Regulation and Operation of Computer Reservation Systems (CRS)*, online: ICAO website <http://www.icao.org/icao/en/atb/ecp/code-conduct.htm> (date accessed: 5 March 2001) [hereinafter *ICAO CRS Code of Conduct*], with explanatory notes on the application of the Code of Conduct online: <http://www.icao.org/ icao/en/atb/ecp/notes.htm> (date accessed: 5 March 2001) [hereinafter *ICAO CRS Notes*].

[139] A copy of the ICAO CRS Code of Conduct is to be found in Appendix D, below.

2) The European Union[140]

Once the liberalization of the European airspace took off in the late 1980's, airlines and travel agents were confronted with the same problems as their US counterparts. In addition, and maybe in some respect comparable to the concentration of US CRSs around the hubs "owned" by their (former) parent airlines, the European CRS market is highly concentrated to the extent that in most States a single CRS has a market share exceeding 80%. Two CRSs, Amadeus and Galileo, hold the lion's share of the relevant market.

The first European Code of Conduct for CRSs was adopted by the Council on 24 July 1989.[141] This first Code was rather difficult to apply efficiently, due to the vagueness of some of its provisions.

In 1993, the Code was amended to clarify some provisions of the original Code and to take into account specific problems that had been encountered since the adoption of the original code.[142] The principal changes included: (1) the requirement to separate the distribution facilities of the CRS from the internal reservation system of its parent airline, (2) the inclusion of non-scheduled airline services, as the distinction between scheduled and non-scheduled services had been removed by the third liberalisation package, (3) the obligation for proprietor airlines to provide other CRSs with as much information as their own CRS, (4) the limitation on the display of code-shared (or other jointly-marketed) flights, (5) rules on the access to personal and marketing data in a CRS, and (6) amendments to improve the transparency of the billing procedure.[143]

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[140] A compiled text of the European CRS Regulations is to be found in Appendix B, below.

[141] See EC, *Council Regulation 2299/89 of 24 July 1989 on a code of conduct for computerized reservations systems*, [1989] O.J. L. 220/1, online: EU website (Eur-Lex) <http://europa.eu.int/eur-lex/en/lif/dat/1989/en_389R2299.html> (date accessed: 10 March 2001) [hereinafter *Council Regulation 2299/89*].

[142] See EC, *Council Regulation 3089/93 of 29 October 1993 amending Regulation (EEC) No 2299/89 on a code of conduct for computerized reservations systems*, [1993] O.J. L. 278/1, online: EU website (Eur-Lex) <http://europa.eu.int/eur-lex/en/lif/dat/1993/en_393R3089.html> (date accessed: 10 March 2001) [hereinafter *Council Regulation 3089/93*].

[143] See EC, *Commission Report on the application of Council Regulation (EEC) No. 2299/89 on a Code of Conduct for Computerised Reservation Systems (CRSs) and proposal for a Council Regulation (EC) amending Council Regulation (EEC) No. 2299189 on a Code of Conduct for Computerised Reservation*

In 1999, the Code was amended again in the light of the experience that had been gained since the adoption of the revised Code in 1993, and to ensure that the Code would be able to deal with the technological (r)evolutions had started to surface. The amendments adopted by the 1999 Regulation[144] are numerous and include provisions dealing with: (1) charging policies, (2) billing information on magnetic media, (3) the inclusion of public information systems (the Internet) in the scope of application of the Code, (4) the display of code-shared flights, (5) audits of compliance with the CRS Regulations, (6) the ranking of flights, (7) the extension of the scope of application to include rail transport, etc.

The approach towards regulation of CRSs in Europe is somewhat different than the one taken in the United States.[145] The European civil servants in Brussels, faithful to their tradition, have chosen to regulate matters in greater detail than their US counterparts. The European CRS Rules have been criticized by one author as being "hyper-technical, difficult to interpret, and, at the same time, extremely vague".[146]

3) Canada[147]

In Canada, CRS regulation began in 1987, when Canada's two major airlines, Canadian Airlines and Air Canada, agreed to merge their respective CRSs into a new system, called Gemini.[148] The Competition Tribunal approved this merger after

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Systems (CRSs), (1997) COM(97) 246 final at 4, online: Docket Management System OST-1997-2881-61 <http://dms.dot.gov> [hereinafter *Commission Amendment Proposal*].

[144] See EC, *Council Regulation 323/1999 of 8 February 1999 amending Regulation (EEC) No 2299/89 on a code of conduct for computer reservations systems (CRSs),* [1999] O.J. L. 040/1, online: EU website (Eur-Lex) <http://europa.eu.int/eur-lex/en/lif/dat/1999/en_399R0323.html> (date accessed: 10 March 2001) [Hereinafter *Council Regulation 323/1999*].

[145] See Leaming, *supra* note 5 at 500.

[146] See R. Cavani, "Essay: Computerized Reservation Systems for Air Transport: Remarks on the European Community Legislation" (1994) 17 Fordham Int'l L.J. 441.

[147] A copy of the Canadian Computer Reservation (CRS) Regulations is to be found in Appendix C, below.

[148] For a detailed account on the Gemini transaction and for further background on Canadian Airline deregulation, see R. Janda, "The Retreat of the Command-and-Control Regulation and the hesitant Advance of Antitrust in the Airline Industry" in *Contemporary Law* (Montreal: Institute of Comparative Law, McGill University, 1994) 626.

negotiating with the merging parties a consent order containing a CRS Code of Conduct.

The Competition Tribunal summarized the content of the Rules as follows:

> The rules provide for the fair recording and display of available flights by a CRS, [...], provide for the equal treatment of all participating carriers and regulate the terms of the contracts between the system vendor and participating carriers and subscribers (travel agents). The rules also oblige the carrier-owner of a CRS to provide timely and complete information to other CRSs, to allow all such systems to issue its tickets and to inform all travel agents that promotions and incentives involving that airline are not conditional upon the use of a particular CRS. [149]

Although the order itself only applied to Gemini, the rules of the order had to be incorporated in contracts between Gemini and any other CRS, for example to secure mutual access to information.[150] In this way, the scope of the order was extended in order to govern the whole airline distribution industry.

Pursuant to Subsection 4.3(2) and Section 4.9 of the *Aeronautics Act*, the CRS Rules have been incorporated into an executive regulation entitled *Regulations respecting Computer Reservation Systems (CRS) operated in Canada for the Purpose of Displaying or Selling Air Services.*[151]

4) The European Civil Aviation Conference (ECAC)

ECAC is an intergovernmental organization created pursuant to an initiative by the Council of Europe and ICAO.[152] Its mission is to promote the "continued development of a safe, efficient and sustainable European air transport system."[153] Presently,

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[149] *Canada (Director of Investigation and Research, Competition Act)* v. *Air Canada* (1993) 49 C.P.R. (3d) 7 at 16.

[150] See Janda, *supra* note 148 at 630-631.

[151] See *Regulations respecting Computer Reservation Systems (CRS) operated in Canada for the Purpose of displaying or Selling Air Services*, SOR/95-275 (6 June 1995) [hereinafter *Canadian CRS Regulations*].

[152] The Council of Europe invited ICAO to convene a conference on this issue.

[153] Art.1 New Const.(1993).

thirty-eight[154] States are members. The instruments available to ECAC to promote its goals are *consultative in nature*, and subject to governmental approval.

ECAC first developed its activities in the fields of *facilitation* and *liberalization of traffic rights*. In addition to these original objectives, the work of ECAC has expanded to other technical areas such as CRSs.

As an international organisation whose most important Member States are also Member States of the European Union, ECAC has had to face the growing intervention (some like to call it "interference") of the European Union. This is true of the ECAC CRS Rules, which are a "carbon copy" (without the sanctioning mechanism) of the European Union's CRS Rules.

The first ECAC CRS Code of Conduct was adopted in 1989. In 1994 and 2000,[155] new Codes were adopted, primarily to reproduce the changes to the CRS Regulations in the European Union.

VI) FROM PAST TO PRESENT

In the United States, deregulation necessitated the development of CRSs, which soon proved to offer a major competitive advantage for those airlines having the financial means to develop them. The US government thought it prudent to address the legitimate anticompetitive concerns that emerged from the use and operation of CRSs through both direct regulation and antitrust law, each having its strengths and weaknesses.

The structure of the CRS market itself calls for a conscious and continuous balancing of interests. Proprietor airlines, subscriber airlines, CRSs, travel agents, and consumers all hold a different view of how the travel distribution industry should be organized and regulated. It is therefore no wonder that a whole gamut of proposals

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[154] See ECAC website: <http://www.ecac-ceac.org/uk/ecac/ecac-memberstates.htm>. In addition, there are some associate members.

[155] A copy of the Revised ECAC Code of Conduct for Computerized Reservation Systems can be found in Appendix E, below.

have been voiced over the years to reform the CRS Regulations, depending on whose interest the proposal was meant to defend. Owner airlines and CRSs asserted that regulation would kill innovation. Travel agents wanted the freedom to switch systems and pay low rental fees. Subscriber airlines demanded low booking fees and neutral screens. Consumers wanted access to a neutral, free source of information, *viz.* the travel agent. Thus, the reform proposals ranged from divestiture of the CRSs,[156] or increased regulation to protect consumers,[157] or a status quo, or an attenuated version of the CRS Regulations,[158] to the repeal of all CRS Regulations and even of antitrust laws, in order to foster innovation.[159]

While this is not the forum to discuss the merits of these proposals, some authors foresaw a lessened need for regulation, or at least a changing regulatory context due to technological changes that were about to take place.[160] They could not have been closer to the truth. One anonymous author wrote in 1990:[161]

> Particular technological changes will significantly affect the CRS market in ways relevant to the proposed regulatory action. [...] [T]he burgeoning ability to access CRSs through home and business computers allows customers to bypass travel agents. Thus, technological change may overrun any potential "bottleneck" of travel agents as the sole distribution source and obviate the need for regulatory interference.

One airline shareholder of Abacus predicted in 1992: "[T]he next wave, from an airline point of view, is how to bypass your CRS."[162]

The Internet is now emerging as this alternative travel services distribution channel, radically changing the whole structure of the distribution chain. New regulatory

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[156] On divestiture, see Leaming, *supra* note 5 at 515; Mifsud, *supra* note 13 at 154.

[157] See Fair, *supra* note 8 at 343

[158] See "Legal and Regulatory Implications", *supra* note 3 at 1949-1950. See also Leaming, *supra* note 5 at 515.

[159] See F.L. Smith, "The Case for Reforming the Antitrust Regulations (if Repeal is not an Option)" (1999) 23 Harv. J.L. & Pub. Pol'y 23, online: WL (TP-ALL).

[160] *E.g.*, see Leaming, *supra* note 5 at 513; "Legal and Regulatory Implications", *supra* note 3 at 1946-1947.

[161] "Legal and Regulatory Implications", *ibid.* at 1946-47.

[162] Leaming, *supra* note 5 at 513.

issues have thus emerged: Should the CRS Rules be extended to the Internet distribution environment? Will the Internet decrease the need for stringent regulation? Will stringent regulation not kill innovation?

PART II. THE INTERNET AND TRAVEL DISTRIBUTION

The World Wide Web is touted as a new, exciting, borderless, even lawless marketplace, a true virtual "Wild Wild West". Yet the Internet is also about communication. Long before the advent of the Internet, ordering by mail, by telephone, by telex, and by fax familiarized us with some of the issues that now dominate the Internet regulatory scene. But this does not mean that the issues at hand are the same ones as existed before. Rather, the Internet seems to have some special characteristics that could warrant a differentiated approach in some cases.

The extraordinary development of the Internet has caught regulators somewhat off-guard. While regulatory issues surely existed before, they were more manageable and easier to grasp. It has taken regulators some time to come to terms with concepts such as web-servers, e-mail and HyperText Markup Language (HTML), and at present, they are assessing whether to adopt special legislation geared towards the Internet. E-travel is one of the key areas currently under scrutiny.

This second part of this thesis neither purports to be comprehensive in scope nor to give the ultimate solution to any topic under regulatory review. It merely attempts to outline the problems that have surfaced as a result of the shift in distribution methods. Positions will be examined and evaluated. Solutions as such cannot readily be given, as the problems have just surfaced, and it is not yet clear where the e-travel revolution will ultimately take us.

A first problem surfaced in the second half of the 1990's. The DOT observed in its advance notice of regulatory review of the CRS Rules that the environment in which CRSs operate was starting to change.[163] In this respect, the DOT pointed out the emergence of booking sites on the Internet as one of the important developments and

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[163] See US DOT/OST, *Advanced Notice of Proposed Rulemaking – Computer Reservation Systems (CRS) Regulations (Part 255) – Notice No. 97-7* (10 September 1997), online: Docket Management System OST-1997-2881-1 <http://dms.dot.gov> at 10 [hereinafter *Advance Notice of Proposed Rulemaking*].

requested concerned parties to comment on whether and how the DOT should extend the CRS Rules to the Internet environment. This "*applicability*" issue will be studied in the second chapter of this part.

Then, in the third chapter, attention will be given to a problem that has recently arisen and that adds a whole new dimension to the aforementioned "applicability" issue. In November 1999, four US airlines announced their plan to launch a joint online travel distributor, "Orbitz.com". This distributor, based on a revolutionary search technology, promises to offer completely bias-free travel information. Other airline-owned or backed websites, such as "Hotwire.com" and "OTP", have recently been launched or are under development.[164] The very fact that they are owned by airlines is enough to raise more than a few eyebrows, given the airlines' track record.[165] Claims of price fixing, exclusive dealing, and other anticompetitive behaviour have been voiced.

E-travel allows airlines to lower distribution costs dramatically by distributing their product at minimal expense through the Internet, be it through their proprietary site or through a consortium site. In this way, they can avoid paying CRS booking fees and travel agent commissions. One telltale sign of this trend is their voluntary divestiture of their ownership interests in the CRSs.

The e-travel revolution is not a stand-alone phenomenon as it is inseparably connected to a second aspect of the airlines' scheme to cut distribution costs: the gradual and steady decline in commission fees, which will be studied in Part III.

But first, it is important to examine the online travel marketplace. Who are its key players? How important is online distribution? What will the future bring? This will be studied in the first chapter of this part.

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[164] See *infra* at 57-61.

[165] *E.g.*, see Airline Tariff Publishing Co cases cited by J.B. Baker, "Identifying Horizontal Price Fixing in the Electronic Marketplace" (1996) 65 Antitrust L.J. 41 at 51.

CHAPTER I. THE STATE OF THE ONLINE TRAVEL INDUSTRY

I) THE DEVELOPMENT OF THE INTERNET

In the late 1960's, the Advanced Research Project Administration (ARPA), a branch of the US Department of Defence (DOD), developed a computer network, the ARPAnet, to link universities and high-tech DOD contractors.[166] Access to the ARPAnet was generally limited to computer scientists and other technical users. During the mid 1980's, the ARPAnet was expanded and interconnected with several networks, forming the high-speed Internet backbone. The Internet was accessible in various forms: File Transfer Protocol (FTP), Gopher, e-mail, and the WWW, the World Wide Web. In 1991, the institutional structure managing the Internet was changed to allow private and commercial interests to participate, and industry supplanted the government in supplying network services.[167] From then on, the WWW and e-mail emerged as the dominant means of online communication.

Since the commercialisation of the Internet, online banking, retail (*e.g.*, music, books, and hardware and software), and the sale of travel services have all been growing exponentially. Worldwide, the number of households using the Internet or other online services is increasing at an average annual rate of 17%, from 67 million in 1998 to approximately 183 million in 2003.[168] Total online purchases, valued at USD 15 billion in 1999, will increase to approximately USD 78 billion by 2003,[169] as consumers become more comfortable making purchases over the Internet (Figure 2).[170]

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[166] See J.K. MacKie-Mason & H.R. Varian, "Some Economics of the Internet" (Tenth Michigan Public Utility Conference, Western Michigan University, 25-27 March 1993, current version February 1994) [unpublished] at 1.

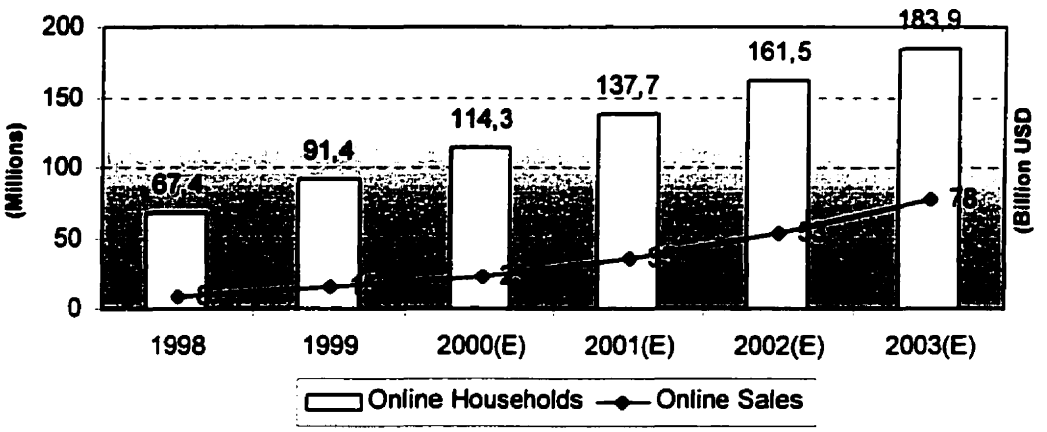
[167] See *ibid.* at 2.

[168] See *Bear Stearns Report*, *supra* note 26 at 26.

[169] *Aviation & Internet Senate Hearings*, Kenneth M. Mead, Inspector General Testimony, *supra* note 19 at 4, citing Forrester Research.

[170] See *ibid.* at 7.

Figure 2. Growth in Online Households v. Growth in Online Sales



Source: Forrester Research (1999)

II) THE INTERNET AS AN EFFICIENT MEANS OF DISTRIBUTION

Since the second half of the nineties, this network of networks has been used by businesses of all kinds to provide interactive, personalized service at very low costs. This applies both to business to consumer (B2C) and to business to business (B2B) transactions. The Internet offers buyers and sellers alike substantial advantages over traditional distribution channels: (1) consumers have access to large amounts of information, enabling them to make more informed choices, and reducing their search costs, (2) retailers can effectively communicate through e-mail and the World Wide Web, as these distribution channels allow them to continuously update catalogues and prices at minimal costs, a feature absent with offline catalogues, (3) online retailers do not generally need "brick and mortar" facilities to market their products and services globally, unlike their offline counterparts, and (4) retailers can easily gather information on consumer preferences, enabling them to target potential consumers effectively.[171]

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[171] See SEC, *Registration Statement under the Securities Act of 1933 of Travelocity.com inc.*, Amendment No. 1 to form S-4, filed with Securities and Exchange Commission (SEC), No. 333-95757, at 71 [hereinafter *Travelocity SEC Registration*].

III) THE ONLINE TRAVEL MARKET

The Internet enhances efficiency in markets by bringing together geographically dispersed actors, and by reducing the high information and search costs related to vast amounts of ever-changing data. Therefore, the Internet is often depicted as a virtual global marketplace.[172] However, this potential truism quickly evaporates when online buyers are confronted with very high transportation costs and customs duties.

Nevertheless, travel distribution companies seem particularly apt to have global reach,[173] as the only physical product involved consists of paper airline tickets, which themselves could be on the brink of extinction due to the growing popularity of ticket-less travel.[174] In addition, travel is a service more than a product. Unlike most products and some services, which most prospective buyers want to see, try, feel, or taste before buying them, travel services cannot be so (easily) "experienced". They are also well-delineated services. Travel involves a person moving between two geographical points within a certain time-span. This explains at least partially why travel is the largest online retail category, with estimated worldwide online transactions of USD 7.8 billion in 1999 that are predicted grow to USD 29.4 billion by 2003 (Figure 3).[175]

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[172] See *ibid.* at 72.

[173] This potential global reach has not yet materialised in the sub-sector of online travel agencies. See *infra* at 56.

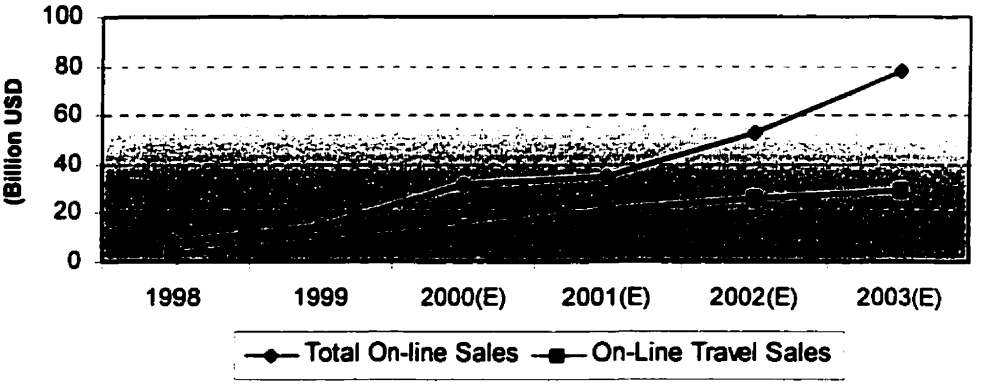
[174] *E.g.*, see Webtravelnews, News Release, "United Airlines E-tickets Now Surpass Paper Tickets" (21 June 1999), online: <http://www.webtravelnews.com/archive/article.html?id=155> (date accessed: 10 March 2001), stating that in 1999 United Air Lines flew more passengers having electronic tickets than paper tickets.

[175] These figures are different from those mentioned in the *PhoCusWright Yearbook 1999*, which states that travel e-commerce will be a USD 20.2 billion market by 2001, up 286% from USD 7 billion in 1999 and USD 10.6 billion in 2000. See Webtravelnews, News Release, "Airline Web Sites Spend More, But Lose Market Share" (20 August 1999), online: <http://www.webtravelnews.com/archive/article.html?id=251> (date accessed: 10 March 2001).

A study by *Jupiter Communications* adopts more modest figures, and predicts growth from USD 4.2 billion in 1999 to USD 16.6 in 2003 (See *Travelocity SEC Registration Statement, supra* note 171 at 72).

A study by the Gartner Group is rather optimistic, predicting a USD 30 billion market by the fourth quarter of 2001. See Webtravelnews, News Release, "$30 Billion in Online Travel Forecast by 2001" (6 January 2000), online: <http://www.webtravelnews.com/archive/article.html?id=378> (date accessed: 10 March 2001) [hereinafter "$30 Billion in Online Travel"].

Figure 3. Growth of Total Online Sales v. Online Travel Sales



Source: Forrester Research (1999)

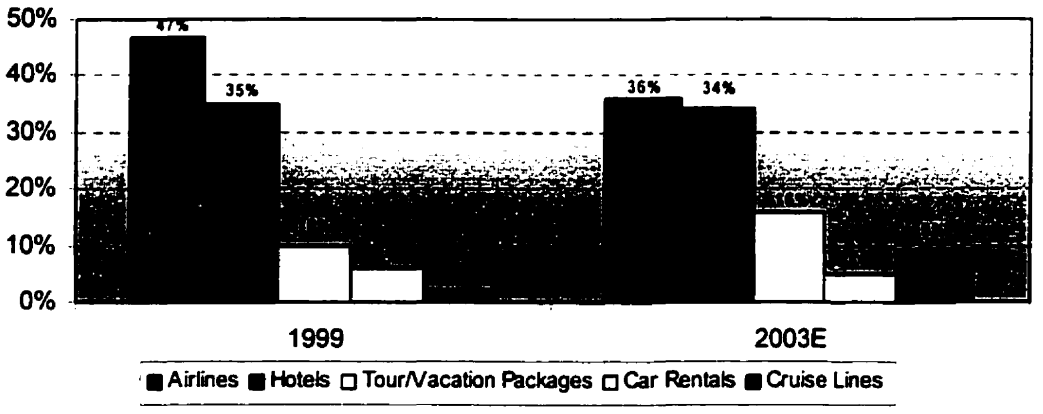
These numbers indicate that the relative importance of travel in total online sales will diminish over time. This is quite logical: Travel has been a pioneering product on the World Wide Web. As consumers become more comfortable with making other online purchases, the share of travel will diminish.

Airline ticket sales represented 47% of all online travel bookings in 1999. According to a study by Forrester Research, the airlines' share will fall to 36% by 2003 as other forms of travel services such as car rentals, hotel services, cruises, and tour packages strengthen their online presence (Figure 4).[176]

The difference in these figures seems to be attributable to several factors, including the different possible standards to define the travel market and the possible differences in prediction variables, such as the numbers of new Internet connections, the development of tightly secured online monetary transactions, etc.

[176] See *Bear Stearns Report*, *supra* note 26 at 29-30. See also the diverting figures by PhoCusWright: Webtravelnews, News Release, "PhoCusWright Reports 3% of Travel Now Booked Online" (15 December 1999), online: <http://www.webtravelnews.com/archive/article.html?id=365> (date accessed: 10 March 2001).

Figure 4. Online Travel Sales Per Travel Sector



Source: Forrester Research (1999)

According to the *PhoCusWright Yearbook 1999: Analysis, Assumptions and Assessments for the Online Travel Marketplace*, only 3% of travel was booked online in 1999, but this is estimated to rise to 8% by 2001.[177] According to a *PhoCusWright Report* released in October 2000, airlines will book 9% of sales on the Internet in 2000.[178] A study by Jupiter Communications predicts that by 2003, Internet sales will account for 10% of total travel sales in the United States.[179] Even under the most optimistic of hypotheses, online distribution will hold a relatively small share of the total distribution market for some time to come (Figure 5).

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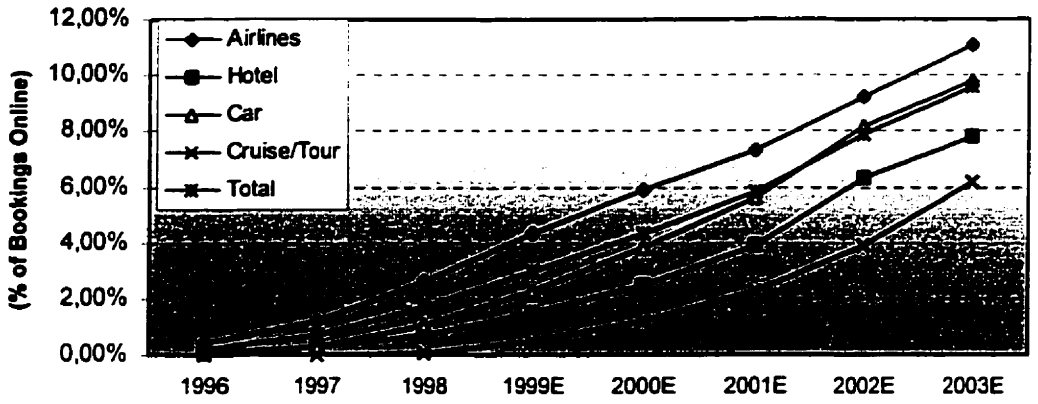
[177] See "$30 Billion in Online Travel", *supra* note 175 .

[178] See Webtravelnews, News Release, "Airline Web Sites Get 58% of Online Travel Bookings" (2 October 2000), online: <http://www.webtravelnews.com/archive/article.html?id=593> (date accessed: 10 March 2001) [hereinafter "58% of Online Travel Bookings"].

[179] See *Bear Stearns Report*, *supra* note 26 at 28.

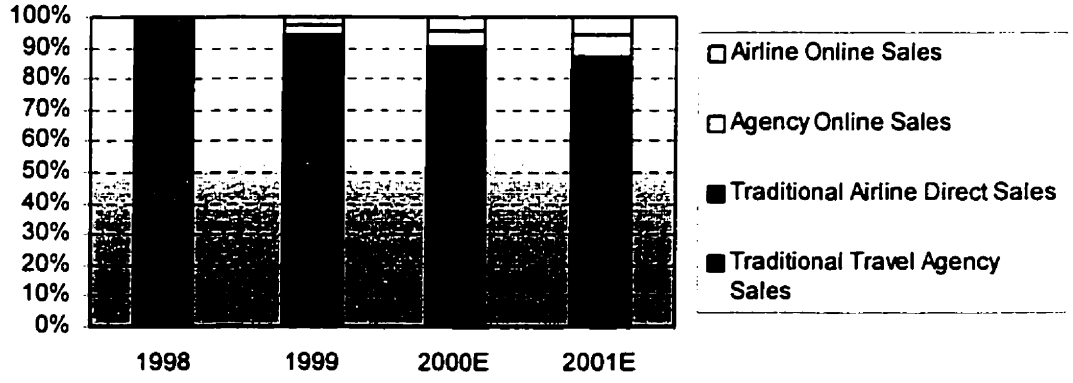
Figure 5. Growth of online travel per Travel Sector



Source: Jupiter Communications

Nonetheless, online distribution has affected the whole travel distribution market, as it seems to have eaten away at nearly all the growth that *potentially* could have been realized by the traditional modes of distribution. It is probably only a matter of time before online distribution pushed the traditional forms of distribution towards negative growth rates (Figure 6).

Figure 6. Airline Sales by Distribution Mode

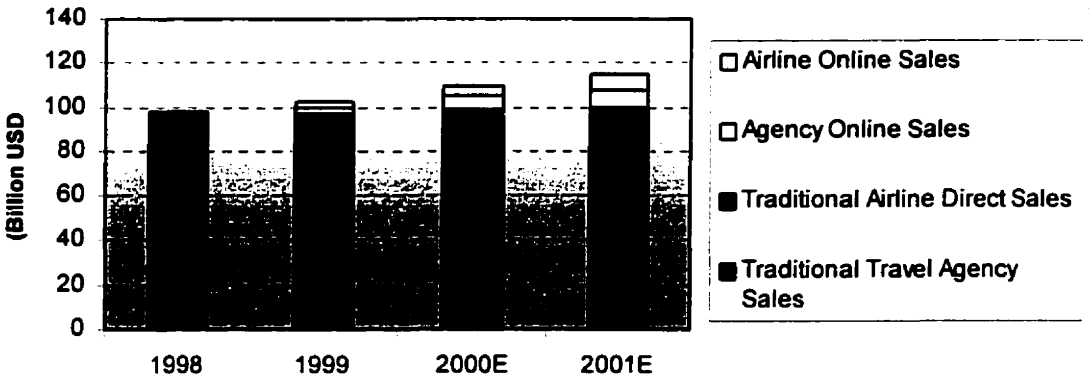


Source: Airline Reporting Corporation

At this moment, online airline ticket distribution holds a relatively larger share of ticket sales than do other forms of travel *vis-à-vis* their respective markets. This is quite logical, as airline tickets (and car rentals, and hotels) are the least complex product to buy and have the highest brand recognition. Nonetheless, sales of other

forms of travel services are starting to pick up. This is probably the case because websites, and especially niche-players, are able to offer prospective travellers far better information than any non-specialized travel agency could without requiring them to leave home (Figure 7).

Figure 7. Total Airline Ticket Sales by Distribution Mode



Source: Airline Reporting Corporation

IV) TYPOLOGY OF ONLINE DISTRIBUTORS

While the commercial dimension of the Internet is still in its infancy, three types of web-based distribution have already emerged. The first two types, airline websites and online travel agency sites, can be seen as a natural extension of the offline distribution system, be it in the form of direct selling, or through travel agents and CRSs. Multi-airline portals, the third and newest type, have no true offline equivalent. It might very well be that in the not-so-distant future some of these portals will develop into full-fledged CRSs of the second generation.[180]

In 1999, 46% of online airline bookings were made through airline websites. The remaining 54% were made through online travel agents. In 2000, the balance, at least according to a *PhoCusWright* prediction of 2 October 2000, swung in favour of the

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[180] See US DOT/OST, *NPRM – Comments of Orbitz, L.L.C.* (22 September 2000), online: Docket Management System OST-1997-2881-144 <http://dms.dot.gov> (date accessed: 10 March 2001) at 35 [hereinafter *Orbitz' Comments*].

airlines, which accounted for about 58% of online bookings, as compared to 42% for travel agency sites.[181]

1) Airline Websites

Airline-operated sites began as information-oriented marketing tools, but have become important commercial tools,[182] offering consumers the opportunity to view information, book itineraries, and track flights.[183] The purpose of this type of site is to bypass CRSs and travel agents, and to distribute the air travel service directly to the consumer. They are not designed or intended to facilitate fare shopping or service comparison, nor are they based upon a CRS booking engine. To lure customers to their website, many airlines offer "Internet-only" fares or bonus frequent flyer miles to consumers booking through their sites.

By embracing online distribution, airlines are hoping to lower their distribution costs dramatically. According to a study conducted by Merrill Lynch in 1999, it costs America West 6 dollars to process an online sale from its proprietary website, as compared to 13 dollars through the airline's own reservation agents (call centers), 20 dollars through online travel agents and 23 through traditional travel agents.[184] Considering that distribution costs can run as high as 20% of operating expenses, the savings can be tremendous.

Some airlines have turned without hesitation to the Internet, making it one of their primary means of distribution. This is reflected in the emergence of airlines that extract more than 15% of their ticket revenues through online distribution. This is the case for regional or low-cost carriers such as Southwest Airlines (20-25% of

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[181] See "58% of Online Travel Bookings", *supra* note 178.

[182] See *Bear Stearns Report*, *supra* note 26 at 40.

[183] See US DOT/OST, *NPRM - Comments of Preview Travel, Inc.* (09 December 1997), online: Docket Management System OST-1997-2881-22 <http://dms.dot.gov> (date accessed: 10 March 2001) at 3 [hereinafter *Preview travel comments*].

[184] Merrill Lynch, "E-commerce: virtually here" (8 April 1999), cited by *GAO Airline Ticket Report*, *supra* note 16 at 17.

revenues), Virgin Express (15%),[185] and Easyjet (40%),[186] which books an amazing 40% through its website. These regional and low-cost airlines perform better than the established "national" airlines, which sell only 5-10% of their flights online, due to lower prices, point-to-point routes, and, with respect to regional airlines, more business passengers.

Southwest,[187] the leading online airline, extracted more than 25% of its January 2000 passenger revenues from its Internet site, putting the airline on track to exceed $1 billion in e-commerce revenues for 2000.[188] This dollar volume makes it one of the most important online travel sites in the world, only preceded by other giants such as Travelocity and Expedia.[189] Delta sold 2.5 million tickets through its website in 2000, generating USD 775 million in revenues, an increase of 270% over 1999. Delta hopes to generate USD 2 billion through its site in 2001.[190] Other airlines such as American Airlines and United Air Lines have comparable online results.

2) Independent Sites or Online Travel Agency Websites

The airlines have to share the online travel market with a host of web-based distribution sites that are owned and operated independently from the airlines. These sites, which position themselves between the airlines and the customers, are the online equivalent of traditional "brick and mortar" travel agencies. In fact, they are

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[185] See D. Delmartino, "ANALYSE. Internet herdefinieert rol van reisagenten en touroperators. Meer 'lookers' dan 'bookers' " *De Standaard* (16 March 2000) [in Dutch].

[186] See Webtravelnews, News Release, "Easyjet Leads Low Fare Airline Battle in Europe" (27 September 1999), online: <http://www.webtravelnews.com/archive/article.html?id=292> (date accessed: 10 March 2001).

[187] See <http://www.southwest.com> (date accessed: 10 March 2001); <http://www.Iflyswa.com> (date accessed: 10 March 2001).

[188] See Webtravelnews, News Release 514, "Southwest Sees $1 Billion in Net Revenue This Year" (29 February 2000), online: <http://www.webtravelnews.com/archive/article.html?id=427> (date accessed: 10 March 2001).

[189] See *ibid.*

[190] See Webtravelnews, News Release, "Delta.com Reports 270% Growth in Online Revenue" (5 January 2001), online: <http://www.webtravelnews.com/archive/article.html?id=663> (date accessed: 10 March 2001).

accredited travel agencies or operate through them.[191] Their goal is to generate as much traffic as possible, and therefore, it is in their interest to be the selling agent for as many airlines as possible, and to offer other travel products, such as hotel and car rental bookings. This is possible through the adoption of CRSs as booking engines, which help consumers compare fares and conditions without visiting each airline's site. Therefore, in addition to CRS inventory, it is becoming increasingly important for online travel agencies to be able to supply consumers with non-CRS travel products, directly contracted from the suppliers.[192] These products typically have higher profit margins, and can strengthen the financial health of those travel agencies that can secure them.

While hundreds of online travel agencies exist, consolidation is imminent. On the one hand, large online travel agencies, such as Expedia or Travelocity, will through aggressive takeover strategies acquire mainly non-CRS content providers and niche product providers.[193] On the other, the negative cash flow of online travel agencies due to the high costs of brand building and exclusive contracts with portals is not sustainable *ad infinitum,* as the recent meltdown of high-tech stocks has demonstrated. Some travel agencies will go bankrupt, or will become easy targets for takeovers.

The US online travel agency scene is dominated by a few large online agencies, such as Travelocity and Expedia, which hold 38% and 23% of the market respectively.[194] Priceline holds a 13% market share.[195] Other online agencies account for the remaining 26% of the online travel agency market.[196]

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[191] See Preview Travel, *supra* note 183 at 3, commenting on the U.S. situation. However, the same generally holds for other countries.

[192] See *Bear Stearns Report*, *supra* note 26 at 48.

[193] Expedia, for example, recently purchased Vacationspot.com and Travelscape.com.

[194] Zoghlin, A., Media Briefing, "The Next Generation Travel Portal" (June 2000), on file with author [hereinafter *Zoghlin Presentation*].

[195] See *Ibid.*

[196] See *Ibid.*

Travelocity is the largest US online travel agent. Its website features booking and purchase capability for airlines, car rental companies and hotels, and cruise and vacation package companies. The site, launched in 1996, was the first to offer travel reservations, and comprehensive destination and event information on the Internet.[197] Travelocity acquired Preview Travel[198] on 7 March 2000. Its combined websites[199] received over 6.6 million visitors per month. This represents more than 50% more visitors than its nearest competitor, Expedia, Inc. On a combined basis, visitors booked USD 1.19 billion in travel services on its websites in 1999, making Travelocity one of the top ten travel agents in the United States.[200] Revenues for 2000 are expected to surpass the USD 2 billion target.[201] Travelocity.com is at present 70% owned by Sabre and is traded on the Nasdaq (TVLY).

One of Travelocity's competitive advantages is its large number of exclusive strategic alliances with online portals, such as AOL, Yahoo!, Netscape, Excite, Lycos, Compuserve, and Digital City, and with other websites, such as Infoseek, USA Today, Go.com, and Time Warner's Road Runner.[202]

Expedia, Travelocity's closest competitor, is an online travel agency providing travel services for leisure and small business travellers, including one-stop shopping and reservation capabilities. Expedia is powered by the Worldspan booking engine. It recently acquired Vacationspot.com and Travelscape.com so as to have increased access to non-CRS inventory.[203] In addition, Expedia is teaming up with "brick and

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[197] See *Sabre Annual Report, supra* note 58 at 4.

[198] See online: <http://www.previewtravel.com> (date accessed: 10 March 2001).

[199] These include Travelocity.com, Travelocity.ca, Travelocity.co.uk and Preview Travel. Figures are for January 2000. See Travelocity Com Inc., *Annual Report 1999*, online: Travelocity Investor Relations - SEC Filings (*sub* SEC filing n° 10-K405) <http://www.travelocity.com> (date accessed: 10 March 2001) at 2.

[200] See *ibid.*

[201] Computerworld, Press Release, "Priceline falling short in on-line air ticket sales" (29 September 2000), online: <http://www.computerworld.com> (date accessed: 10 October 2000).

[202] See *Bear Stearns Report, supra* note 26 at 68.

[203] See *ibid.* at 49.

mortar" agencies, to provide its customers with the best (specialized) service.[204] In 1999, it attracted on average approximately 4 million unique visitors each month.[205] Expedia was launched in October 1996 by Microsoft Corporation and was spun off in November 1999 as a separate company. It is traded on the Nasdaq (EXPE). Expedia is expected to report revenues that exceed USD 1.8 billion for the calendar year 2000.[206]

Priceline.com is a travel agency site dedicated to auctioning travel (and other) products online. Priceline.com utilises a patented Internet pricing method that allows the customer to name the price he is willing to pay for a certain product or service. If a supplier is willing to match the bid, the contract will be concluded. Priceline.com's demand collection system currently offers "name your price" products and services across the travel, automotive, and personal finance categories. The company currently has ten participating domestic[207] and twenty international airlines.[208] The "name your price" service can be used by airlines to efficiently solve the dilemma of excess inventory. Priceline's patented "reverse auction" business method allows for the selling-off of surplus inventory without negatively affecting that portion of business that is paying full retail price.[209] The website receives approximately 3.9 million unique visitors per month.[210] Its stock is traded on the Nasdaq (PCLN).

As airlines seem increasingly able to efficiently distribute their excess inventory through their proprietary website, or through jointly owned platforms such as Orbitz[211] and Hotwire,[212] the future of websites such as Priceline seems dismal.

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[204] Webtravelnews, News Release "Expedia adds bricks to clicks with eGulliver" (25 September 2000), online: <http://www.webtravelnews.com/archive/article.html?id=588> (date accessed: 10 March 2001).

[205] See *Bear Stearns Report*, *supra* note 26 at 47.

[206] Webtravelnews, News Release "Expedia on track to book 1.8 billion" (1 August 2000), online: <http://www.webtravelnews.com/archive/article.html?id=551> (date accessed: 10 March 2001).

[207] These include American Airlines, America West, Continental, Northwest, TWA, United Airlines, and US Airways.

[208] See *Bear Stearns Report*, *supra* note 26 at 70.

[209] See *ibid.* at 54.

[210] See *Bear Stearns Report*, *supra* note 26 at 53, citing Media Metrix's data for February 2000.

[211] Orbitz will be discussed on page 58.

[212] Hotwire will be discussed on page 59.

Priceline's stock fell from an all-time high of over USD 140 to USD 2.81 in January 2001.

Major European players are dwarfs compared to their US counterparts. Names include: ebookers (EUR 29 million bookings in 1999, 107 million projected for 2000), Expedia (EUR 39 million bookings in 1999, 150 million projected for 2000), Travelprice.com (started in 1999, EUR 60 million sales expected in 2000), Degriftour[213] (EUR 51 million bookings in 1999, 160 million projected for 2000), and Lastminute.com (EUR 10 million in 1999, 46 million expected in 2000).[214]

The European travel scene is fairly different from in the United States.[215] Whereas the US travel scene is dominated by travel agents and airlines, its European counterpart has an additional powerful player: tour operators, which organize integrated travel packages for the consumer. These tour operators own or control airline fleets, hotel rooms, cruise ships, and retail travel agencies. It is therefore quite understandable that some of the stronger on-line travel brands are those of tour operators.

The importance of brand building also partially explains why market leaders in the United States will probably not be able to establish themselves prominently on the European scene over the next few years.[216] Another reason is the traditional delay in the adoption of new technologies in Europe. The European online travel market is only forecast to grow from about USD 3 billion in 2001 to 8.5 billion in 2003, as compared with more than USD 6 billion in 2001 and more than 16 billion in 2003 in

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[213] Degriftour was acquired by Lastminute.com in August 2000. See Webtravelnews, News Release, "UK-based Lastminute.com buys France's Degriftour" (15 August 2000), online: <http://www.webtravelnews.com/archive/article.html?id=561> (date accessed: 10 March 2001).

[214] Projections by PhoCusWright. See Webtravelnews, News Release 621, "European Online Travel Market Charts its Own Course" (21 June 2000), online: <http://www.webtravelnews.com/p000621.htm> (date accessed: 10 March 2001) [hereinafter "European Online Travel Market"].

[215] See for more information on this topic: Webtravelnews, News Release, "PhoCusWright reports on European online travel market" (7 January 2001) online: <http://www.webtravelnews.com/archive/article.html?id=561> (date accessed: 5 March 2001).

[216] See Webtravelnews, News Release, "What is US Online Travel's Future in Europe" (14 May 2000), online: <http://www.webtravelnews.com/archive/article.html?id=489> (date accessed: 10 March 2001).

the United States.[217] Payment procedures also are a big differentiator. Germans and Scandinavians, for example, are far less at ease with credit cards than the British.[218] A final 0reason for the fragmented European scene and a barrier to entry for foreign online travel service distributors are the various languages and cultural sensitivities in Europe.

3) Multi-Airline Portals/Consortia

A third and hybrid type of travel distribution website is the multi-airline travel portal site ("multi-airline portal"), also known as the consortium model due to the fact that it is owned by several airlines.[219] Generally, multi-airline portals profile themselves as pure online travel agencies accidentally owned by a group of airlines.[220] They are not built around a CRS search engine. Instead, they use a new and purportedly superior search technology[221] that allows the potential traveller to browse fares and book flights as though he were booking through a CRS.

The consortium model has the advantage for the participating airlines of bypassing both travel agents and CRSs, while consumers are able to compare prices quite easily. Thus, the development of multi-airline portals must be interpreted as an apparent move to save the already low commissions paid to online travel agency sites,[222] while being more consumer-oriented than single airline sites.

Two sub-types of multi-airline portals can be distinguished: inclusive and exclusive portals. Search and booking capabilities on inclusive sites are not limited to the member airlines, whereas exclusive sites only allow for the browsing and booking of flights on their member airlines.

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[217] See "European Online Travel Market", *supra* note 214.

[218] See *ibid.*

[219] See *Bear Stearns Report*, *supra* note 26 at 59.

[220] See *Orbitz' Comments*, *supra* note 180 at 37-40.

[221] At the moment, multi airline portals still depend on CRS technology to perform the actual booking, new booking technology is being rapidly developed that will bypass the CRSs.

Currently, several multi-airline portals are being developed, and are discussed below.

i. Orbitz.com (United States)

The first multi-airline portal, code-named T-2,[223] and now officially baptized "Orbitz.com", began in November 1999 as a joint equity partnership of four major US airlines, namely Delta Air Lines, United Air Lines, Northwest Airlines, and Continental Airlines. In April 2000, American Airlines was added as an equity airline, much to the surprise of industry analysts, since the airline is owned by AMR, which recently spun off Sabre and Travelocity.[224] It is anticipated that there will be additional equity investors in the future, including both travel suppliers and non-travel suppliers, and that Orbitz could go public in the future.[225] The website is beta testing and will become fully operational in June 2001.[226]

Besides equity airlines, there are also 23 "Charter" associates. These are airlines that signed the binding *North American Airline Charter Associate Agreement* with Orbitz.[227] This agreement stipulates the rights and obligations of participating carriers, be they equity airlines or charter associates. The charter associates include major airlines such as Air France, Ansett Australia, Iberia, Sabena, Singapore, Swissair, US Airways, and Varig.[228]

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[222] Multi-airline portals claim to be ordinary online travel agencies that depend equally on commissions for income. While this may be true, it is equally true that airlines are paying themselves when paying a commission to a site that they partially own.

[223] T-2 is reported to stand for "Travelocity Terminator"(!). See *Aviation & Internet Senate Hearings*, Association of Retail Travel Agents Testimony, *supra* note 19 at 1.

[224] See Webtravelnews, News Release, "Airline Owned T2 Travel Portal Answers Charges" (9 June 2000), online: <http://www.webtravelnews.com/archive/article.html?id=511> (date accessed: 10 March 2001) [hereinafter "T2 answers charges"].

[225] See online: <http://www.orbitz.com/about/index.html> (date accessed: 10 October 2000).

[226] Webtravelnews, News Release, "Orbitz names travel partners, sets launch timetable" (8 September 2000), online: <http://www.webtravelnews.com/archive/article.html?id=578> (date accessed: 10 March 2001).

[227] For a copy of this agreement, see US DOT/OST, *NPRM – Comments of Travelocity.com* (22 September 2000), online: Docket Management System OST-1997-2881-158, Exhibit 4 [hereinafter *Orbitz Agreement*].

[228] Other charter associates include Aeromexico, Air Jamaica, Aloha, Asiana, COPA, CSA Czech, Hawaiian, Korean Air, LTU Intl, Mexicana, Midway, Midwest Express, Spirit, and Vangaurd.

Some uncertainty still surrounds the precise nature and operation of the Orbitz website. Orbitz itself states that it "will not rely on the computer reservation systems (CRSs) built by the airlines for either fare schedule information or the processing of that information"[229] and that it is "the only site demonstrating that Internet sites need not be based on the old CRS technology".[230] Paradoxically, at the same time, Orbitz states: "We are not a CRS. We will use one of the smaller CRS's to make the actual booking".[231] Essentially, it appears Orbitz will function in the following way: A new type of search engine, developed by ITA Software,[232] will browse its fare database, and then actually book the travel product via Worldspan, Orbitz's affiliate CRS.

Notwithstanding Orbitz's assertions to the contrary, it appears Orbitz *is* more than just another new online travel agency. It combines aspects of a CRS with aspects of a travel agency. In addition, Orbitz is committed to completely severing its ties with CRSs, and even with the ATPCO for that matter, and connecting directly to the carriers' internal reservations systems as soon as technology allows.[233]

ii. Hotwire (United States)

A consortium composed of Texas Pacific Group, a private investment company, and eight US airlines secretly developed a joint website that was launched in the fall of

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Negociations are underway at a number of other carriers that are interested at participating. In addition, suppliers of travel products and services other than airlines can participate as charter associates See online: <http://www.orbitz.com/about/charter.html> (date accessed: 10 March 2001). Other sources include ATA, Air Tran, Air Canada, Alitalia, All Nippon Air, Austrian, British Midland and KLM charter associates. See Webtravelnews, News Release 573, "11 European Airlines Launch Web Travel Portal" (12 May 2000), online: <http://www.webtravelnews.com/archive/article. html?id=487> (date accessed: 10 March 2001) [hereinafter " 11 European Airlines"].

[229] See Orbitz, Press Release, "Orbitz Announced as Name of New Travel Portal" (12 June 2000), online: <http://www.orbitz.com/newsroom/pressreleases/pr_press_06122000b.html> (date accessed: 23 June 2000).

[230] See *Aviation & Internet Senate Hearings*, Testimony of J. Katz on behalf of Orbitz, *supra* note 19 at 4.

[231] See *ibid.* at 10.

[232] See online: <http://www.itasoftware.com> (date accessed: 10 March 2001).

[233] See *Aviation & Internet Senate Hearings*, Kenneth M. Mead, Inspector General U.S. Department of Transportation Testimony, *supra* note 19 at 17.

2000: Hotwire.com.[234] This website, formerly code-named "Purple Demon",[235] takes a direct shot at Priceline.com, as its main target is to sell the so-called "distressed inventory", the empty seats on scheduled flights. Hotwire does not utilize the "name your price – reverse auction" business model, but rather offers consumers "opaque fares", which are deeply discounted fares that do not disclose the carrier's identity beforehand.[236]

iii. OTP – Online Travel Portal (Europe)

Following the example of the major US airlines, eleven European carriers announced on 12 May 2000 that they intended to create the first trans-European travel agency, code-named T-3[237] and now baptized OTP,[238] by the end of 2000.[239] The participating carriers are Aer Lingus, Air France, Alitalia, Austrian Airlines Group, British Airways, British Midland, Finnair, Iberia, KLM, Lufthansa, and SAS. Through their joint website, the European airlines expect to attract a significant proportion of total online travel sales in Europe.

iv. T-4 (the Asia-Pasific Region)

Little is known about this project. Partners include Air New Zealand, Ansett Australia, Asiana Airlines, Cathay Pacific, China Airlines, Malaysia Airlines, Qantas, Royal Brunei, and Singapore Airlines.[240]

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[234] See <http://www.hotwire.com/> (date accessed: 10 March 2001). The participating airlines are: American Airlines, U.S. Airways, Hawaiian Airlines, TWA, America West Airlines, Continental Airlines, Northwest Airlines and United Air Lines.

[235] Priceline's ad campaigns feature *Star Trek*'s former Capt. Kirk.

[236] S. Carey & M. Brannigan (The Wall Street Journal), Press Article "William Shatner, meet the Purple Demon", online: Hotwire website <http://www.hotwire.com> (date accessed: 25 February 2001).

[237] The site has also been dubbed "Me-Too" by the press. See *Aviation & Internet Senate Hearings*, Association of Retail Travel Agents Testimony, *supra* note 19 at 2.

[238] See EU, *Notification of a Joint venture in the Field of Travel Agency Services*, [2001] O.J. L. 220/1, C35/6, Case Comp/38.006

[239] See "11 European Airlines", *supra* note 228. This deadline has not been met. Both Orbitz and OTP are lagging well behind their launch schedule.

[240] See *Aviation & Internet Senate Hearings*, American Society of Travel Agents Testimony, *supra* note 19 at app.

v. T-5 (Latin America)

Varig, and TAM have been named as partners in this as yet limited project.[241]

vi. Joint Airline B2B Web Initiative

This initiative, aimed at the B2B travel management market, is reported to have Air France, American Airlines, British Airways, Continental Airlines, Delta Air Lines, and United Air Lines as partners.[242]

vii. The Alliance Initiatives

In addition, airline alliances, such as Star Alliance, Qualiflyer Group, Global One, and SkyTeam, the alliance around Air France,[243] have all announced or implemented joint sites. These sites do not yet offer the possibility to book flights, but instead refer to the various partnering airlines for bookings. However, it seems only a matter of time before the alliances develop "alliance portals" to allow for the booking of their tickets.

4) Intelligent Agents or "Travelbots"

Technology currently being developed will allow consumers to have a program or web service browse the Internet looking for the best deals. This technology is already available in the retail sector ("shopbots"), and could possibly be expanded into the travel sector. However, these intelligent agents will be of limited use in the travel sector, given the existence of both online travel agents, built around traditional CRSs like Travelocity, and new multi-airline portals like Orbitz.

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[241] See *ibid.*

[242] See *ibid.*

[243] See Letter from the American Association of Travel Agents to Hon. Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. D.O.J. (16 February 2000), online: <http://www.astanet.com/news/legfiling.asp#Congressional Testimony> at 4 (date accessed: 14 June 2000) [hereinafter "ASTA Portal Antitrust Complaint"].

V) THE ROAD AHEAD

What will the future bring? Will online travel distribution remain a fairly marginal phenomenon, or will it blossom and gradually start eating away at the market share of traditional "brick and mortar" travel agencies?

In my view, the latter scenario is more probable than the former. Much will depend on technology. Although it is projected that more than 180 million people will be online in 2003 worldwide, most of those connections will be based on slow analogous technology. New technologies will bring the broadband network right into the living room. The Internet will be accessible through the television, and navigated by voice and/or a wireless keyboard, so that even the more technology-wary will no longer face any barriers. The broad bandwidth will enhance the online shopping experience of the traveller, as she or he will be able to select flight seating arrangements visualised on his screen and to virtually walk trough a hotel room. Tourist guides and local information will be "only a click away". When, in addition to broadband access to the Internet, privacy and payment security issues can be satisfactorily resolved, the online distribution channel might one day challenge offline distribution as the preferred channel for buying travel for the majority of the population.[244] But we are not quite yet there. One of the issues that certainly cannot be forgotten in this exciting development is the legal framework in which this new form of distribution has to operate.

Executives building the new online travel market place will have to solve a host of legal problems. Do the CRS Rules apply to my Internet business? And to my consortium website? Can I legally bias my website in order to generate some more revenue? What rules govern my website, which is based in the United States but has European customers? Answers to these and other questions do not yet exist. The next chapters therefore merely attempt to explore some of the regulatory problems involved with online travel distribution.

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[244] Sabre, for example, predicts that by 2005, the *traditional* travel agents market share in ticket distribution will plummet from 75% to 45%. N. Godwin, "Sabre: Agents could retain 65% of air sales by 2005" *Travel Weekly* (3 April 2000) 10.

CHAPTER II. THE APPLICATION OF CRS REGULATIONS TO THE INTERNET DISTRIBUTION ENVIRONMENT

The CRS Rules have primarily been designed to oblige the airline-owned CRSs to provide neutral data to their subscribers, *viz.* travel agencies and corporate travel departments. Today, the Internet is emerging as a viable alternate means of distributing travel services. Consumers visit online travel agencies expecting the same kind of neutral travel information as "brick and mortar" agencies purport to offer. But are traditional travel agents under any obligation to offer such neutral advice? Are online travel agencies? Should they be?

I) THE CURRENT CRS REGULATORY ENVIRONMENT

1) The United States

The legislative authority for the CRS Regulations is identified in the United States Code (49 U.S.C. 41712):

> Sec. 41712. Unfair and deceptive practices and unfair methods of competition
>
> [...] *the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.* If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary *shall* order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.[245]

The Secretary's authority is not limited to cease and desist order proceedings, as Section 41712 might suggest, but includes the issuance of rules (49 U.S.C. 40113):

> Sec. 40113. Administrative
>
> (a) General Authority. - The Secretary of Transportation [...] may take action the Secretary [...] considers necessary to carry out this part, including conducting

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[245] Formerly *Fed. Aviation Act of 1958*, Pub. L. No. 85-726, § 411; 49 U.S.C. 1381. The CRS Rules were upheld by the 7th Circuit in *United Air Lines* v. *CAB*, 766 F.2d 1107 (7th Cir. 1985).

> investigations, *prescribing regulations*, standards, and procedures, and issuing orders.[246]

A ticket agent is defined as (49 U.S.C. 40102 (a)40) "a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation."[247]

The CRS Regulations themselves are contained in the Code of Federal Regulations (14 C.F.R. § 255).[248] Their applicability is determined by Section 2 of the Regulations:

> This rule applies to air carriers and foreign air carriers that themselves or through an affiliate own, control, operate, or market computerized reservations systems for travel agents in the United States, and to the sale in the United States of interstate, overseas, and foreign air transportation and of other airline services through such systems. Each carrier that owns, controls, operates, or markets a system shall ensure that the system's operations comply with the requirements of this part.

Section 3 further states:

> System owner means a carrier that holds five percent or more of the equity of a system [...]
>
> Subscriber means a ticket agent, as defined in 49 U.S.C. 1301(40), that holds itself out as a neutral source of information about, or tickets for, the air transportation industry and that uses a system.

Section 2 of the CRS Rules clarifies that the Rules only apply to air carriers owning, controlling, operating, or marketing CRSs, and to the sale of tickets through such systems. The conduct of travel agents does not seem to fall within the scope of the CRS Regulations. This view is confirmed by the language of the CRS Regulations repeatedly stating, "each system owner shall" or "no system may".[249]

Recently, the Inspector General of the DOT expressed the law as it stands:

> The regulations were thought necessary because the travel agents that used these systems were locked into contractual relationships with the CRSs. If the travel agents were receiving biased information, so were their clients. The regulations stopped short

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[246] Formerly *Fed. Aviation Act of 1958*, Pub. L. No. 85-726, § 204(a); 49 U.S.C. 1324(a).

[247] Formerly 49 U.S.C. 1301(40).

[248] See Appendix A, below.

[249] Cf. 14 C.F.R. § 255, ss. 5-11.

> of requiring to present unbiased information to consumers. The rationale was that consumers are free to choose where they get their information since they do not have contractual relationships with travel agents [...].
>
> Neither online agencies nor brick and mortar travel agencies are covered by existing bias regulations. Online travel agents [...] may appear to be different entities than brick and mortar travel agencies with retail locations, but from a regulatory standpoint, they are identical. Both act as intermediaries between the airlines and consumers, albeit one has a human interface and the other relies upon a computer program. Both rely upon CRSs to provide information [...] and use the CRS to book travel reservations. *Neither is subject to CRS regulations and is not legally bound to provide information in an unbiased manner.*[250]

This startling conclusion is open to criticism, as the Rules themselves are to some degree ambiguous in this respect. First, Section 2 of the Rules states that these are applicable "to air carriers that [...] own [...] Computerized Reservation *Systems* for *travel agents* [...]." A "*system*" is defined as a CRS offered by a carrier to *subscribers*, who are defined as neutral sources of travel information and tickets. The Rules thus are applicable to CRSs, insofar as they are marketed to ticket agents who hold themselves out to be neutral sources of travel information. Consequently, the text of the CRS Rules seems to equate *travel agents* with "*system subscribers*". In short, while the CRS Regulations do not impose an explicit legal obligation to be neutral on travel agents, the text seems to imply that the Rules apply to them as neutral providers of travel information.

Second, under 49 U.S.C. 41712, the Secretary of Transportation has the power to order travel agencies engaging in *unfair or deceptive practices* to stop them, without it being necessary that the conduct of the travel agency violates antitrust laws.[251] Alternatively, the Secretary can, under the authority granted to him by 49 U.S.C. 40113, regulate those practices.[252] At this moment, however, no specific regulation prohibits travel agencies from reshaping the information provided by a CRS into displays biased in favour of the agency's preferred suppliers.

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[250] See *Aviation & Internet Senate Hearings*, Kenneth M. Mead, Inspector General US Department of Transportation Testimony, *supra* note 19 at 27.

[251] See *United Air Lines* v. *CAB*, 766 F.2d 1107 at 1114 (7th Cir. 1985).

[252] On the disclosure of code-sharing arrangements and long-term wet leases, see 14 C.F.R. § 257. On unfair and deceptive practices of ticket agents, see 14 C.F.R. § 399.80. This section lists practices by

Finally, while the consumer might be free to choose his travel agent, increasingly he has to remunerate the travel agent to process tickets, as many travel agents, facing decreasing commission revenues, have started charging customers for their services. In my view, by charging a fee the agent has left the strict agency relationship between airline and travel agent, and a new agency contract has been formed with the customer. This strengthens the impression that travel agents have an implicit obligation of some sort to present neutral information.

One last issue to consider is whether multi-airline portals are covered by the CRS Regulations. These new, hybrid travel intermediaries could be qualified in three ways. First, a portal could be qualified as a CRS supplemented by a travel agency. In this case, the booking engine, the "back office" part of the portal, seems to be subject to the Rules. The "front end" travel agency part of the portal, like other travel agencies, would be allowed to bias its displays. To say the least, this distinction between "back office" booking engine and "front-end" travel agency seems rather artificial. In addition, it is doubtful whether both the CRS part and the travel agency part would meet their respective definitions under the CRS Regulations. Second, if the portal is qualified as a CRS, but not as a travel agency, the Rules do not appear to apply, as the system is not a CRS for travel agents, but interacts directly with the prospective traveller. Third, if the CRS can be qualified as a travel agency, it would not be subject to the Rules, as is the case with any other travel agency. It appears that under these three possible approaches, the result is the same: Multi-airline portals are under no legal obligation to provide consumers with biasfree information.

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ticket agents that are (among others) regarded as unfair or deceptive practices, or unfair methods of competition.

2) The European Union[253] and ECAC[254]

The applicability of the CRS Regulations is determined by Article 1 of Council Regulation No 2299/89, as amended by Regulation No 3089/93[255] and Regulation No 323/1999:[256]

> This Regulation shall apply to any computerised reservation system, insofar it contains air-transport products [...], when offered for use 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, [...][257]

Article 2 of the Regulation states:

> For the purposes of this Regulation: [...]
>
> (f) "computerized reservation system" (CRS) means a computerised system containing information about, *inter alia*, air carriers' [...] fares [...] to the extent that some or all of these services are made available to subscribers [...]
>
> (k) "participating carrier" means an air carrier which has an agreement with a system vendor for the distribution of air transport products through a CRS [...];
>
> (l) "subscriber" shall mean a person, other than a consumer, or an undertaking, other than a participating carrier, using a CRS under contract or other financial arrangement with a system vendor[...];
>
> (m) "consumer" shall mean any person seeking information about or intending to purchase an air-transport product for private use.

Therefore, CRSs are subject to the EU Regulations, provided they are made available to subscribers, both travel agents and corporate travel departments, selling air travel services in the European Union. In contrast, airlines' websites do not seem to fall within the scope of the Regulations, as they only contain information on a single airline and as they are not made available to subscribers as such.

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[253] A compiled text of the European CRS Regulations is to be found in Appendix B, below.

[254] A copy of the ECAC Regulations is to be found in Appendix E, below. The substantive ECAC CRS provisions are *mutatis mutandis* identical to those found in the EU CRS Rules.

[255] See *Council Regulation 3089/93, supra* note 142.

[256] See *Council Regulation 323/1999, supra* note 144.

[257] See *Council Regulation 2299/89, supra* note 141.

Before the adoption of the 1999 amendment to the Code of Conduct it was unclear whether the data delivered to online travel agencies had to be unbiased, as the Regulation applied to subscribers, who were defined as persons or undertakings "using the distribution facilities [...] of a CRS".[258] The 1999 amendment to the Regulations deleted the reference to the distribution facilities and applies to all systems used by "a person, other than a consumer, [...] using a CRS under contract". This amendment clarifies that the services provided to online reservation services, such as online travel agents, are subject to the Rules.[259]

At the same time as bringing Internet CRS services within the ambit of the CRS Regulations, the European Union has taken regulation an important step further by inserting a new Article 9a:

> 1. (a) In the case of information provided by a CRS, a subscriber shall use a neutral display [...] unless another display is required to meet a preference indicated by a consumer.
>
> (b) No subscriber shall manipulate information provided by a CRS in a manner that leads to inaccurate, misleading or discriminatory presentation of that information to any consumer.

The term "neutral display" in the first paragraph would seem to suggest that this can be any display, provided it is neutral. Article 9.5 however seems to imply otherwise:

> 5. A system vendor shall provide in each subscriber contract for:
>
> (a) *the* principal display, conforming to Article 5, to be accessed for each individual transaction, except where a consumer requests information for only one air carrier or where the consumer requests information for bundled air transport products alone;
>
> (b) the subscriber not to manipulate material supplied by CRSs in a manner which would lead to inaccurate, misleading or discriminatory presentation of information to consumers.

It appears that in the European Union, travel agents, while not being directly subject to the display Rules, have to use the principal and non-biased display provided by the CRS, unless a consumer requests otherwise.

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[258] See *Council Regulation 3089/93, supra* note 142, art. 1.1.

[259] See *Commission Amendment Proposal, supra* note 143 at 4.

In addition, Article 9a stipulates that travel agents may not manipulate the data in a misleading way. Consequently, both online and "brick and mortar" travel agencies are, albeit indirectly, covered by the display rules of the CRS Code of Conduct.

This fundamental regulatory difference between the United States and the European Union is not devoid of practical consequences and could lead to intricate problems when US travel agents wish to expand into the European markets. One only has to imagine a situation where a US online travel provider biases its displays in the United States by selling "shelf space" in its "travel supermarket". Were this travel provider to offer travel services to the European public, it could find itself subject to the European Rules under Article 1 of the Council Regulation, even though it is a US firm and the CRS system is located in the United States.[260] Such a situation is far from merely theoretical, given the global scope of the Internet. US online travel agencies should therefore proceed with caution when conducting business outside their jurisdiction.

US travel agents could argue that while Article 1 of the European Regulations applies the Rules extraterritorially to CRSs, it does not repeat this extraterritoriality for subscribers in Article 9. This interpretation, however, seems to contradict the spirit of the law. In addition, under this interpretation, European online travel agents could easily escape the law by relocating their web servers. Finally, this interpretation would also be contextually illogical as Article 9.5, as amended in 1999, compels CRS vendors to ensure that subscribers are contractually bound to use neutral displays and to provide neutral information. This Article is clearly corollary to the provision of Article 9a, and it applies extraterritorially by virtue of Article 1. The extraterritorial logic of the Regulations would be undermined if Article 9a were to have a purely territorial application.

In my opinion, multi-airline portals do not fall within the scope of the (display) Rules. They cannot be qualified as *Computerized Reservation Systems* in the sense of the EU Regulations, as they are marketed directly to the consumer, and therefore are not

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[260] These rules are inspired by the antitrust doctrine of extraterritoriality. See *Council Regulation 2299/89 (as amended)*, *supra* note 141, art. 1.

made available to subscribers. As far as a multi-airline portal would still rely on an outside CRS for additional fare information or for making the booking, one could argue that they are *subscribers* to the CRS.

This was foreseen by the draftsmen of the 1999 amendment to the EU CRS Regulation, which states in its amended Article 21:

> 1. Neither Article 5, Article 9(5) nor the Annexes shall apply to a CRS used by an air carrier or a group of air carriers:
>
> (a) in its or their own office or offices and sales counters clearly identified as such; or
>
> (b) to provide information and/or distribution facilities accessible through a public telecommunications network, clearly and continuously identifying the information provider or providers as such.

In this way, the provision that exempted *CRSs*[261] used by an air carrier or a group of air carriers[262] in their offices and at their sales counters was expanded to include situations where a consumer goes online and books a ticket with an airline or a group of airlines.[263] In such situations, the information provided by the CRS and the portal may be biased as the consumer cannot have a reasonable expectation that an airline or a group of air carriers will provide unbiased information.

One condition must be satisfied to qualify for the exemption: The information provider(s) must be clearly and continuously identified. A problem could arise in this respect if a multi-airline portal were to boast that it operates as a new travel agency, as "Orbitz" does.[264] Here, the consumer has an expectation of neutrality towards the

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[261] A consumer cannot reasonably expect to receive unbiased information from an airline or a group of airlines. See *Commission Amendment Proposal*, *supra* note 143 at 18.

[262] The rules do not define the concept of "group of air carriers". In this respect, it is interesting to note that the 1997 proposal for a Council Regulation (EC) amending Council Regulation (EEC) No. 2299/89 limits the concept of "group of air carriers" to those having a joint venture or other contractual arrangement, excluding interline agreements. This limitation was deleted in the final text. Even without this nuance, it is evident that multi-airline portals fall within the scope of the exemption. See *ibid.* at 26-27 (proposed Articles 21.a.1 and 21c).

[263] See *Council Regulation 2299/89 (as amended)*, *supra* note 141, art. 21.1.

[264] See *Aviation & Internet Senate Hearings*, Testimony of J. Katz on behalf of Orbitz, *supra* note 19 at 15.

website. Therefore, such a portal will not be exempt and will have to abide by the Code of Conduct.

One must thus conclude that an airline travel portal using an outside CRS for information or booking, wishing to bias its portal, has to claim that it is a travel agency when distributing its product in the United States, while it has every reason not to do so when operating in Europe!

3) Canada

The applicability of the Canadian CRS Regulations is determined by Sections 3 and 4 of the *Regulations respecting computer reservation systems (CRS) operated in Canada for the purpose of displaying or selling air services*:[265]

> 3. These Regulations apply in respect of systems that are operated in Canada for the purpose of displaying or selling air services, irrespective of
>
> (a) the legal status or nationality of the system vendor;
>
> (b) the source of the information used or the location of the relevant data processing centre; and
>
> (c) where the air services are provided.
>
> 4. These Regulations do not apply in respect of systems that are used by a carrier and its affiliates or a charterer in their own offices and at their own sales counters.

Section 2 of the Regulations states:

> "air service" means a service for the transportation of passengers that is provided by means of an aircraft and that is publicly available; [...]
>
> "subscriber" means a travel agent or other entity that holds itself out to the public as a source of information about the air service industry, that makes reservations and issues tickets for air services and that contracts with a system vendor to use a system; [...]
>
> "system" means a computer reservation system that is offered by a system vendor to subscribers or consumers, that contains information about the schedules, fares, rules or availability of more than one carrier and that provides subscribers with the capability to make reservations or issue tickets for air services; [...]

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[265] See *Canadian CRS Regulations*, *supra* note 151.

The Regulations apply to those systems used in Canada by travel agents or consumers that contain information on more than one carrier. Unlike the European or US Regulations, the Canadian Regulations explicitly stipulate that they are applicable to informational systems marketed directly to consumers.[266] Moreover, the CRS Regulations apply to subscribers who "use" a system. This definition is broad enough to bring systems that provide their information through public telecommunications networks within the scope of the Regulations.

The Canadian Regulations do not apply in respect of CRSs used by a carrier and its affiliates at their own sales counters. Although the text is not as clear as the recently updated European Regulations or the ECAC Code of Conduct, this provision exempts airlines' websites from the Regulations.

The Regulations do not explicitly prohibit travel agencies from manipulating the information they receive, notwithstanding Section 29 stating: "A subscriber shall provide to a consumer all the information provided by participating carriers and charterers [...] respecting each service in which the consumer expresses an interest."

In my view, this Section does not bring subscribers directly within the ambit of the Regulations, as it only requires them to provide full information for the precise air services the consumer expresses an interest in. Hence, the Rules do not appear to preclude a travel agent from reshaping the ranking of air services provided by different carriers.

Multi-airline portals do not seem to fall within the scope of the Canadian Regulations, unless they are to be qualified as "pure" CRSs (without a "front-end" agency part).[267]

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[266] Section 3 *juncto* Section 2 *s.v.* "System". This seems to apply primarily to corporate travel departments. Conversely, consumers booking through Internet sites generally operate through an accredited travel agent.

[267] CRSs are defined as systems offering their services to travel agents or consumers. See *Canadian CRS Regulations, supra* note 151 at s. 2.

4) ICAO

ICAO reviewed its CRS Code of Conduct in 1995 and 1996 and adopted a revised Code on 25 June 1996, replacing in its entirety the Code adopted by the Council of ICAO in 1991.[268]

Article 2 of the Code states:

> a) "Computer reservation system" means a computer system that provides displays of schedules, space availability and tariffs of air carriers, and through which reservations on air transport services can be made; [...]
>
> d) "Subscriber" means an entity such as a travel agent that uses a CRS under contract with a system vendor for the sale of air transport services to the general public.

Article 3(a) continues:

> This Code shall apply to the distribution of international air service products through CRSs. Where a State determines it is necessary to meet the purpose of the Code [...], it shall also apply to computer information systems which provide displays of schedules, space availability and tariffs of air carriers, without the capability of making reservations.

The text of the Code is accompanied by *Notes on the Application of the Code of Conduct*,[269] which explain the purpose and intent of its provisions and identify relevant factors to be taken into account when applying the Code.

The general principle underlying the ICAO Code of Conduct is that CRSs, which are used to distribute air service products directly or indirectly to air transport users, and through which reservations can be made, are subject to the rules and obligations. Consequently, travel service distribution through public telecommunications networks and personal computers may fall within the scope of the Code, provided that the entities concerned meet the definition of "system vendor" and "subscriber".[270]

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[268] See *ICAO CRS Code of Conduct, supra* note 138.

[269] See *ICAO CRS Notes, Ibid.*

[270] "Subscribers" are entities such as travel agents that use a CRS under contract with a system vendor for the sale of air transport services to the general public. Online travel agents are clearly subscribers, as defined by the Code of Conduct. See *ICAO CRS Code of Conduct, supra* note 138, art. 2(d).

In addition, and somewhat remarkably, Article 3 states that governments can expand the application of the Rules to computer information systems –the Internet–, where these do not include reservation capabilities. The practical use of this stipulation seems limited to electronic multi-carrier airline guides.

Subscribers, like in the European Union, shall:

> a) use or provide a principal display meeting the requirements of Article 7 for each transaction, except where a preference indicated by an air transport user requires the use of another display;
>
> b) not manipulate information supplied by a CRS in a manner that would result in inaccurate or misleading information being given to an air transport user;[271]

The Code acknowledges however that States have limited extraterritorial enforcement capabilities respecting travel agents.[272] Where States do not find it practicable to ensure compliance by travel agents with the provisions of the Code of Conduct, CRSs shall include appropriate provisions regarding compliance in their contract with each subscriber.[273] These provisions are to some degree comparable to those found in the European CRS Regulations.

The ICAO CRS Code of Conduct does not exempt multi-airline portals from the scope of the Rules. Hence, they appear to be covered by the Code, regardless whether they would be qualified as CRSs, or as travel agents, as both have the obligation to provide unbiased information.[274]

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[271] *Ibid.*, art. 10.

[272] See *ibid.*, art. 4.

[273] See *ibid.*, art. 7(j).

[274] Article 12(f) exempts "multi-access CRSs" from certain obligations of the Code. Multi-access CRSs are CRSs that provide subscribers with direct access to individual air carrier CRS displays through a common switching centre and/or interface. Hence, multi-airline portals are not multi-access CRSs. The existing "alliance portals" do seem to qualify as multi-access CRSs. See *ICAO CRS Notes, supra* note 138, note on Article 2.

II) THE DEBATE ON THE APPLICABILITY OF THE CRS REGULATIONS TO THE INTERNET[275]

To say the least, some clarification whether or how the various CRS codes apply to web-based travel distribution would be welcome. In the United States, the country where e-travel has had the deepest impact, the applicability of CRS Regulations to the Internet is one of the hotly debated core issues of the DOT's proposed reform of the CRS Regulations.[276]

It is important to remember that the CRS Regulations apply to the data delivered to online travel agencies, which, at least in the United States, are free to manipulate and bias this information. The Regulations do not apply to airlines' websites. Multi-airline portals do not seem to be covered under the different CRS codes of conduct, except perhaps by the ICAO CRS Code of Conduct.

It is equally important to realize that structural changes have occurred in the CRS industry that in the long run could obviate the need of stringent regulation. The DOT invited interested parties to comment on these different developments,[277] and since then more than 180 comments have been filed with the DOT.[278] The main positions in the ongoing debate can be summarized as follows.

Many travel agents oppose the regulation of their respective websites.[279] Some online travel agents nonetheless favour the extension of some rules, including the display

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[275] The debate on the jurisdiction of the DOT to regulate travel websites on the Internet will not be examined in the framework of this limited text.

[276] See *Advance Notice of Proposed Rulemaking, supra* note 112; US DOT/OST, *NPRM – Supplemental advance notice of proposed rulemaking* (24 July 2000), online: Docket Management System OST-1997-2881-128, OST-1997-3014-3, OST-1997-4775-48 1 <http://dms.dot.gov> (date accessed: 10 March 2001) ; also published at 65 Fed. Reg. 45551 (2000) [hereinafter *Supplemental Advance Notice of Proposed Rulemaking*].

[277] In the framework of this limited text, the assumption has been made that the rules, in some form or another, will continue to govern the travel distribution industry.

[278] See Docket OST-1997-2881, online: Docket Management System OST-1997-2881 <http://dms.dot.gov> (date accessed: 10 March 2001).

[279] See US DOT/OST, *NPRM – Comments of Biztravel.com, Inc.* (22 October 1998), online: Docket Management System OST-1997-2881-82 <http://dms.dot.gov> (date accessed: 10 March 2001) at 4 [hereinafter *Biztravel Comments*].

bias Rules, to the Internet scene.[280] Other online travel agents oppose an extension of the Rules to independent travel agents, but demand an extension to consortium websites.[281] Traditional travel agents generally are in favour of regulation of Internet websites and demand that airlines be obliged to make available all their fares through the CRSs. They base their opinion on the "digital divide" between those who are connected and those who are not.[282] In general, CRSs also favour an extension of updated CRS Rules to all sites that offer the fares of more than one carrier, thus to online travel agents and airline consortium websites.[283] Most airlines[284] and airline-owned consortia such as "Orbitz" oppose the extension of the CRS Rules to the online marketplace altogether, and especially any provision that would oblige them to make their Internet-only fares available through any other travel distribution channel. Some airlines explicitly favour the extension of the CRS Rules to online travel agency sites.[285]

The applicability debate is primarily focused on two issues: (1) whether *websites* should be regulated, and (2) whether the *airlines' use of the Internet as a distribution*

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[280] See US DOT/OST, *NPRM – Comments of Travelocity.com* (22 September 2000),), online: Docket Management System OST-1997-2881-158 <http://dms.dot.gov> (date accessed: 10 March 2001) at 16.

[281] See US DOT/OST, *NPRM – Comments of Expedia, Inc.* (22 September 2000), online: Docket Management System OST-1997-2881-150 <http://dms.dot.gov> (date accessed: 10 March 2001) at 7.

[282] The "digital divide", the difference in opportunities for those who are connected and those who are not, is said to follow the *social strata*. Applied to the travel scene, senior citizens, new immigrants, and the economically disadvantages would miss out on the best deals because they do not have the means to access them. See US DOT/OST, *NPRM – Comments of the American Express Travel Related Services Company, Inc.* (14 April 2000), online: Docket Management System OST-1997-2881-126 <http://dms.dot.gov> (date accessed: 10 March 2001) at 2 [hereinafter: *American Express Comments*].

[283] See US DOT/OST, *NPRM – Comments of Amadeus Global Travel Distribution* (9 December 1997), online: Docket Management System OST-1997-2881-31 <http://dms.dot.gov> (date accessed: 10 March 2001) at 20 [hereinafter *Amadeus Comments*]; US DOT/OST, *NPRM – Comments of Sabre, Inc.* (22 September 2000), online: Docket Management System OST-1997-2881-155 <http://dms.dot.gov> (date accessed: 10 March 2001) at 24.

[284] See US DOT/OST, *NPRM – Comments of Northwest Airlines, Inc.* (22 September 2000), online: Docket Management System OST-1997-2881-160 <http://dms.dot.gov> (date accessed: 10 March 2001) at 7; US DOT/OST, *NPRM – Supplemental comments of Continental Airlines, Inc.* (22 September 2000), online: Docket Management System OST-1997-2881-161 <http://dms.dot.gov> (date accessed: 10 March 2001) at 8; US DOT/OST, *NPRM – Supplemental comments of Delta Air Lines* (25 September 2000), online: Docket Management System OST-1997-2881-162 <http://dms.dot.gov> (date accessed: 10 March 2001) at 16.

[285] See US DOT/OST, *NPRM – Comments of Lufthansa, A.G.* (22 September 2000), online: Docket Management System OST-1997-2881-146 <http://dms.dot.gov> (date accessed: 10 March 2001) at 7.

channel, both regarding their proprietary websites and online travel agencies, should be regulated.[286] The answer to those questions depends on a number of factors, which will be examined below.

1) The Regulation of the Operation of Travel Distribution Websites

This highly complex issue stands at the centre of the current regulatory review of the CRS Rules by the DOT. The two main problems that the DOT has to tackle are whether online travel agents should be treated differently than traditional travel agents or CRSs, and whether the possible regulation of Internet travel distribution will stifle competition and innovation in this area of tremendous economic growth potential.

i. Does the Operating Environment of the Internet Warrant a Differentiated Regulatory Approach?[287]

In its *Advance Notice of Proposed Rulemaking on Computer Reservation Systems*, the DOT specifically invited interested parties to discuss the applicability problem "in light of the difference between the way CRSs and Internet services are typically used by consumers".[288] The DOT acknowledged: "[W]hile consumers can directly use the Internet sites, consumers relying on travel agencies for information and advice do not see the CRS displays used by the travel agent."[289] In addition, the DOT noted: "[T]ravel agencies hold themselves out as unbiased sources of information, while many websites do not."[290]

The DOT recalled some of the reasons underlying the regulation of CRSs, notably (1) the usual practice of travel agencies of using only one CRS, (2) the difficulty for travel

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[286] See *Supplemental advance notice of proposed rulemaking, supra* note 276 at 5 (Fed. Reg. 45557).

[287] It is important to recall that the approach at present is uniform: the rules do not apply directly to both on- and offline travel agencies. A differentiated approach would be one where offline travel agencies remain exempt from the application of the rules while the same rules apply to online travel agents.

[288] See *Advance Notice of Proposed Rulemaking, supra* note 112 at 19.

[289] *Ibid.* at 19.

[290] *Ibid.*

agencies to switch between CRSs or to utilise more than one system, and (3) the fact that travel agents work under significant time pressure, inducing them to book (one of) the first flight(s) appearing on the first display, even if flights displayed later may better suit the travellers' needs, and noted that these factors seem unlikely to be as true for consumer use of Internet booking sites.[291]

In my view, the debate is, in a sense, a false one. Although less visible on the Internet, the travel agent is still present in the background. In the words of the Inspector General of the DOT:

> Neither online agencies nor brick and mortar travel agencies are covered by existing bias regulations. Online travel agents [...] may appear to be different entities than brick and mortar travel agencies with retail locations, but from a regulatory standpoint, they are identical. *Both act as intermediaries between the airlines and consumers, albeit one has a human interface and the other relies upon a computer program.* Both rely upon CRSs to provide information [...] and use the CRS to book travel reservations. *Neither is subject to CRS regulations and is not legally bound to provide information in an unbiased manner.*[292]

The essential question appears to be whether the law must be amended so as to oblige travel agents to provide unbiased travel information. The lawmaker will have to decide whether to discriminate between on- and offline travel agents in order to take into account the alleged "special characteristics" of the Internet.

The following paragraphs will examine the precise nature of online travel agencies by comparing them to both CRSs and offline travel agents.

1. CRSs versus Travel Agents

Microsoft, a major shareholder of Expedia, distinguishes between travel agents using CRSs, which have incentives to present data in a biased manner, and online travel agents lacking such incentives:

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[291] See *ibid.*

[292] See *Aviation & Internet Senate Hearings*, K.M. Mead, Inspector General US Department of Transportation Testimony, *supra* note 19 at 27.

> [T]he websites offer the displays they believe their customers will want, not the displays the airlines might want. Thus, there is no incentive or opportunity for an independent travel website such as Expedia to affect adversely competition in the market for air travel.[293]

In Expedia's opinion, CRSs have compelling reasons to bias their air travel information, as they are owned by airlines. But the same cannot hold true for online travel agents,[294] who will be penalized by a more or less perfectly competitive market if they dare to bias their information.

This argument disregards the recent changes in ownership of CRSs, although it must be acknowledged that the CRSs remain controlled in most cases by the airlines.[295] In addition, it ignores that travel agents have incentives of their own to bias their displays.

Microsoft's comments further state that online travel agents lack market power, which has been an important prerequisite for the regulation of CRSs.[296] Conversely, the DOT, concurring with the views of the DOJ, considers each CRS to constitute a separate market for air carriers, as travel agents generally only subscribe to one CRS. In addition, Microsoft argues that unlike CRSs, travel agencies cannot be qualified as "essential facilities" for the sale of travel services.[297]

It might be asked whether the major online travel agents indeed lack market power. The three largest online agencies hold a market share of 70% of the online travel agency market. It is therefore not evident that the market itself would be acting to protect the consumer against the harm of bias.

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[293] US DOT/OST, *NPRM – Comments of Microsoft Corporation* (09 December 1997), online: Docket Management System OST-1997-2881-20 <http://dms.dot.gov> (date accessed: 10 March 2001) at 5 [hereinafter *Microsoft Comments*].

[294] See *Biztravel Comments*, supra note 279 at 5.

[295] Since the spin-off of Sabre by AMR, the parent company of American Airlines, the former is 100% publicly owned. As such, Sabre is no longer subject to the US CRS Regulations. American will however continue to market Sabre. This thesis will not examine the question whether the scope of the rules should be extended to include systems that are marketed by an airline.

[296] See *Microsoft Comments*, *supra* note 293 at 4.

[297] *Ibid.* Microsoft seems to have forgotten that the Court ruled that CRSs do not constitute "essential facilities". See *In re Air Passenger Computer Reservation Sys. Antitrust Litig.*, 694 F. Supp. 1443 (C.D. Cal. 1988).

Microsoft argues that the online travel market is and will remain highly competitive, as competitors are only "a click away". Conversely, "brick and mortar" travel agents can be few and far between and working under time pressure. In other words, price comparisons are extremely difficult in the offline world, whereas online price comparisons are easy.

This viewpoint is open to some criticism. While it might be true that it is easy to switch between websites on the Internet, the question is whether consumers will do so. People want to see quick results. And they are creatures of habit. They like to bookmark sites and revisit them. This could create an effect similar to that of travel agencies relying on a single CRS.[298]

Nevertheless, in my opinion cross research remains easier on the Internet than in the offline world of "brick and mortar" travel agencies, especially when the online consumer has taken the time and effort to complete a registration process that creates a personal profile on a particular website.

Furthermore, most consumers do not know which CRS a travel agent uses, so they cannot easily compare information supplied by different CRSs. Finally, chances are that the vast majority of traditional travel agents in a particular region use the same CRS, as these systems have established regional dominance throughout the United States and Europe.

Conversely, on the Internet, a prospective traveller can easily compare the results generated by different CRSs.[299] In addition, independent navigators might appear in the near future that could take over most of the comparison process from the consumer. A travelbot will, in a matter of seconds, roam the world of online travel and provide the consumer with the best offers from several online travel agents. Of course, the travelbot itself might be prone to biasing.

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[298] See *Amadeus Comments*, *supra* note 283 at 23.

[299] *E.g.*, Travelocity.com utilises Sabre as a booking engine, while Expedia is powered by Worldspan.

2. Online versus Offline Travel Agents

In general, a lot more similarities than differences seem to exist between on- and offline travel agents. Both types of travel agencies have incentives to present information in a biased manner as they depend on airlines' commissions. Besides "normal" commissions, travel agents can receive so-called "override" commissions when they steer customers towards a favoured airline. There is no reason why these so-called "override" commissions could not exist in the online market. Therefore, the mere fact that travel agencies could be inclined to bias the service they offer does not seem to warrant a differentiated approach between on- and offline travel agencies.

There do however remain a few differences between online and offline travel agents. Some *proponents of Internet regulation*, such as the American Society of Travel Agents (ASTA), have played on the distinction between the use of an Internet travel agency and a traditional travel agency to advocate regulation of the former: "[T]he public [...] would not have the help of human travel agency personnel intervening between the biased display and the consumer's decision."[300] ASTA argues that online travel agencies are the functional equivalent of CRSs and therefore it favours a rule that "ban[s] display bias by all firms that hold themselves out as travel agents".[301]

This reasoning has some flaws: If the consumer needs to be saved from CRS bias, the target of regulation should be the CRS bias, and not the travel agent. Bringing online travel agencies within the scope of the Rules will not eliminate CRS bias. The argument assumes that all "brick and mortar" travel agents are neutral, only intervening to eliminate possible display bias. This disregards the reality of "override" commissions, which are increasingly important as commissions based on travel sold are dwindling or capped.[302]

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[300] US DOT/OST, NPRM – Comments of the American Society of Travel Agents (ASTA) (9 December 1997), online : Docket Management System OST-1997-2881-26 <http://dms.dot.gov> (date accessed: 10 March 2001) at 8 [hereinafter *ASTA Comments*].

[301] *Ibid.*

[302] Override commissions could possibly be more important for online travel agents than for "brick and mortar" agencies, given the commission cap of $10 for US domestic flights.

The main argument made by the *opponents of regulation of online travel agencies* is that regulation is not only unnecessary, as Internet markets are transparent and efficient, but will also inhibit consumer choice and discourage further innovation.[303] Some commentators also argue that there is no need to protect the customer against display bias, because the only bias would be the one reflecting the preferences the customer expressed.[304] These arguments will be examined below.

It is important to note that besides traditional travel agencies and web-based agencies, a hybrid form of travel agency has emerged: the "click and mortar" travel agency, which offers consumers the advantages of online booking, but in addition has a whole network of offline travel agents to take care of customer support.[305]

3. Does a differentiated approach place CRSs at a competitive (dis)advantage?

The DOT also invited interested parties to discuss whether, and how, the CRS Regulations place the systems at a competitive disadvantage as compared to booking travel services offered on the Internet.[306]

It is difficult to understand how the possible extension to online travel sites of the scope of applicability of the CRS Rules would place CRSs at a competitive (dis)advantage. CRSs deliver data to both on- and offline travel agencies. The use that travel agencies make of the information and displays made available by the CRS does not seem to have a significant bearing on the competitive environment in which the CRS must operate.

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[303] See *ASTA Comments*, *supra* note 300 at 6.

[304] See Biztravel Comments, *supra* note 279 at 4.

[305] See Webtravelnews, Press Release, "Expedia Adds Bricks to Clicks with eGulliver" (25 September 2000), online: <http://www.webtravelnews.com/archive/article.html?id=588> (date accessed: 10 March 2001); Webtravelnews, Press Release, "Carlson's Batt Questions Viability of Internet Travel Sales" (28 September 1999), online: <http://www.webtravelnews.com/archive/article.html?id=295> (date accessed: 10 March 2001).

[306] See *Advance Notice of Proposed Rulemaking*, *supra* note 112 at 20.

The DOT did not reiterate its question in its *Supplemental advance notice of proposed rulemaking*,[307] possibly because it realised that this question had lost most of its relevance.[308]

ii. Would the Application of the CRS (Display) Rules Impede the Development of Online Travel?

One of the main arguments to oppose any modification of 14 CFR part 255 (the US CRS Rules) that would bring Internet travel sites within the ambit of the DOT's current display bias rules poses that such a modification "would inhibit the growth of the Internet travel sector and thereby would inhibit consumer choice, discourage further market innovation and deprive customers of direct access to technological innovations that ensure and extend the very protection the rules were designed to provide."[309]

Somewhat curiously, this commentator does not explain why the applicability of display rules would discourage innovation. This statement seems to refer to the introduction of the original CRS Regulations that, indeed, had a discouraging effect on innovation, primarily by diminishing monopoly rents extracted from the systems.

At the same time, online agencies argue that competition in the online travel-place is vigorous[310] and that market power, and the accompanying monopoly rents, do not exist: "There is no need to protect the customer against display bias because, quite simply, the only bias reflected in the bias is the customer's own."[311] If no bias exists, how could a rule prohibiting bias stunt innovation?

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[307] See *Supplemental advance notice of proposed rulemaking supra* note 276.

[308] In 1997, the structure and future development of the online travel market were largely unknown.

[309] *See Biztravel Comments, supra* note 279 at 1 & 6.

[310] See *ibid.* at 6.

[311] See *ibid.*

Other commentators expressed concerns that, under the CRS Regulations, they would no longer be able to adapt the search query to the needs of the consumer.[312]

The US CRS Rules indeed impose the obligation to use integrated and neutral displays. These displays have to abide by a few essential rules that are contained in Section 255.4 of the Rules.[313] These Rules do not exclude the use of consumer preferences to rank the flights. In addition, if a consumer expresses a wish to fly only on certain airlines, it can be argued that the display would no longer be integrated, and that the display rules do not apply.[314]

Nevertheless, some clarification on this particular point might be welcome. This could happen as the DOT is considering adopting a rule requiring each system's display criteria to be rationally related to consumer preferences.[315]

2) Regulation of the Use of the Internet by Airlines

Not only the websites themselves, but also the use that airlines are making of the Internet as a distribution channel have become subject to regulatory review. In their enduring effort to lower distribution costs, airlines have been accused of using the Internet in a discriminatory and unlawful manner to exclude both on- and offline travel agents from the distribution chain. This discrimination and unlawful behaviour is said to occur in various ways.

First, the practice of differential commission levels for sales through traditional travel agents versus ticket sales through the Internet is said to be discriminatory, to

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[312] See *ibid.*

[313] These are: (1) there should be no *system-imposed* priority for online connections over interline connections, (2) elapsed flight time should be a significant factor in ranking flights *or* single plane flights should be given preference over connecting services, (3) carrier identity may not be a factor in ranking flights in an integrated display, and (4) carrier identity may not be a factor in constructing the display of connecting flights in an integrated display.

[314] Cf. 14 C.F.R. § 255.3, which defines an integrated display as "any display that includes the schedules, fares, rules, or availability of all or a significant portion of the system's participating carriers."

[315] Cf. US DOT/OST, *Final Rule - Fair Displays of Airline Services in Computer Reservation Systems (CRSs)* (3 December 1997), online: Docket Management System OST-1996-1639-28 <http://dms.dot.gov> (date accessed: 10 March 2001); also published at 62 Fed. Reg. 63837 (1997). See also *Amadeus Comments, supra* note 283 at 28.

threaten the growth of online travel agencies, and to constitute an unfair method of competition in the sale of air transportation, violating 49 U.S.C. 41712.[316] The subject of commission fees will be concisely explored in Part III of this thesis.

In addition, the emergence of the so-called "Internet-only" fares, *i.e.*, steeply discounted airfares that can only be accessed through the airlines' website or through an airline-owned consortium, such as Orbitz or Hotwire, have been said to constitute another example of discriminatory behaviour against travel agents.[317] Opponents of this practice have asked the DOT to compel air carriers to make all their fares available to all distribution channels at the same time, creating a level playing field for all distributors.[318]

Another allegedly anticompetitive move by the airlines will be at the centre of the third chapter of this part: the appearance of airline-owned online travel distributors. These new, hybrid websites are accused of all sorts of anticompetitive practices, ranging from price collusion to a boycott of travel agents.

Finally, claims have been made of other conduct discriminating against online travel agents while favouring traditional travel agents and airlines' sites. In particular, ARC, an airline-owned consortium responsible for the accreditation of travel agents and the settlement of airline ticket sales, has been accused of venturing beyond its functions and of facilitating co-ordination between the airlines to the detriment of the online travel agency business.[319] ARC notably (1) considered adopting recommended guidelines for electronic travel agencies that would facilitate airline rules denying independent online travel agents the right to issue paper tickets, even when consumers explicitly required them,[320] and (2) distributed amongst its members a

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[316] See *Preview Travel Comments*, *supra* note 183 at 7.

[317] See *American Express Comments*, *supra* note 282 at 3.

[318] See US DOT/OST, *NPRM – Comments of the Association of Retail Travel Agents (ARTA)* (10 December 1997), online: Docket Management System OST-1997-2881-57 <http://dms.dot.gov> (date accessed: 10 March 2001) at 13.

[319] See US DOT/OST, *NPRM – Comments of the Interactive Travel Services Association (ITSA)* (22 October 1998), online: Docket Management System OST-1997-2881-115 <http://dms.dot.gov> (date accessed: 10 March 2001) at 14 [hereinafter *ITSA Comments*].

[320] See *Preview Travel Comments*, *supra* note 183 at 7.

"carrier reservation matrix" that indicates how the airlines place more restrictions on the booking capabilities of online agents (number of bookings per passenger booking, number of flight segments a person can book online, time limitations for making reservations, etc.) than "brick and mortar" agencies.[321] The mere distribution of this matrix by an airline-owned venture could be interpreted as an implicit invitation for competitors to align their business practices.[322] Airlines claim that these restrictions are necessary because abusive or "fictitious" bookings are alleged to be more frequent with online travel agencies.[323]

3) Evaluation of the Debate and Proposal for Regulation

In my view, the debate as to the applicability of the CRS Rules to the Internet is in a sense a false debate. CRSs are different in nature from travel agencies. But both CRSs and travel agents have their own reasons for biasing their displays, CRSs because they are owned or marketed by airlines, travel agents because they need the extra income generated from override commissions and other incentives. The debate should therefore focus on the duty to provide unbiased information in general.

Amadeus, the leading European CRS, expressed the same view as follows:

> The Department should focus, like the EU proposal, on the concept of "unbiased information." In the same way that a consumer "expects" limited information when visiting a website established by an individual airline, that consumer may expect unbiased information by choosing to visit a comprehensive source of information -- whether that be a travel agency or a website operated by a travel professional or on-line service provider.[324]

The regulatory authorities should reconsider whether travel agents can legally reshape the (supposedly biasfree) information provided by a CRS, be it into a display favouring the preferred airlines, or in another way, such as orally by the travel agent who has the override commission in mind. Should all travel agents, in the same way as CRSs, not be bound by a legal duty of impartiality and neutrality?

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[321] See *ITSA Comments*, *supra* note 319 at 14.

[322] Cf. *Interstate Circuit* v. *United States*, 306 U.S. 208 at 222 (1939).

[323] See *ITSA Comments*, *supra* note 319 at 15.

[324] See *Amadeus Comments*, *supra* note 283 at 25.

In its comments, ASTA stated: "The history of traditional CRS services indicates that the opportunity to bias usually leads to the reality of bias."[325] Would the same reasoning apply to travel agents? If so, the time might be right for regulation.

In addition, the industry is rapidly changing: airlines divest themselves of their interest in CRSs, but are (jointly) moving into the travel agency business. In addition, the distinction between on- and offline travel agencies is blurring due to the emergence of "click and mortar" agencies.

Therefore, travel agents, CRSs, and airline-owned consortiums should be bound by the legal obligation to provide unbiased consumer-oriented information. In formalizing this obligation, the DOT might perhaps find guidance in the text of the European CRS Regulations:

> 1. (a) In the case of information provided by a CRS, a subscriber shall use a neutral display [...] unless another display is required to meet a preference indicated by a consumer.
>
> (b) No subscriber shall manipulate information provided by a CRS in a manner that leads to inaccurate, misleading or discriminatory presentation of that information to any consumer.
>
> (e) A consumer shall be entitled at any time to have a print-out of the CRS display or to be given access to a parallel CRS display reflecting the image that is being displayed to the subscriber.[326]

The adoption of a similar text in the United States and other countries would oblige on- and offline travel agencies to provide neutral information through displays or otherwise. Some minor rewriting might be needed to cover those situations where an online travel agency or consortium website would not be based on a CRS, or where both functions would be blurred.

The adoption of the above-mentioned text, possibly with slight modifications, would also offer the advantage of a harmonized transatlantic environment covering the

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[325] See *ASTA Comments, supra* note 300 at 8.

[326] See US DOT/OST, *NPRM – Comments of the Association of European Airlines* (18 September 2000), online: Docket Management System OST-1997-2881-133 <http://dms.dot.gov> (date accessed: 10 March 2001) at 14.

overwhelming majority of potential online travellers. Amadeus's stance on the matter clear:

> Absent harmonization, globally accessible Internet sites could be forced to choose among: (1) following the most restrictive rule, (2) being electronically screened from conducting business in the most restrictive jurisdiction and (3) maintaining two (or more) complete sites at significant expense.[327]

[327] See *Amadeus Comments*, *supra* note 283 at 6.

CHAPTER III. ANTITRUST LAW AND TRAVEL DISTRIBUTION: ANALYSIS OF THE ORBITZ CASE

I) INTRODUCTION

The preceding chapter examined Internet travel distribution from a regulatory perspective, by comparing the current regulatory environment of several countries, and by analysing whether the CRS Regulations are applicable to the Internet. I tentatively concluded that it would be advisable to extend the scope of the US CRS Rules through an express provision that travel agents also be obliged to provide unbiased CRS information.

This chapter will approach the online travel distribution industry from that other avenue open to the authorities: antitrust law. Rather than focussing on the ticket distribution industry as a whole, I have chosen to consider the most recent and controversial manifestation of the changes affecting the travel distribution chain: the emergence of consortium websites, which are travel distributors owned by groups of airlines. Orbitz, the multi-airline portal established by five founding US airline equity partners and 23 associate airlines, is the consortium website having received the most attention in the industry. The analysis of this Chapter will therefore focus on Orbitz, but could be applied *mutatis mutandis* to other multi-airline portals.

In essence, it appears that a consortium website constitutes a type of hybrid distribution service, combining aspects of a travel agency with characteristics of the CRS business, such as a state of the art search engine. The purpose of this type of airline-owned website is to bypass travel agents, and ultimately CRSs, in order to lower distribution costs for the airlines.

This being the case, both traditional and online travel agents felt threatened, and strong anticompetitive allegations were immediately voiced by the American Society of Travel Agents (ASTA), calling such portals "a Death-star that would obliterate

competition in the skies".[328] ASTA also stated: "It is doubtful that any industry in this country, or in the world, exhibits such incestuous interconnectedness among firms that are supposed to be full-fledged competitors".[329]

On 16 February 2000, ASTA filed a formal complaint with the Department of Justice urging it to investigate and take action against the major US and foreign carriers participating in this joint portal, which would allegedly monopolize the sale of travel services on the Internet.[330] ASTA's complaint was taken seriously by the DOJ, which announced in May 2000 that it would investigate the antitrust implications of Orbitz.[331]

In addition, the problem gained political attention, and a Senate Hearing on "Aviation and the Internet", focussing on the emergence of multi-airline portals, was held on 20 July 2000 before the US Senate Committee on Commerce, Science and Transportation.[332] The testimony submitted on that occasion further developed, explored, and assessed the ideas expressed in ASTA's complaint.

While it may be impossible to predict the outcome of the antitrust investigation, the materials submitted both at the Senate Hearing and in the framework of the general review of the CRS Regulations by the DOT allow for a preliminary examination of the general competitive environment and the precise antitrust allegations that have been expressed.

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[328] ASTA, Press Release, "Justice Department Probe into Airline Web Site – Senate Hearing on T-2" (18 May 2000), online: Astanet News Releases <http://www.astanet.com/news/releasearchive/05_18_00.html> (date accessed: 10 March 2001) [hereinafter "Justice Department Probe"].

[329] "ASTA Portal Antitrust Complaint", *supra* note 243.

[330] The AST complaint received support among others from the Coalition for Travel Industry Parity (CTIP) and from Member of Congress DeFazio. See ASTA, Press Release, "Congressman DeFazio urges Justice Action on Airlines' Web Site" (7 April 2000), online: Astanet News Releases <http://www.astanet.com/news/releasearchive/04_07_00.html> (date accessed: 10 March 2001).

[331] See "Justice Department Probe", *supra* note 328.

[332] ASTA, Press Release, "ASTA Applauds Senate Committee for Holding Hearing on Aviation and The Internet" (17 May 2000), online: Astanet News Releases <http://www.astanet.com/news/releasearchive/05_17_00.html> (date accessed: 14 June 2000).

Before concentrating on the antitrust concerns that have been voiced regarding the multi-airline portal model, it is important to review the applicability of the CRS Rules to consortium websites.

II) The Applicability of the CRS Rules to the Multi-airline Portals: The Legal Status in the United States, the European Union, and Canada

1) The United States

Multi-airline portals could, theoretically, be analysed in three ways. First, if a portal is qualified as a CRS combined with a travel agency, the booking engine powering the airline portal seems to be subject to the Rules. The "front end" travel agency part of the portal, in the same way as other travel agencies, would be free to bias its displays. Second, a portal could be qualified as a CRS, and not as a travel agency. In this case, the Rules do not seem to apply, as the system is not a CRS for travel agents, but interacts directly with the consumer. Third, in case the consortium site is to be qualified as a travel agency, it is not subject to the Rules, as these do not apply in themselves to travel agencies. It appears that under any possible qualification, multi-airline portals are not subject to the CRS regulations, as they exist today in the United States.

2) The European Union and ECAC

Multi-airline portals do not fall within the scope of the (display) Rules, as they cannot be qualified as *Computerized Reservation Systems* in the sense of the EU Regulations. As far as a multi-airline portal would still rely on an outside CRS for additional fare information or for making booking, it could qualify as a *subscriber* to a CRS. In this case too the portal would not be covered by the (display) Rules, since the EU Regulations exempt CRSs that are used by a "group of air carriers" providing distribution facilities through a public telecommunications network, when these are clearly and continuously identifying the information provider or providers as such. In these situations, the information provided by the portal may be biased, as the consumer cannot have a reasonable expectation that a group of air carriers will provide unbiased information.

3) Canada

As travel agencies are not covered by the Rules, multi-airline portals do not seem to be subject to them, unless they are to be qualified as "pure" CRSs (without a "front end" travel agency part). In this latter case, they fall within the scope of the Rules, as CRSs are defined as systems offering their services either to travel agents or to consumers.[333]

III) General Antitrust Analytical Framework for Competitor Collaborations

In the emerging e-commerce market, competitors must sometimes collaborate in order to fund expensive innovation efforts, lower production and other costs, combine complementary expertise and skills, and achieve economies of scale and scope.[334] For guidance on the application of general antitrust principles to a complex joint distribution setting, it is interesting to study the US *Guidelines for Collaborations Among Competitors*.[335] These Guidelines, issued on 7 April 2000 by the Department of Justice and the Federal Trade Commission, state the Agencies' antitrust enforcement policy with regard to competition issues raised by collaborations among competitors. They do not revise the law, nor do they create any legally enforceable right or defence. They simply state how the Agencies intend to apply existing antitrust law to competitor collaborations.[336]

It is important to note that the Guidelines do not provide guidance with respect to the possible effects of competitor collaborations in foreclosing or limiting competition by

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[333] See *Canadian CRS Regulations*, *supra* note 151, s. 2.

[334] See D.A. Balto, "Emerging Antitrust Issues in Electronic Commerce" (2000) 4:10 Cyberspace L. 8.

[335] See *Competitor Collaboration Guidelines*, *supra* note 81.

[336] See *ibid.* at 2.

rivals not participating in a collaboration.[337] Nevertheless, these effects may be of concern to the Agencies and may prompt enforcement action.[338]

In US antitrust terms, the proposed Orbitz joint venture seems to qualify as a "marketing collaboration", *i.e.*, an agreement "jointly to sell, distribute, or promote goods or services that are either jointly or individually produced".[339] This type of agreement is analysed under the "rule of reason", which focuses on "the state of competition with, as compared to without, the relevant agreement."[340] Analysis under the "rule of reason" will result in the prohibition of an agreement when it "likely will harm competition by increasing the ability or incentive to raise prices above, or reduce output quality, service, or innovation below what would likely prevail in the absence of the agreement."[341] In situations where anticompetitive harm has already occurred, or where it is evident from the nature of the specific agreement that such anticompetitive harm will result, the antitrust Agencies will challenge the agreement without a detailed analysis of the relevant market(s), unless pro-competitive benefits evidently override the (potential) harm.[342] In some situations, however, the possibility of anticompetitive harm is present, but a detailed market analysis is needed to determine the precise overall competitive effect of the collaboration.

The Guidelines identify marketing collaborations as agreements that by their very nature could harm competition by eliminating independent decision-making, diminishing the incentive to compete, or combining control or financial interests. In addition, marketing collaborations may facilitate collusion.[343] Competitor collaborations provide participants with a platform through which explicit or tacit collusion can take place, and compliance can be monitored. Furthermore, competitor

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[337] Nor with respect to the possible anticompetitive effects of standard setting in the context of competitor collaborations. See *ibid.*

[338] See *ibid.*

[339] See *ibid.* at 14.

[340] See *ibid.* at 10.

[341] See i*bid.*

[342] See *ibid.*

[343] See *ibid.* at 15.

collaborations can increase market concentration, and thereby raise the likelihood of collusion among all firms in the relevant market.[344]

A detailed market analysis encompasses three steps. First, relevant markets have to be defined, and market share and concentration calculated. A high market share or concentration may create or increase market power, which in turn can lead to competitive harm.[345] Then, the degree to which the participants to the agreement have the ability and incentive to compete independently should be examined. Factors to be considered include: (1) the duration of the agreement, (2) its exclusivity,[346] (3) the financial interests in the collaboration and in other participants, and (4) the likelihood of anticompetitive information sharing.[347] Finally, the contestability of the market should be evaluated by examining whether new entry in the relevant market is possible, likely, and timely.[348] In addition, any other market circumstance that may foster or impede anticompetitive harm must be appraised.[349]

If the examination of the aforementioned factors indicates that anticompetitive harm is present or imminent, the collaboration, in order to be allowed, must benefit, or potentially benefit, the consumer by expanding output, reducing price, or enhancing quality, service, or innovation.[350] In addition, the benefits must likely offset the anticompetitive harm. For example, marketing collaborations can be pro-competitive, when a combination of complementary assets enables products or services to reach the marketplace more quickly and efficiently, or when the collaboration enables the participating firms to decrease costs, passing (part of) the surplus on to the consumer. In addition, the agreement must be reasonably necessary to achieve those pro-

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[344] See *ibid.*

[345] See *ibid.* at 11.

[346] This factor indicates whether it is likely that the participants in a competitor collaboration will continue to compete independently outside the collaboration in the market in which the collaboration operates. See *ibid.* at 19.

[347] See *ibid.*

[348] See *ibid.* at 11 & 19.

[349] See *ibid.* at 11.

[350] See *ibid.* at 23.

competitive benefits.[351] In case there are significantly less restrictive means to achieve the same benefits, the agreement is not reasonably necessary and will be challenged.

The Agencies believe that competitor collaborations must be encouraged, as they often have an overall pro-competitive effect.[352] Therefore, they have established "safety zones". When the combined market share of the collaboration and the participants does not exceed 20% of each relevant market in which competition may be affected by the collaboration, the agreement will, absent of extraordinary circumstances, be allowed.[353] Agreements that do not fall within one of the safety zones receive full analysis under the "per se rule" or the "rule of reason".

IV) THEORY APPLIED: ANTITRUST CONCERNS ABOUT THE ORBITZ COLLABORATION

While the outcome of the Orbitz antitrust investigation is in the hands of the DOJ, a few general remarks can already be made that will allow for a better understanding of those specific antitrust allegations voiced, and for a preliminary evaluation of possible pro-competitive effects of the collaboration. To this end, Orbitz will be analysed as a collaboration among competitors, using the analysis suggested by the Guidelines. Then, the focus will turn to those anticompetitive allegations that fall outside the scope of the Guidelines, such as the effects the agreement has on competition by rivals.

1) Orbitz as a Collaboration among Competitors

Various anticompetitive concerns have been expressed by groups of traditional and online travel agents. In their view, the Orbitz arrangement constitutes a violation of antitrust law and principles. Some of these allegations can be categorized as constituting *per se* violations of antitrust law. This is the case for the allegations of allocation of lines of commerce, price fixing, and concerted refusal to deal with travel agents. Whatever the merits of these *per se* violation claims, it is certain that Orbitz

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[351] See *ibid.* at 24.

[352] See *ibid.* at 1.

[353] A second safety zone concerns research and development collaborations in innovation markets. See *ibid.* at 26.

constitutes a marketing collaboration among competitors. Anticompetitive concerns therefore must be balanced against pro-competitive benefits.

i. Orbitz as a Per Se Violation of Antitrust Law?

The Association of Retail Travel Agents (ARTA) and the American Society of Travel Agents (ASTA) contend that the proposed competitor collaboration through Orbitz is so brutally anticompetitive that it should be challenged and prohibited under the *per se* rule. ARTA, in its testimony at the Senate Hearings on Aviation and the Internet, argued that the Orbitz travel portal constitutes a *per se* illegal *agreement to share the air travel market by allocating lines of commerce*. The allocation of a line of commerce can be defined as an agreement whereby two or more parties agree not to compete on a certain product line or on certain services.[354] In other words, it is an agreement to carve up the market. ARTA alleges that the Orbitz agreement is a deliberate attempt by the airlines to re-allocate online travel commerce "from a somewhat competitive mix of independent single-airline sites, independent online travel agencies, and independent retail travel agencies with their own websites to a single-channel distribution system controlled directly by consortiums of US and international airlines."[355]

ARTA does not clarify how the Orbitz collaboration amounts to an agreement between the competitors to allocate certain services exclusively to one of its participants. Such an agreement would seem to exist only where travel agents and airlines agree that the former will not conduct online business, while the latter will only conduct online business, and will halt distribution through other direct channels, such as proprietary sales counters. Therefore, in my view, the Orbitz competitor collaboration does not constitute an agreement or conspiracy to carve up the market by allocating lines of commerce.

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[354] For example, two car manufacturers could agree that one of them will only produce sedans while the other will limit its product range to SUVs. Or two airlines might agree that one of them will cover Western Europe, whilst the other will only fly to Eastern Europe.

[355] See *Aviation & Internet Senate Hearings*, Testimony by the Association of Retail Travel Agents, *supra* note 19 at 2. In addition, ARTA claims that this type of competitor collaboration is not reasonably necessary to obtain the pro-competitive benefits generated through Orbitz, if any.

In its complaint of 16 February 2000 to the DOJ, ASTA also took the position that the Orbitz agreements were a *per se* violation of antitrust law as they involved price fixing and constituted a concerted refusal to deal with travel agents. ASTA claims that the very fact that the airlines make joint claims for what the website will offer (*i.e.*, the lowest fares on the market) "indicates exchange of price information and commitment to future price understandings and policies".[356] ASTA has defended its view by referring to the Orbitz *Airline Charter Associate Agreement*, which includes a "non-discrimination" clause, through which an airline choosing to participate in Orbitz in return agrees that any fare it offers to the general public through some other retail (online) channel will also be made available to the general public through Orbitz on a "Most Favoured Nation" (MFN) basis:

> To the extent that Airline offers any of the following in connection with the display or sale of Air Travel fulfilled through an Internet Travel Provider Site: (i) published Fares, (ii) schedules, (iii) seat availability, (iv) Service Enhancements, (v) frequent flyer program account information, (vi) frequent flyer promotions (including, but not limited to mileage promotions, (vii) functionality or processing of frequent flyer transactions, or (viii) the purchase, sale or redemption of frequent flyer miles, Airline shall offer Company (*i.e. Orbitz)* the same on a MFN basis.
>
> "MFN Basis" means that Airline shall offer Company commercial terms and conditions equal to or better than the most favourable terms and conditions offered by Airline to any other Internet Travel Provider Site: provided, that MFN Basis shall not obligate Airline to delay or forego a commercial opportunity due to Company's inability to proceed with a similar commercial transaction with Airline for technical, financial or other reasons.[357]

In my view, it is questionable whether the Orbitz collaboration and in particular the MFN clause should be qualified as an agreement not to compete on prices. The participants remain free to set their prices themselves. They only agree to distribute them also through the Orbitz channel. Even if the abovementioned agreement, or its practical application, were proven to constitute a price fixing agreement, which in my view is not very likely, the "per se" analysis could in this particular case probably be abandoned and replaced by a "rule of reason" analysis. The agreement would survive scrutiny if it qualifies as an agreement that is reasonably related to the integration and is reasonably necessary to achieve its pro-competitive benefits in "an efficiency-

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[356] "ASTA Portal Antitrust Complaint", *supra* note 243 at 2.

[357] See *Orbitz Agreement*, *supra* note 227, s. 2.1.(b) and Exhibit A.

enhancing integration of economic activity".[358] It does not seem unreasonable to argue that Orbitz indeed will enhance economic efficiency by offering consumers centralized access to the lowest fares and the best deals. The MNF clause can under this analysis be characterized as reasonably necessary to achieve these efficiencies.

ASTA has also claimed that the airlines are boycotting travel agencies through a *concerted refusal to deal* with them.[359] The US Supreme Court has held that corporate entities (or private persons) violate antitrust laws when they jointly seek to disadvantage competitors by "cut[ting] off access to a supply, facility, or market necessary to enable the boycotted firm to compete".[360] In my view, the fundamental problem underlying ASTA's claim is that all participants in the Orbitz website remain completely free to share their lowest fares with anyone else, including travel agents.

On this matter, the *Orbitz Airline Charter Associate Agreement* states:

> The relationship between Airline and Company as set forth in this Agreement will be non-exclusive. Therefore, subject to Section 2,[361] Airline may participate in other Internet travel sites similar to the Company Site, and this agreement will not confer any rights on one party to restrict the other party's ability to offer Published Fares or to do business, or choose not to do business, with any other airline, Internet Travel Provider Site or any other entities.[362]

It seems difficult, therefore, to speak of an *explicit* conspiracy to cut off a supply, facility, or market. In addition, travel agents themselves will have access to all information through the Orbitz website.[363]

In a nutshell, it does not seem likely that the Orbitz competitor collaboration can be easily framed in one of the practices that warrant a *per se* review.

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[358] *Competitor Collaboration Guidelines*, *supra* note 81 at 8.

[359] See "ASTA Portal Antitrust Complaint", *supra* note 243 at 2.

[360] See *Northwest Wholesale Stationers* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 at 294 (1985). See also D.A. Balto, Antitrust and the Emerging World of Electronic Commerce" (1999) 3:10 Elec. Banking L. & Com. Rep. 9.

[361] This refers to the MFN clause.

[362] See *Orbitz Agreement, supra* note 227, s.7

[363] It is important to realize that while the Orbitz Agreement itself might not warrant a *per se* review, its practical application might. If the application of the Orbitz agreement were to lead, for example, to a proven refusal to deal with travel agents, this conspiracy could be subject to a *per se* review.

ii. Analysis of Orbitz under the Rule of Reason

Multi-airline portals such as Orbitz qualify as competitor collaborations[364] for the business purpose of joint marketing, selling, and distribution of travel services in order to lower distribution costs. Such "marketing collaborations may involve agreements on price, output or on the use of competitively significant assets, such as an extensive distribution network, that can result in anticompetitive harm."[365]

Since Orbitz is not yet operational, no anticompetitive harm has occurred. Moreover, it is not immediately evident whether any anticompetitive harm will flow from the proposed agreements, as they could in fact increase competition in the online travel market, currently dominated by two giants, *viz.* Travelocity and Expedia. Therefore, an in-depth analysis of the proposed agreements seems warranted. This is, to say the least, an extremely intricate exercise, as various factors come into play, and any of them can influence the outcome of the analysis.

The first step in such an analysis under the rule of reason is to define the markets that are affected by the competitor collaboration. These include "all markets in which the economic integration of the participants' operations occurs or in which the collaboration operates or will operate, and may also include additional markets in which any participants is an actual or potential competitor."[366] The economic integration of the participants to Orbitz takes place in the ticket distribution market, and both on- and offline distribution markets are affected.[367]

The major question that remains unanswered is whether competition in the air transport market as such will be significantly affected. If such is the case, the relevant

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[364] The Guidelines define "competitor collaboration" as "a set of one or more agreements, other than merger agreements, between or among actual or potential competitors in a relevant market, to engage in economic activity, and the economic activity resulting therefrom". See *Competitor Collaboration Guidelines*, *supra* note 81 at 2.

[365] *Ibid.*at 14.

[366] The competitor collaboration might alter available information and incentives to compete or provide an additional platform for collusion. See *ibid.*at 16.

[367] For the purposes of this analysis, the geographical market is assumed to be the United States, as Orbitz is geared towards the US market. Where other air transport markets would be significantly affected, these have to be taken into account for the purposes of the analysis.

market will include the air transportation market. ARTA believes it will be affected, contending: "[T]he joint ownership and operation of T-2 constitutes, in practical terms, a merger of significant corporate resources".[368] Airlines participating either as equity owners or as charter associates hold 82.12% of the US domestic market.[369] ASTA, sharing ARTA's view, has stated: "[I]n practical effect, the United States airline industry has begun to operate as a single enterprise, of which the joint Web-site is just the most recent manifestation."[370]

In my opinion, the Orbitz competitor collaboration should indeed be analysed against the backdrop of competition in the whole air transport industry. Any change in the cost of distributing tickets will directly affect competition in the air transportation market, as distribution and marketing accounts for about one-fifth of operating expenses for airlines. Furthermore, the *Orbitz Airline Charter Associate Agreement* affects not only distribution processes, but also neighbouring fields such as marketing. But of paramount importance is the obligation to provide Orbitz with all fares on a MFN basis. Here, the potential for anticompetitive harm seems most evident.

As stated above, the market share of the airlines participating in Orbitz is higher than 80%. Hence, at first the potential for anticompetitive harm seems enormous. However, while market concentration affects the likelihood that one firm, or a small group of firms, can successfully exercise market power,[371] it only provides the Agencies with a starting point upon which to evaluate competitive concerns.[372]

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[368] See *Aviation & Internet Senate Hearings*, Testimony by the Association of Retail Travel Agents, *supra* note 19 at 6.

[369] The Agencies approach the calculation of market share as set forth in Section 1.4 of the US FTC and DOJ, *Horizontal Merger Guidelines*, 2 April 1992, as revised on 8 April 1997, online: DOJ Website <http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html> (date accessed: 23 August 2000) [hereinafter *Horizontal Merger Guidelines*]. Cf. *Competitor Collaboration Guidelines*, *supra* note 81 at 17.

[370] See "ASTA Portal Antitrust Complaint", *supra* note 243 at 2.

[371] See *Horizontal Merger Guidelines*, *supra* note 368, s. 2.0.

[372] See *ibid.*

Marketing co-operations such as Orbitz have the potential to harm competition as they can limit independent decision-making and as they combine financial or other interests, thereby limiting the incentive and ability to compete vigorously.[373] In addition, marketing collaborations may provide opportunities for the participants to collude. When competitors share information through collaboration, chances are that collusion on matters such as price or other competitively sensitive variables will arise.[374]

1. Competitive Harm by Limiting Independent Decision-making, or Combining Control or Financial Interests

As a preliminary remark, it has to be noted that the airline industry, with its myriad of alliances, and code-sharing and participation agreements, is not the ideal background for vigorous competition.[375]

The US *Antitrust Guidelines for Collaborations Among Competitors* state:

> marketing collaborations may involve agreements
> - on price,[376] output
> - on the use of competitively significant assets, such as an extensive distribution network,
>
> that can result in anticompetitive harm.
> Such agreements can create or increase market power or facilitate its exercise
> - by limiting independent decision making;
> - by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise would be controlled independently; or

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[373] See *Competitor Collaboration Guidelines*, *supra* note 81 at 14.

[374] See *ibid.* at 15.

[375] For a graphic presentation of the ownership or contractual relations between the airlines, see *Aviation & Internet Senate Hearings*, Testimony by the American Society of Travel Agents, *supra* note 19 exhibits 7-11.

[376] It might be surprising to learn that marketing collaborations involving agreements on price, which under normal circumstances are a *per se* violation, can be analysed under the rule of reason. The Guidelines stipulate that this is only the case under strict conditions. If the agreement is reasonably related to the cooperation and reasonably necessary to achieve its pro-competitive effects, it will be analysed under the rule of reason (See *Competitor Collaboration Guidelines*, *supra* note 81 at 8). "Reasonably necessary" does not mean "essential", but if there exists significantly less restrictive means to achieve the same pro-competitive benefits, then the agreement is not reasonably necessary.

> by combining financial interests in ways that undermine incentives to compete independently.[377]

The crucial question therefore is whether Orbitz will limit independent decision-making or decrease the incentive for the participating airlines to compete, thereby harming competition.

Orbitz's participants, be they equity partners or charter associates, continue to compete against each other and against Orbitz itself. Each partner remains free to disseminate its fares to any other party. Each party remains free to set prices for its products, sell tickets through its proprietary website, and participate in other collaborations or marketing alliances. Hence, at first sight, independent decision-making does not seem to be compromised. The airlines remain free to disseminate their lowest fares to everyone. However, it is unclear whether they will do so.

This is particularly so because Orbitz rewards airlines that book through its site with a rebate on the CRS booking fees. As any cost saving is important, airlines might not be willing to offer their lowest fares through the more expensive distribution channels. Furthermore, Orbitz requires its participants to contribute significant assets that would otherwise have enabled them to compete independently, as they have a contractual obligation to promote Orbitz. These funds would otherwise have flowed to marketing their own products. This promotional obligation can be satisfied by offering promotions that are available only on the Orbitz website, further increasing the incentives to distribute the lowest fares exclusively though Orbitz.[378]

Finally, while Orbitz does not directly control price decisions, independent decision-making with respect to price setting appears to be indirectly compromised as the Charter Agreement obliges every participant to disclose its lowest fares to Orbitz. Sharing this information is likely to facilitate price comparisons, not only for consumers, but also for the airlines, which might be less inclined to offer special

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[377] *Competitor Collaboration Guidelines*, *supra* note 81 at 14.

[378] See *Orbitz Agreement*, *supra* note 227, exhibit B.

targeted fares[379] if they have to make them available through a common platform. Hence, Orbitz could serve as a platform of rapid information exchange. The result of this could be that sellers will not cut prices. In other words, chances are that Orbitz will lead to "frictionless coordination".[380]

It should also be noted that Orbitz is a cooperation of indefinite duration. The likelihood for anticompetitive behaviour is greater with co-operations of a long duration.[381]

2. Competitive Harm through Collusion

Worse than price parallelism leading to frictionless coordination is collusion on prices. This claim revives the allegations of price collusion that were voiced in the first half of the nineties, alleging that the US carriers had employed a computer system run by an airline joint venture, the Airline Tariff Publishing Company (ATPCO), to fix prices.[382]

Alex Zoghlin, Orbitz's Chief Technical Officer (CTO), has stated somewhat cynically in defence of the participants to Orbitz that the airlines have no need for *new* sharing of price information, as ATPCO already provides electronic access to all *published* airline price and schedule information.[383] He seems oblivious to the fact that Internet-only fares used to be limited to airlines' sites or were disseminated through targeted e-mails and therefore were not as widely available as they would be on a jointly owned platform.

More importantly, Zoglin has stated that built-in firewalls would prevent information sharing by the airlines. This statement seems to refer implicitly to the ATPCO case where airlines were illegally exchanging information through an elaborate system of

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[379] *E.g.*, through weekly e-mail offers.

[380] J.B. Baker, "Identifying Horizontal Price Fixing in the Electronic Marketplace" (1996) 65 Antitrust L.J. 41 at 42. The difference between Orbitz as a platform for information exchange and other platforms (*e.g.*, e-mails, advertisements) is not so much one of nature but of degree.

[381] See *Competitor Collaboration Guidelines*, *supra* note 81 at 21.

[382] See *ibid.* at 51.

[383] "T2 answers charges", *supra* note 224.

"footnote designators" to reach a consensus fare,[384] and only afterwards was the fare published. Orbitz now promises to behave better, stating that "the website will receive fare information through the same 'public pipes' as competitors."[385]

As a general remark, one can wonder whether it would be unreasonable to argue that the consciousness of the increased possibility of frictionless coordination though participation in Orbitz implies a collusive meeting of minds to coordinate prices.

3. Contestability of the Market

If the nature of the agreement and the market analysis suggest that anticompetitive harm will occur, the Agencies must examine whether the market will react and new entry will follow in a timely and sufficient manner.

The funding required to launch, market and maintain a website is huge.[386] Nonetheless, entry is possible. But, in my view, new entry will not be sufficient. A new entrant will most probably not be able to secure access to the best fares to the same degree as airline-backed websites. Orbitz will in my view most likely close the door to any major new entry in the online marketplace.

Orbitz itself claims that it is a new entrant, currently holding a market share of 0%.[387] But, as Senator John McCain expressed at the Hearing of the Senate Committee on Commerce, Science and Transportation: "We need to look at the down-the-road market power of a site that may be the only outlet for the best deals that the airlines have to offer".[388]

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[384] See Baker, supra note 380 at 52.

[385] "T2 answers charges", *supra* note 224.

[386] Hotwire, the airline-backed travel agency for discounted tickets, is being developed with 75 million USD in funding. See Webtravelnews, News Release, "Airline Backed Hotwire to Sell Discounted Tickets" (5 July 2000), online: <http://www.webtravelnews.com/archive/article.html?id=527> (date accessed: 19 January 2001).

[387] This is so because Orbitz is not yet operational.

[388] See *Aviation & Internet Senate Hearings*, Testimony by Senator John McCain, *supra* note 19 at 2.

4. Conclusion

From the above, I tentatively conclude that the Orbitz website will harm competition because it will reduce incentives for the participating airlines to compete. In addition, the participating airlines may knowingly enter into an agreement that facilitates parallel price behaviour. Finally, Orbitz will hamper new entry in the online travel market, as it will be able to secure exclusive access to the best fares.

5. Claimed Potential Pro-competitive Effects of Orbitz

If the Antitrust authorities were to reach the same conclusion, they would have to examine whether the agreement is reasonably necessary to achieve "cognizable efficiencies". In other words, the agreement would have to benefit consumers.

Orbitz argues that it will benefit consumers both directly and indirectly. The direct benefits are said to be that Orbitz will offer *unbiased access* to the fares of *all airlines* (be they equity partners, charter associates, or non-participating airlines)[389] and access to the *lowest fares* of all the participating carriers.[390] Nevertheless, concerns have been voiced in this regard. First, the promise of unbiased fares depends on the fulfilment of two conditions: (1) Orbitz's revolutionary search software must perform as promised, and (2) Orbitz must abide by its Charter.

Orbitz contends that it will indirectly benefit consumers by bringing competitive pressure to the online travel market and to CRSs with respect to display bias. Online travel agencies, which are now said to openly "swing market share" for the airlines willing to sponsor them, will be compelled to remove all bias from their displays in order to remain competitive.

In addition, Orbitz's revolutionary architecture will prompt technological innovation that has long been halted by the CRS-dominated travel distribution chain. Consumers

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[389] Orbitz has the contractual obligation to do so. See *Orbitz Agreement, supra* note 227, s. 3.1

[390] See *Orbitz Agreement, supra* note 227, s. 2.1.(b).

will benefit from better search software that examines *every* possible flight option and provides more up-to-date seat availability data.[391]

Through the rebate on CRS booking fees that it will offer to participating airlines complying with their promotional obligations under the Charter Associate Agreement,[392] Orbitz argues that it will put competitive pressure on these fees, which are often perceived as being excessive.[393] In the long run, Orbitz will connect directly to the carriers internal reservation systems, bypassing CRSs altogether.[394]

Finally, data generated through Orbitz will be the exclusive property of the airline on which the booking is made. Airlines will not be required to pay for this information, and they solely will determine what it may be used for.[395] This will particularly protect smaller airlines, which will not see their data sold to their competitors.

The benefits must not only be verifiable and potentially pro-competitive, but the agreement itself must be reasonably necessary to achieve them, and less restrictive alternatives should not exist to achieve the same benefits. In my opinion, it is doubtful that a MFN clause must be included in the Charter Agreement to obtain the abovementioned pro-competitive benefits. If such is the case, the inclusion of such a clause should be prohibited.

6. The balance: overall Competitive Effect of Orbitz

The assessment of competitive harms and cognizable efficiencies is by necessity an approximate judgement.[396] On the one hand, Orbitz seems to bring significant benefits and innovation to the travel distribution market. On the other, while not amounting to a *per se* violation of antitrust laws, it seems reasonable to assume that Orbitz will

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[391] See *Orbitz's Comments*, *supra* note 180 at 29-33.

[392] See *Orbitz Agreement*, *supra* note 227 s. 2.1.(b).

[393] See *Orbitz's Comments*, *supra* note 180 at 33.

[394] See *ibid.* at 35.

[395] See *Orbitz Agreement*, *supra* note 227, s. 2.1.(c).

[396] See *Competitor Collaboration Guidelines*, *supra* note 81 at 25.

eliminate some of the incentives to compete vigorously in the air transportation market. Furthermore, it is possible that Orbitz will provide a platform for collusion. If Orbitz were able to dominate the online distribution market, it might abuse its position and start charging a premium for participation, just as CRSs did twenty years ago.

The MFN clause, obliging each participating carrier to offer the lowest fares through Orbitz and the incentives to provide Orbitz with those fares exclusively seem clearly anticompetitive and are not reasonably necessary to achieve pro-competitive benefits. Therefore, I consider regulatory intervention on this point to be desirable.

2) The effects of Orbitz on competition within the travel distribution market

At this point, it is important to recall the structure of the online travel market. Airlines and online travel agents each control about 50% of the online travel market, with the balance expected to swing in favour of the airlines.[397] The US online travel agency scene is dominated by a few large online agencies such as Travelocity, Expedia, and Priceline.[398]

Orbitz will indeed bring new and desirable competition to the market of online travel agents. While this finding seems positive, there is a downside: Orbitz will be owned by certain airlines that with others are already controlling over 50% of the online distribution market. Hence, an examination of the effects of the Orbitz collaboration on competition within the online travel market seems warranted, since, as stated above, the Guidelines do not take into account the possible effects of competitor collaborations on limiting competition by rivals,[399] but deal only with the competitive ramifications for those participating[400] in the collaboration.

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[397] See "58% of Online Travel Bookings", *supra* note 178.

[398] See *Zoghlin Presentation*, *supra* note 194.

[399] These could be labelled as "external (competitive) effects" of a competitor collaboration.

[400] These effects can, therefore, be labelled as "internal (competitive) effects" of a competitor collaboration.

The major anticompetitive concern is that the proposed Orbitz arrangement is part of a conscious, concerted, and therefore allegedly illegal scheme by the airlines to rearrange the travel distribution chain by bypassing CRSs and excluding travel agents. The conduct of the airlines is alleged to constitute a concerted refusal to deal with travel agencies –be they on- or offline– through the reduction of travel agents' commissions[401] by the airlines and through the exclusive posting of "Internet-only" fares on the airlines sites' and the common airline portal site. [402]

Alex Zoghlin, Orbitz's CTO, commenting on the relation between declining commission levels and the emergence of websites like Orbitz, stated that like all other online travel services, most of Orbitz's revenues will come from commissions.[403] Therefore, the success of Orbitz would be jeopardised if (online) travel agent commissions were reduced. He seems to forget that at least the equity partner airlines, which pay commissions to Orbitz, are, in a way, paying themselves. A cynical observer might also note that it is possible that the purpose of Orbitz might not be to make money, but to save money. The gains from an even slight decline in commission fees will easily compensate for the possible losses of Orbitz by lower commission fees, while obliging travel agents to charge higher transaction fees, which could, in turn, drive consumers towards sites such as Orbitz - full circle!

With respect to "Internet-only" airfares, which have been discussed above, the Orbitz agreement explicitly states that airlines are free to give all fares offered through Orbitz to anyone else and that all airlines are free to form similar relationships with other travel agencies (online or offline). Therefore, Orbitz argues it competes fairly for access to web fares,[404] while forgetting the powerful incentives built into the Orbitz system not to divulge the lowest fares to other agencies through the MFN clause and in-kind promotional obligations.

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[401] See "ASTA Portal Antitrust Complaint", *supra* note 243 at 2.

[402] "T2 answers charges", *supra* note 224.

[403] See *ibid.*

[404] See *ibid.*

In addition, the promotional obligations of carriers under the Orbitz Charter Agreement could lead to an intense exchange of information that could be used to target customers of other online travel agencies. A striking example of this is to be found in the Charter Agreement, which stipulates that an airline, in order to comply with its promotional obligations, can sell "competitive purchaser names", the data of passengers who booked travel through some online agency.[405]

From the above, it is clear that competition law authorities should be mindful of the implications of Orbitz on competition within the online distribution market.

Changing the tone from observation to speculation, perhaps some confirmation of the final goal of Orbitz might be found in a book published by two senior consultants of the Boston Consulting Group (BCG), which acted as the launch manager of Orbitz.[406] The authors, who acknowledge by name some of the BCG consultants involved in the Orbitz project, advise established retailers wanting to defend themselves against independent "navigators"[407] who are closely affiliated with consumers. As applied to the travel market, the book explains how airlines should best protect themselves them against the powerful travel agencies that have emerged in the online travel marketplace. Nothing quite matches the concise and powerful language of the authors of the book *Blown to Bits – How the New Economics of Information Transforms Strategy* themselves:

> Incumbents have a lot to lose. Product suppliers and traditional retailers alike fear the rise of the agent who facilitates broad-reaching comparisons without even being party to the transaction. However, a component of critical mass for either kind of new navigator is often the incumbents' product information, price lists, and willingness to accept business switched through that navigator. This opens the possibility of *denying critical mass*. If enough suppliers refuse to sell through the e-retailer, or enough retailers refuse to provide information to the dispassionate agent, neither the e-retailer nor the agent can achieve critical mass.[408]

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[405] See *Orbitz Agreement*, *supra* note 227, exhibit B.

[406] See Ph. Evans & T.S. Wurster, *Blown to Bits – How the New Economics of Information Transforms Strategy* (Boston: Harvard Business School Press, 1999).

[407] "Navigators" are intermediaries that guide the consumer through the myriad of choices available on the Internet. In the Internet world, they are often closely affiliated with consumers' interests. Travel agencies are a form of navigators.

[408] See Evans & Wurster, *supra* note 405 at 115.

> Suppliers and retailers are the source of information on product features, price, and availability that the new navigators need. So simply refuse to make that information available![409]
>
> While it is undoubtedly in the interests of all sellers *collectively,* it is not in the interests of any one seller *individually* to deny its own data to the navigator. But if everyone reasons that way, the navigator will achieve critical mass.[410]
>
> Look seriously at alliances to address the affiliation problem: a *group* of suppliers may be able to create a navigator with strong customer affiliation that is more comprehensive and more credible than any of its members.[411]

V) CONCLUSION

Both competition among participants to the Orbitz competitor collaboration and the possible effects of Orbitz on the online distribution market as a whole warrant serious antitrust scrutiny. Several possible regulatory actions can be envisaged, ranging from interdiction or divestiture of the proposed website, to no regulation at all.

The clear and serious anticompetitive concerns identified in this chapter do not imply that more competition in the online travel market would not be welcome, given that the online travel agency market is in fact a duopoly. But in my view, the unregulated entry of Orbitz in the travel distribution market will undermine the goal of bringing more competition to this market. A reasonable solution could be found by allowing the airlines to distribute their product through a common platform on the Internet, whilst disallowing, through a consent order or by direct regulation, the use of a MFN clause. In this way, innovation and competition can be preserved, and new entry will not be deterred.

If the evolution of the market makes this necessary, the Agencies should take regulation a step further by requiring the airlines to offer all fares that they offer through Orbitz to all players in the distribution chain, and to provide these fares the same financial conditions as are offered to the airlines (*e.g.*, a rebate on CRS fees).

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[409] *Ibid.*

[410] *Ibid.* at 139-140.

[411] *Ibid.* at 136.

Even in this case, the antitrust and regulatory authorities will have to keep a close eye on Orbitz, in order to ascertain that no collusion takes place through this common platform, that Orbitz delivers what it promises, *i.e.*, unbiased information and the lowest prices, and that competition in the airline industry in general is protected.

PART III. COMMISSION FEES

I) INTRODUCTION

It would be a mistake to attribute all the changes in the ticket distribution industry solely to the Internet. Rather than a cause, the Internet has been a catalyst in the changing distribution context. As studied in Part I of this thesis, travel agents depend for income on the commission fees they collect from airlines for selling tickets. After deregulation, these commissions increased, until the mid nineties, when they reached more than 10%. Since then there has been a steady decline in commission fees. To compensate for this loss, many travel agencies are now charging so-called "service fees" to their customers for the processing of tickets.

The factual background of commission policies will be studied in the next section. Thereafter, as in the preceding Part, attention will turn to the legal concerns that have been voiced with respect to this dynamic change. It will become clear that here, too, though no hard evidence might be available, the conduct of the airlines has at least an appearance of being collusive. At the same time, the complexity of antitrust analysis and the thin line between competitive parallel behaviour and anticompetitive collusion will become evident.

II) THE DEVELOPMENT OF COMMISSION POLICIES[412]

Before deregulation, airlines fixed commissions jointly. In 1977 the CAB withdrew antitrust immunity from this practice.[413]

At the time of deregulation, travel agents' commissions were about 8% of the value of the ticket. With rapidly changing and increasingly complex fare structures, the dependency of airlines on travel agents grew. In fact, travel agents were at that time

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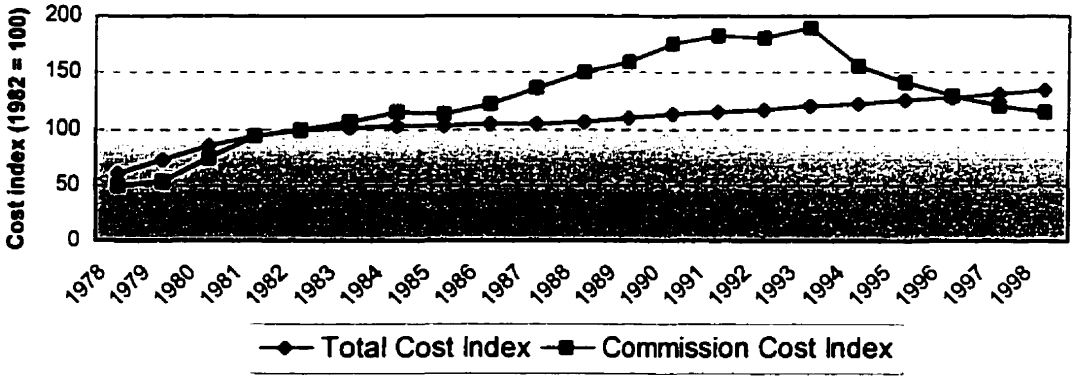
[412] This part focuses on the situation in the United States. In general, in Europe the decline in commission fees has been less dramatic. A decline in airline ticket commissions would also be less problematic in Europe, since, for many travel agents, sales of tour packages carrying high commission fees constitute their core business.

[413] *Aviation & Internet Senate Hearings*, American Society of Travel Agents Testimony, *supra* note 19 at 14.

one of the cheapest means of distributing tickets. Quite naturally, airline competition for travel agency sales led to higher standard commission levels and the introduction of additional incentives for travel agents, such as "override" commissions and free tickets.

By 1993, commission fees had risen to 10.9% of the value of the ticket, before topping in 1995 at 11.19% of the cost of the ticket. At the same time, in the early 1990's, airlines were registering massive losses. Commission costs, the fourth largest expense after labour, fuel, and aircraft fleet,[414] directly contributed to this poor result as commission costs grew a great deal faster than total costs (Figure 8).

Figure 8. Airlines' Cost Indices



Source: Air Transport Association and US airlines (1999)

In order to avoid bankruptcy, airlines had to cut costs on all fronts. In February 1995, a first step was taken by Delta Airlines, which capped commission payments on domestic tickets at USD 50 per roundtrip ticket, thereby effectively reducing commission levels for all flights costing more than USD 500.[415] Other major airlines followed suit.[416] In September 1997, the major airlines reduced domestic commission

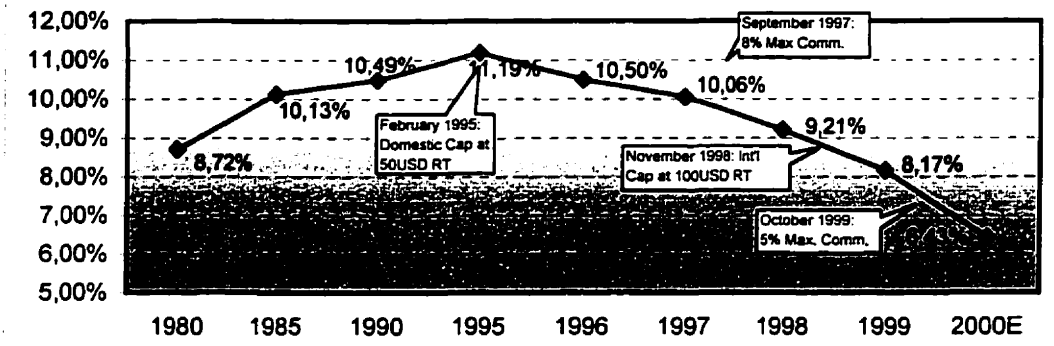
[414] See Air Transport Association, Airline Cost Index – Fourth Quarter 1999, online: <http://www.air-transport.org/public/industry/34.asp> (date accessed: 3 July 2000).

[415] The customary commission rate for domestic flights was at that time about 10%.

[416] See *GAO Airline Ticket Report*, *supra* note 16 at 6.

levels to 8%,[417] and in November 1998, international flights were capped at USD 100 for a round trip ticket and commission levels for international flights were reduced to 8%. Finally, in October 1999, commissions were further cut to 5% (Figure 9).

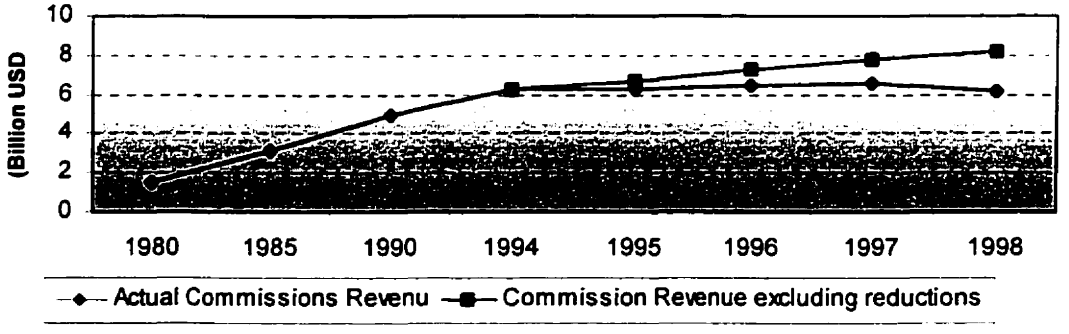
Figure 9. Average Commission Rate (All Fares)



Source: ASTA Senate Testimony

The result of these commission cuts has been a tremendous loss in travel agency revenues. Had domestic and international commission rates remained at their peak levels, travel agencies would have earned USD 4.3 billion more from 1995 to 1998. Figure 10).

Figure 10. Actual v. Potential commission revenu

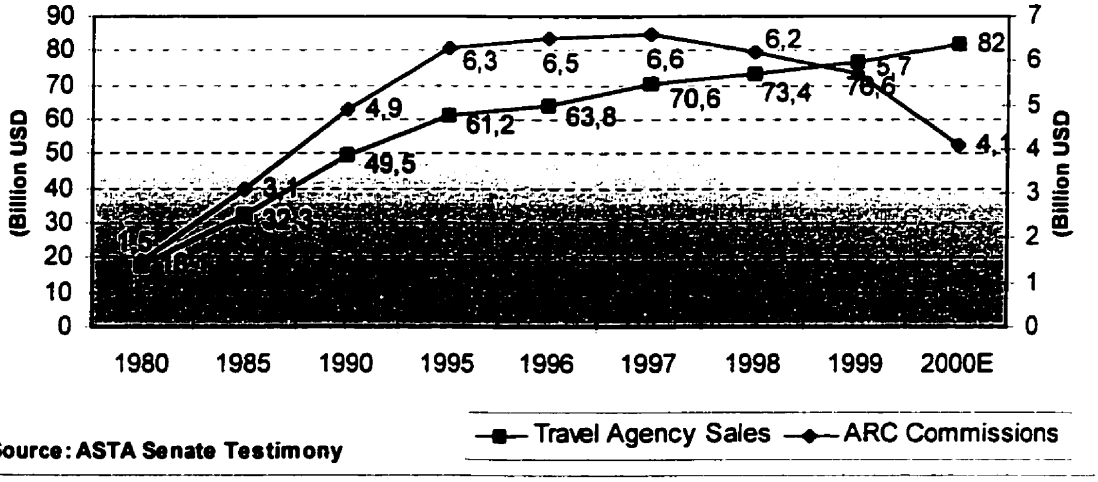


Source: GOA 1999 Study

[417] Except for Southwest Airlines, which maintained a 10% commission with no cap for *offline* transactions. See *ibid.*

Nevertheless, total income generated from ticket sales still grew. From 1997 on, higher ticket sales were no longer able to compensate for the loss of income caused by decreasing commission levels. Consequently, total revenues generated by commissioned airline ticket sales started dropping in 1998, and have been declining ever since (Figure 11).

Figure 11. Total Travel Agency Sales v. Commissions



Source: ASTA Senate Testimony

Due to this drop in income, travel agents started charging "service fees " for what had always been free, *viz.* the processing of tickets, lost ticket applications, visa services, etc. Currently, these service fees typically range from USD 5 to USD 30, with USD 13 being the average.[418]

At the same time, travel agents and airlines alike discovered the Internet as a new and promising way to distribute travel services. Arguing that online distribution was substantially cheaper for travel agencies, airlines decided to discriminate between on- and offline commission levels. In July 1996, Northwest Airlines and Continental Airlines reduced commissions for online transactions to 5%, with a cap of USD 25 for domestic roundtrips and USD 40 for international roundtrips.[419] After several rounds

[418] ASTA, Press Release, "Vast majority of ASTA agents charging service fees, study shows" (10 March 2000), online: Astanet News Releases <http://www.astanet.com/news/releasearchive/03_10_00b.html> (date accessed: 14 June 2000).

[419] See *ITSA Comments, supra* note 319 at 8.

of commission cuts, most airlines apply commission fees of 4-5% with a cap ranging from USD 5 to USD 10 for domestic roundtrips.[420]

Southwest Airlines went even further, becoming the first airline to make Internet sales non-commissionable in 1998.[421] On 28 February 2001, Northwest Airlines and KLM decided to follow the example of Southwest.[422]

III) THE FUTURE: TOWARDS A GENERALIZED ZERO-COMMISSION POLICY?

In any scenario, travel agency distribution, be it on- or offline, will remain an important part of the travel distribution industry. Sabre predicts that by 2005 "brick and mortar" travel agencies will still account for 45% of air ticket sales in the United States, while online travel agencies will account for another 20% of sales.[423]

Since the travelling public is willing to pay for the services travel agents offer, the fact remains that (major) airlines simply cannot afford to miss out on these tickets. For this reason, individual airlines have an economic incentive to continue to commission airline ticket sales. At this moment, the zero commission policy of Southwest, Northwest, and KLM remains the exception. In the case of Southwest, it can be explained by the fact that this airline has always been the champion of direct sales. For Northwest and KLM, the reasons behind this latest move are not clear, but they could be linked to the imminent launch of Orbitz.[424]

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[420] See *ibid.* See also Webtravelnews, News Release, "United Airlines Cuts Travel Agent Commissions" (7 October 1999), online: <http://www.webtravelnews.com/archive/article.html?id=307> (date accessed: 10 March 2001).

[421] See *ITSA Comments, supra* note 319 at 9.

[422] See Webtravelnews, News Release, "Northwest Ends Online Commissions, Online Agencies Unfazed" (1 March 2001) online: <http://www.webtravelnews.com/article.html?id=711> (date accessed: 10 March 2001) [hereinafter "Northwest ends commissions"]

[423] See N. Godwin, "Sabre: Agents Could Retain 65% of Air Sales by 2005" *Travel Weekly* (3 April 2000) 10.

[424] See "Northwest ends commissions", *supra* note 422. See also Webtravelnews, News Release, "Why Other Airlines are Slow to Follow Northwest's Cut" (7 March 2001) online: < http://www.webtravelnews.com/article.html?id=716> (date accessed: 10 March 2001), stating that the best way for the airlines to prove that they are not colluding, just weeks before the launch of Orbitz, is to have one of them cutting commissions and the others not following suit.

Therefore, I do not believe that on an individual basis and for most airlines, a zero-commission policy is economically sound. Still, it goes without saying that for the airline industry as a whole, lower commission fees mean enormous savings.

IV) Changing Commission Policies: A Violation of Antitrust Laws?

1) Introduction

Shortly after the first round of commission cuts was announced, ASTA accused the airlines of collusive behaviour in an attempt to drive travel agents out of business. Aspects of this lawsuit will be examined below.

In addition, it has been argued that the difference in commission levels between on- and offline distribution channels constitutes illegal discrimination, as both kinds of travel agents perform the same functions. This allegation will be concisely examined below.[425]

The fundamental change in the ticket distribution industry by the changing relationship between travel agents and airlines prompted ASTA to react in several ways. First, the "Operation: Take Control" initiative was implemented. This operation involved lobbying Congresses at both the federal and state levels to obtain legislation favourable to travel agents.[426] Second, a national public relations campaign was launched to inform the travelling public of the commission cuts implemented by the airlines and of the new ticketing fees travel agents had to charge to compensate for at least a fraction of their income losses.[427] Third, and most importantly, in 1995, ASTA filed an antitrust complaint under Section 1 of the *Sherman Act* against the seven largest US airlines,[428] which together control 85% of the domestic air travel market, alleging that the airlines were colluding to eliminate travel agents from the

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[425] See Section V at 123.

[426] See Pate, *supra* note 82 at 947.

[427] See *ibid.* at 948.

[428] These are American Airlines, Continental Airlines, Delta Airlines, Northwest Airlines, Trans World Airlines, United Airlines and USAir.

distribution chain, thereby unreasonably restraining trade affecting interstate commerce and violating Section 1 of the *Sherman Act*.

After summary judgment, this *Travel Agency Commission Antitrust Litigation*[429] case was settled out of Court for USD 86 million, in order to avoid lengthy litigation with an uncertain outcome.[430]

2) Legal Analysis

Notwithstanding this out-of-court settlement, it is useful to analyse the legal reasoning in this case to fully understand the difficulties in proving a claim in the complex setting of travel distribution. It might be useful to remember that in order to constitute a *Sherman Act* Section 1 violation three elements must be proven by the plaintiff.[431] The first element is direct or circumstantial proof of a contract, agreement, or conspiracy for the purpose of restraining trade. The second element is that the restraint of trade must affect interstate commerce. The third element, developed through case law, requires that except in the case of "per se" violations of the *Sherman Act* (notably price fixing and market division) the restraint be unreasonable.

As in most antitrust cases, no direct proof of collusion was present in the case at hand. Therefore, ASTA had to rely on circumstantial evidence.

In order for circumstantial evidence to be allowed in antitrust cases, it must satisfy a double test, which is enforced by a specific summary judgment inquiry. First, the defendants in the antitrust case must have an economic motive to conspire.[432] In other words, the conspiracy must make business sense. ASTA's complaint in the *Travel Agency Commission* case contended that the new commission policies constituted a case of conspiracy to eliminate travel agents by *non-price predation*. Non-price

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[429] See *In re Travel Agency Commission Antitrust Litigation*, 898 F. Supp. 685 (D. Minn. 1995) [hereinafter *In re Travel Agency*].

[430] See Pate, *supra* note 82 at 944-945.

[431] See *Fuentes* v. *South Hills Cardiology*, 946 F.2d 196 at 198 (3d Cir. 1991).

[432] See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 at 587 (1986) [hereinafter *Matsushita Elec.*].

predation is a form of predation whereby competitors are targeted, not by fare wars, but by increasing their costs, or limiting their income, or both.[433] In this case, as the colluding firms suffered no long- or short-term losses, colluding to eliminate travel agents by lowering their commission fees makes economic sense.[434]

Second, joining the conspiracy must be consistent with the independent interests of the defendants.[435] In the case at hand, cooperation to reduce commission fees seems consistent with the airlines' goal to cut costs. Thus, the Court refused to grant a summary judgment against ASTA, finding that collusion would be at least economically plausible. This finding, however, was not enough to establish the existence of a conspiracy, the first condition to establish a Section 1 violation.

To prove a conspiracy relying solely on circumstantial evidence, a plaintiff may have recourse to evidence of parallel behaviour. However, this in itself does not establish the existence of a conspiracy, as it may be the manifestation of legitimate business considerations. In the *Travel Agency Commission* case, the airlines argued that parallel behaviour was normal in an oligopolistic market with widely disseminated information.[436] They did not however explain why, in the late 1980's, several unilateral attempts to reduce commission fees had failed,[437] and why now, in the same market, the parallel behaviour had appeared. Hence, at first sight, there was an appearance of a conscious parallelism. Unfortunately, the Court did not have the chance to rule on this point, so the matter remains undecided.

It is important to note that the airlines could have argued that a link exists between the emergence of the Internet as an important means of ticket distribution and the decline in commission fees. An airline could feel confident that it would be able to make up the shortfall in travel agency business due to a cut in commissions by offering customers lower fares on its own website.

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[433] See Pate, *supra* note 82 at 951.

[434] See *ibid.*

[435] See *Matsushita Elec.*, *supra* note 432 at 587.

[436] See *In re Travel Agency, supra* note 429 at 688.

If the court had nevertheless found a situation of conscious parallelism, the plaintiffs would have had to prove some additional elements, called "plus factors". These "plus factors" establish that a defendant has both the motive ("plausible reason") and the opportunity to collude.[438] As established by the summary judgment procedure, the motive to collude seems to be present in this case. No airline on its own can reduce commission fees without risking losing business. Conversely, cooperation allows the airlines to reduce commissions while risking nothing.

Another "plus factor" that ASTA would have had to demonstrate is the opportunity to collude, indications of which possibly could have been found in public speeches, subtle press releases, private dinners, etc.

If ASTA had succeeded in proving the existence of a conscious parallelism, which is not certain, and of the abovementioned "plus factors", a conspiracy in restraint of trade would have been found. Obviously, a conspiracy between the airlines would affect interstate commerce, thus proving the second element, since the airlines and most travel agents conduct business on a national or even global scale.

The third element to be proven is the unreasonableness of the restraint of trade. Two rules have been developed by the US Supreme Court to test the unreasonable character of a contract, agreement, or conspiracy: the "per se rule" and the "rule of reason". In my view, a proven collusion between airlines to exclude travel agents from the travel distribution chain would qualify as a "per se" violation of antitrust law and would constitute a *(horizontal) group boycott* as both individual airlines and travel agents are direct competitors for the purpose of distributing air travel.[439]

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[437] See Pate, *supra* note 82 at 962.

[438] *Ibid* at 956.

[439] The article by I. Pate analyses the behaviour of the airlines in terms of a *vertical restraint* in the relationship between airlines and travel agencies, while acknowledging, "evidence of horizontal collusion among the airlines to eliminate travel agency commissions would invoke per se analysis." See *ibid.* at 966, footnote 149.

At first sight, a serious problem arises in this particular factual context. Normal boycotts involve a concerted refusal to buy or sell. In the case at hand, the airlines did not refuse to buy or sell, and they were under no obligation to pay commission fees.

A somewhat creative interpretation of the agency relationship might solve this problem. If one equates the airlines with the buyers of the services of travel agents, the concerted reduction in commission fees might be construed as a refusal to buy, amounting to a "per se" violation of antitrust laws. In other words, while a single airline is completely free not to buy the services of travel agents, it may not act collusively with other airlines in order to lower the price of those services, or to drive travel agents out of business.

However, as far as the conduct of the airlines would be judged to be necessary to achieve the pro-competitive benefits that flow from the cooperation, the conduct of the airlines, even when on its face a *per se* violation of antitrust law, would have to be analysed under the rule of reason, involving an inquiry into the overall competitive effect of the competitor collaboration. Since this rule of reason analysis has already been undertaken in the last chapter of the preceding part of this thesis, I will limit the present analysis to some general remarks.

In my view, cooperation among airlines for the purpose of lowering distribution costs by agreeing on a change to the distribution system would qualify as a marketing collaboration involving agreement on the use of a network of distributors.[440] Alternatively, this type of agreement could be qualified as cooperation for the purpose of buying the services of travel agents. Cooperation in this field might enable the airlines, the buyers of the services of travel agents, to drive down prices (*i.e.*, commission fees) below what likely would have prevailed in the absence of the agreement.[441]

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[440] Cf. *Competitor Collaboration Guidelines*, *supra* 81 at 14.

[441] See *ibid.*

The nature of these types of agreements carries the potential for anticompetitive harm by limiting independent decision-making or by combining financial interests or control. In addition, a common platform could provide a forum for collusion.[442]

At first sight, the decline in commission fees might appear to have no significant bearing on the ability or incentives to compete between the airlines. This might be true if the decline in commission rates were a stand-alone phenomenon. There are however various other developments in the air travel industry that do not increase the likelihood of cutthroat competition, notably the emergence of airline alliances, mergers, and most importantly, the appearance of common online distribution channels.

Competitive harm will flow from the loss of travel agency service and from higher prices. It is clear that the value of the loss of travel agency service is not easily measurable.

The benefits of the alleged collusive behaviour are evident. Lower commission costs reduce the operation costs for airlines. The question is whether the efficiencies can be said to be cognizable. This means that they have to benefit consumers (*e.g.*, through lower prices or better service) and that they cannot be achieved through significantly less restrictive means. Particularly, the first condition could turn out to be difficult for the airlines to prove in an antitrust litigation. It is, for example, not certain, and in any event difficult to verify, that savings by the airlines are being passed on to the consumer. And even if part of the savings were passed on, this efficiency might be offset by the loss in service of travel agents.

As an alternative to analysis under Section 1 of the *Sherman Act*, the conduct of the airlines could also be analysed as a conspiracy to monopolize the travel distribution industry, a violation of Section 2 of the *Sherman Act*. Here, however, the specific intent to monopolize must be proven, which is never easy.[443]

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[442] See *ibid.*

[443] See Lifland, *supra* note 87 at 203 *in fine*.

V) ONLINE VERSUS OFFLINE COMMISSION POLICIES: A LICIT DISCRIMINATION?

As stated above, different commission fee levels apply to bookings made through the Internet and to sales made through traditional travel agency channels. The question has arisen whether the differentiation in commission fees between bookings made through the Internet and bookings made by other means, such as those made by telephone, is discriminatory and illegal.

It is important to note in this respect that buyers or sellers have traditionally been afforded the right, providing they are acting independently, to select those with whom they do business, and to determine the terms of these contractual arrangements. This brings us to similar antitrust problems as in the preceding section. Once again, the crucial point is to prove a tacit understanding between the airlines.[444] Of importance to this analysis is whether the conduct of the airlines has any reasonable business justification and whether there are any pro-competitive effects. Airlines allege that lower commission fees reflect the lower costs for travel agencies to distribute travel through the Internet,[445] and benefit the travelling public.

VI) CONCLUSION

In tandem with the emergence of the Internet as a means of distribution of airline tickets, nearly all airlines have implemented new and lower commission policies. In addition, they started discriminating between on- and offline commission fees. It is not clear at this point whether this decline in commission fees is the expression of a tacit collusive plan by the airlines to slowly strangle the travel agency business, or whether the airlines individually felt confident that they could implement revised commission policies, hoping that the Internet would make up for any loss they would suffer due to upset travel agents.

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[444] The analysis is analogous to the analysis respecting the decline in commission fees and will therefore not be repeated.

[445] See *ITSA Comments*, *supra* note 319 at 10-12.

This last view could explain why airlines felt confident they could reduce commission fees almost to nothing when dealing with online travel agents. Here there are no long-lasting relationships to be soured. In addition, the airlines already hold 50% of the online travel market. Any loss of online travel agency business could possibly be easily recuperated by higher direct online sales. It will become even easier for airlines to recover lost business when an airline-owned venture such as Orbitz or OTP becomes operational.

PART IV. ONLINE TRAVEL: A CONCLUSION

Drawing conclusions always seems a dangerous undertaking. Premises change, conditions do not materialize, facts are misperceived. However, it is a fact, and the first conclusion of this thesis, that the travel distribution market is changing.

In the first chapters, the traditional travel distribution chain, as it stood until a few years ago, was dissected. We saw that deregulation necessitated the development of CRSs, which soon proved to offer a major competitive advantage for those airlines having the financial means to develop them.

The US government thought it wise to address the legitimate competition law concerns connected to the operation and use of CRSs through both direct regulation and antitrust law, each having its strengths and weaknesses.

The structure of the CRS market itself calls for a conscious and continuous balancing of interests. Proprietor airlines, subscriber airlines, CRSs, travel agents and consumers all hold different views of how the travel distribution industry should be organized and regulated.

Some authors foresaw a lessened need for regulation, or at least a changing regulatory context due to the technological changes still to come.[446] As one author wrote in 1990:

> Particular technological changes will significantly affect the CRS market in ways relevant to the proposed regulatory action. [...] [T]he burgeoning ability to access CRSs through home and business computers allows customers to bypass travel agents. Thus, technological change may overrun any potential "bottleneck" of travel agents as the sole distribution source and obviate the need for regulatory interference.[447]

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[446] *E.g.*, see Leaming, supra note 5 at 513; "Legal and Regulatory Implications" *supra* note 3 at 1946-1947.

[447] "Legal and Regulatory Implications", *ibid.*

An airline official predicted in 1992: "The next wave, from an airline point of view, is how to bypass your CRS."[448]

The Internet is now emerging as this alternative travel services distribution channel, radically changing the structure of the travel distribution chain. But the emergence of the Internet is not a stand-alone phenomenon. At the same time as the Internet slowly made its way into the homes of millions of people around the globe, the attitude of airlines towards travel agents started to change.

Whether the link between these two phenomena is causal or not, it is certain that the Internet offers airlines the first real possibility to distribute their product directly to the travelling public, without duplicating the high costs of a complex distribution network. In this sense, the advent of the Internet was exactly what the airlines had been waiting for during the better part of two decades, during which they showed their growing frustration at ever-increasing booking and commission fees.

Confident in their ability to distribute their product themselves, and dissatisfied with governments intervening in the operation and (thus) in the profitability of the CRSs they owned, the airlines have been divesting themselves of the ownership interests they had held on to so firmly for many years.

These evolutions abruptly put an end to the relative cease-fire between airlines, CRSs, and travel agents. The balance has been broken, and traditional links are being severed.

In this phase of uncertainty, all parties, and especially those who stand to lose the most, are trying to protect their former privileges whilst rethinking their role in the new and dynamic distribution context. One way to protect privileges, or for that matter to destroy them, is through law. It is therefore no wonder that many concerns are being voiced respecting the new Internet distribution development. Should the CRS Rules be extended to the Internet distribution environment? Will the Internet decrease the need for stringent regulation of CRSs? Will stringent regulation kill

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[448] Leaming, *supra* note 5 at 513.

innovation? Should the airlines be allowed to cooperate in a joint hybrid travel intermediary? Is all this part of a master plan by the airlines to kill competition in the travel industry?

I chose to focus on two particular questions that have been at the centre of the debate on "the Internet and travel distribution".

First, I examined whether the current CRS Regulations should be amended to cover situations of online distribution. I concluded that the debate as to the applicability of the CRS rules to the Internet is in a sense a false debate that should refocus on the issue of bias in general, and "travel agency bias" in particular. The regulatory authorities have to examine and decide whether travel agents and other travel intermediaries, notably airline-sponsored travel portals, can legally reshape the (supposedly bias-free) information provided by a CRS, be it into a display favouring a preferred airline, or be it in another way such as orally by the travel agent, who has some obscure incentive in mind.

It is important to realize in this respect that airlines are not only divesting themselves of their interest in CRSs, but that they are also (jointly) moving into the travel agency business. In addition, the distinction between on- and offline travel agencies is blurring with the emergence of "click and mortar" agencies.

I concluded that on- and offline travel agents, CRSs, and airline-owned consortiums alike should be bound by the legal obligation to provide unbiased, consumer-oriented information.

The emergence of airline-owned hybrid travel intermediaries, named consortium websites or multi-airline portals, stood at the centre of the second part of this thesis. Orbitz, the common platform of the major US carriers, was chosen as subject for analysis. I concluded that both the analysis of competition between the participants to Orbitz and the possible effects of Orbitz on competition within the online distribution market as a whole warrant serious antitrust scrutiny. I noted that more competition in the online travel market would be very welcome, given the fact that the online travel agency market is in fact a duopoly. But I tentatively concluded that the

unregulated entry of Orbitz into the travel distribution market would ultimately undermine the goal of bringing more competition to this market.

In my view, a reasonable way to deal with the emergence of these airline-owned online distributors would be to allow the airlines to distribute their product through a common platform on the Internet, whilst disallowing the organization of this platform in a way that could lead to the exclusive offering of fares on the common platform. In this way, innovation and competition can be preserved, and new entry will not be deterred.

If the market nevertheless evolves in an anticompetitive direction, the relevant government agencies should not hesitate to take regulation a step further by requiring the airlines to offer all fares that they offer through Orbitz to all players in the distribution chain.

Even in this case, the antitrust and regulatory authorities will have to keep a close eye on Orbitz, in order to ascertain that competition in the online travel marketplace remains healthy, while at the same time exercising prudence to protect competition, not the competitors. In fulfilling their mission, the antitrust and regulatory authorities have the most uncomfortable task of fostering competition in a dynamic and changing market. I can only wish them well.

APPENDIX A

CODE OF FEDERAL REGULATIONS - TITLE 14 - AERONAUTICS AND SPACE

CHAPTER II--OFFICE OF THE SECRETARY, DEPARTMENT OF TRANSPORTATION (AVIATION PROCEEDINGS)

PART 255--CARRIER-OWNED COMPUTER RESERVATIONS SYSTEMS

Sec. 255.1 Purpose.

(a) The purpose of this part is to set forth requirements for the operation by air carriers and their affiliates of computer reservations systems used by travel agents so as to prevent unfair, deceptive, predatory, and anticompetitive practices in air transportation.

(b) Nothing in this part operates to exempt any person from the operation of the antitrust laws set forth in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12).

Sec. 255.2 Applicability.

This rule applies to air carriers and foreign air carriers that themselves or through an affiliate own, control, operate, or market computerized reservations systems for travel agents in the United States, and to the sale in the United States of interstate, overseas, and foreign air transportation and of other airline services through such systems. Each carrier that owns, controls, operates, or markets a system shall ensure that the system's operations comply with the requirements of this part.

Sec. 255.3 Definitions.

Affiliate means any person controlling, owned by, controlled by, or under common control with a carrier.

Availability means information provided in displays with respect to the seats carrier holds out as available for sale on a particular flight.

Carrier means any air carrier, any foreign air carrier, and any commuter air carrier, as defined in 49 U.S.C. 1301(3), 49 U.S.C. 1301(22), and 14 CFR 298.2(f), respectively, that is engaged directly in the operation of aircraft in passenger air transportation.

Discriminate, discrimination, and discriminatory mean, respectively, to discriminate unjustly, unjust discrimination, and unjustly discriminatory.

Display means that system's presentation of carrier schedules, fares, rules or availability to a subscriber by means of a computer terminal.

Integrated display means any display that includes the schedules, fares, rules, or availability of all or a significant proportion of the system's participating carriers.

On-time performance code means a single-character code supplied by a carrier to the vendor in accordance with the provisions of 14 CFR part 234 that reflects the monthly on-time performance history of a nonstop flight or one-stop or multi-stop single plane operation held out by the carrier in a CRS.

Participating carrier means a carrier, including a system owner, that has an agreement with a system for display of its schedules, fares, or seat availability, or for the making of reservations or issuance of tickets through a system.

Service enhancement means any product or service offered to subscribers or participating carriers in conjunction with a system other than the basic display of information on schedules, fares, rules, and availability, and the basic ability to make reservations or issue tickets for air transportation.

Subscriber means a ticket agent, as defined in 49 U.S.C. 1301(40), that holds itself out as a neutral source of information about, or tickets for, the air transportation industry and that uses a system.

System means a computerized reservations system offered by a carrier or its affiliate to subscribers for use in the United States that contains information about schedules, fares, rules or availability of other

carriers and provides subscribers with the ability to make reservations and to issue tickets, if it charges any other carrier a fee for system services.

System owner means a carrier that holds five percent or more of the equity of a system, that has one or more affiliates that hold such an equity interest, or that together with affiliates holds such an interest.

Sec. 255.4 Display of information.

(a) All systems shall provide at least one integrated display that includes the schedules, fares, rules and availability of all participating carriers in accordance with the provisions of this section. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other displays maintained by the system vendor. No system shall make available to subscribers any integrated display unless that display complies with the requirements of this section.

(1) Each system must offer an integrated display that uses the same editing and ranking criteria for both on-line and interline connections and does not give on-line connections a system-imposed preference over interline connections. This display shall be at least as useful for subscribers, in terms of functions or enhancements offered and the ease with which such functions or enhancements can be performed or implemented, as any other display maintained by the system vendor.

(2) Each integrated display offered by a system must either use elapsed time as a significant factor in selecting service options from the database or give single-plane flights a preference over connecting services in ranking services in displays.

(b) In ordering the information contained in an integrated display, systems shall not use any factors directly or indirectly relating to carrier identity.

(1) Systems may order the display of information on the basis of any service criteria that do not reflect carrier identity and that are consistently applied to all carriers, including each system owner, and to all markets.

(2) When a flight involves a change of aircraft at a point before the final destination, the display shall indicate that passengers on the flight will change from one aircraft to another.

(3) Each system shall provide to any person upon request the current criteria used in editing and ordering flights for the integrated displays and the weight given to each criterion and the specifications used by the system's programmers in constructing the algorithm.

(c) Systems shall not use any factors directly or indirectly relating to carrier identity in constructing the display of connecting flights in an integrated display.

(1) Systems shall select the connecting points (and double connect points) to be used in the construction of connecting flights for each city pair on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including each system owner, and to all markets.

(2) Systems shall select connecting flights for inclusion (``edit") on the basis of service criteria that do not reflect carrier identity and that are applied consistently to all carriers, including each system owner.

(3) Systems shall provide to any person upon request current information on:

(i) All connecting points and double connect points used for each market;

(ii) All criteria used to select connecting points and double connect points;

(iii) All criteria used to ``edit'' connecting flights; and

(iv) The weight given to each criterion on paragraphs (c)(3) (ii) and (iii) of this section.

(4) Participating carriers shall be entitled to request that a system use up to five connect points (and double connect points) in constructing connecting flights for the display of service in a market. The system may require participating carriers to use specified procedures for such requests, but no such procedures may be unreasonably burdensome, and any procedures required of participating carriers also must be used by any system owner when it requests or causes its system to use specific points as connect points (or double connect points).

(5) When a system selects connecting points and double connect points for use in constructing connecting flights it shall use at least fifteen points and, after September 15, 1993, six double connect points, for each city-pair, except that a system may select fewer such connect or double connect points for a city-pair where:

(i) Fewer than fifteen connecting points and six double connect points meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria, along with all additional connecting points and double connect points requested by participating carriers.

(6) If a system selects connecting points and double connect points for use in constructing connecting flights it shall use every point requested by itself or a participating carrier up to the maximum number of points that the system can use. The system may use fewer than all the connect points requested by itself and participating carriers to the extent that:

(i) Points requested by the system and participating carriers do not meet the service criteria described in paragraph (c)(1) of this section; and

(ii) The system has used all the points that meet those criteria.

(d) Each system shall apply the same standards of care and timeliness to loading information concerning participating carriers as it applies to the loading of its own information or the information of a system owner. No system owner may use procedures for providing information on its own services to its system that are not available to participating carriers. Each system shall provide to any person upon request all current data base update procedures and data formats.

(e) Systems shall use or display information concerning on-time performance of flights as follows.

(1) Within 10 days after receiving the information from participating carriers or third parties, each system shall include in all integrated schedule and availability displays the

on-time performance code for each nonstop flight segment and one-stop or multi-stop single plane flight, for which a participating carrier provides a code.

(2) A system shall not use on-time flight performance as a ranking factor in ordering information contained in an integrated display.

(f) Each participating carrier shall ensure that complete and accurate information is provided each system in a form such that the system is able to display its flights in accordance with this section.

(g) A system may make available to subscribers the internal reservations system display of a system owner or other participating carrier, provided that all participating carriers are offered the ability to make their internal reservations displays available to subscribers, and provided further that a subscriber and its employees may see any such display only by requesting it for a specific transaction.

[Amdt. 255-9, 57 FR 43834, Sept. 22, 1992, as amended at 62 FR 63847, Dec. 3, 1997]

Sec. 255.5 Defaults and service enhancements.

(a) In the event that a system offers a service enhancement to a system owner or other participating carrier, it shall offer the enhancement to all participating carriers on nondiscriminatory terms, except to the extent that such service enhancement is still in the development stage or that participation is not immediately feasible for technical reasons, in which event the system shall make it available to all participating carriers as soon as possible.

(b) After October 1, 1993, no system may create or maintain a default in any system feature that automatically prefers one or more system owners over other participating carriers.

Sec. 255.6 Contracts with participating carriers.

(a) No system may discriminate among participating carriers in the fees for participation in its system, or for system-related services. Differing fees to participating carriers for thesame or similar levels of service shall be presumed to be discriminatory.

(b) No system may condition participation in its system on the purchase or sale of any other goods or services.

(c) Notwithstanding paragraph (b) of this section, a system may condition participation in its system in the United States on a participating carrier's agreement to participate in the system or affiliated systems in other countries, if the system and such affiliates agree that:

(1) The display of services in such system and its affiliates will not use any factors related to carrier identity and

(2) Any fees charged the carrier shall not be discriminatory.

(d) A system shall provide upon request to carriers current information on its fee levels and fee arrangements with other participating carriers. A system's bill to a participating carrier for any fee must contain adequate information and be on magnetic media so that the participating carrier can determine whether the bill is accurate. At a minimum, booking fee bills must include the following information for each segment: PNR record locator number, passenger name, booking status, agency ARC number, pseudo-city code, CRS transaction date, city-pair information, flight number, flight date, class of service, and type of CRS booking.

(e) No system may require a carrier (other than a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system) to maintain any particular level of participation or buy any enhancements in its system on the basis of participation levels or enhancements selected by that carrier in any other foreign or domestic computerized reservations system. A system may not compel a carrier that owns or markets, or is an affiliate of a person that owns or markets, a foreign or domestic computerized reservations system, to maintain a particular level of participation or buy an enhancements in its system on the basis of participation levels or enhancements selected by that carrier in another foreign or domestic computerized reservations system, until 14 days after it has given the Department and such carrier written notice of its intent to take such action.

[Amdt. 255-9, 57 FR 43834, Sept. 22, 1992, as amended at 62 FR 59802, Nov. 5,1997]

Sec. 255.7 System owner participation in other systems.

(a) Each system owner shall participate in each other system and each of its enhancements (to the extent that such owner participates in such an enhancement in its own system) if the other system offers commercially reasonable terms for such participation. Fees shall be presumed commercially reasonable if:

(1) They do not exceed the fees charged by the system of such system owner in the United States or

(2) They do not exceed the fees being paid by such system owner to another system in the United States.

(b) Each system owner shall provide complete, timely, and accurate information on its airline schedules, fares, and seat availability to each other system in which it participates on the same basis and at the same time that it provides such information to the system that it owns, controls, markets, or is affiliated with. If a system owner offers a fare or service that is commonly available to subscribers to its own system, it must make that fare or service equally available for sale through each other system in which it participates.

Sec. 255.8 Contracts with subscribers.

(a) No subscriber contract may have a term in excess of five years. No system may offer a subscriber or potential subscriber a subscriber contract with a term in excess of three

years unless the system simultaneously offers such subscriber or potential subscriber a subscriber contract with a term no longer than three years. No contract may contain any provision that automatically extends the contract beyond its stated date of termination, whether because of the addition or deletion of equipment or because of some other event.

(b) No system may directly or indirectly impede a subscriber from obtaining or using any other system. Among other things, no subscriber contract or contract offer may require the subscriber to use a system for a minimum volume of transactions, and no subscriber contract or contract offer may require the subscriber to lease a minimum number or ratio of system components based upon or related to:

(1) The number of system components leased from another system vendor or

(2) The volume of transactions conducted on any other system.

(c) No system owner may require use of its system by the subscriber in any sale of its air transportation services.

(d) No system owner may require that a travel agent use or subscribe to its system as a condition for the receipt of any commission for the sale of its air transportation services.

(e) No system may charge prices to subscribers conditioned in whole or in part on the identity of carriers whose flights are sold by the subscriber.

Sec. 255.9 Use of third-party hardware, software and databases.

(a) No system may prohibit or restrict, directly or indirectly, the use of:

(1) Third-party computer hardware or software in conjunction with CRS services, except as necessary to protect the integrity of the system, or

(2) A CRS terminal to access directly any other system or database providing information on airline services, unless the terminal is owned by the system.

(b) This section prohibits, among other things, a system's:

(1) Imposition of fees in excess of commercially reasonable levels to certify third-party equipment;

(2) Undue delays or redundant or unnecessary testing before certifying such equipment;

(3) Refusal to provide any services normally provided subscribers because of a subscriber's use of third-party equipment or because of the subscriber's using the same equipment (unless owned by the system) for access to both the system and to another system or database; and

(4) Termination of a subscriber contract because of the subscriber's use of third-party equipment or use of the same equipment for access to the system and to another system or database.

(c) A system shall make available to developers of third-party hardware and software on commercially reasonable terms the nonproprietary system architecture specifications and other

nonproprietary technical information needed to enable such developers to create products that will be compatible with the system.

(d) Nothing in this section shall be construed to require any system or system owner to:

(1) Develop or supply any particular product, device, hardware or software to enable a subscriber to use another system, or

(2) Provide service or support with respect to any product, device, hardware, software, or service not provided to a subscriber by the system or system owner.

Sec. 255.10 Marketing and booking information.

(a) Each system shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to carriers that it elects to generate from its system. The data made available shall be as complete and accurate as the data provided a system owner.

(b) Each system shall make available to all foreign participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to bookings on international services that it elects to generate from its system, provided that no system may provide such data to a foreign carrier if the foreign carrier or an affiliate owns, operates, or controls a system in a foreign country, unless such carrier or system provides comparable data to all U.S. carriers on nondiscriminatory terms. Before a system provides such data to a foreign carrier, it shall give written notice to each of the U.S. participating carriers in its system that it will provide such data to such foreign carrier. The data made available by a system shall be as complete and accurate as the data provided a system owner.

(c) Any U.S. or foreign carrier receiving data on international bookings from a system must ensure that no one has access to the data except its own personnel and the personnel of any outside firm used for processing the data on its behalf, except to the extent that the system or a system owner provides such access to other persons.

Sec. 255.11 Exceptions.

(a) The obligations of a system under Sec. 255.4 shall not apply with respect to a carrier that refuses to enter into a contract that complies with this part or fails to pay a nondiscriminatory fee. A system shall apply its policy concerning treatment of non-paying carriers on a uniform basis to all such carriers, and shall not receive payment from any carrier for system-related services unless such payments are made pursuant to a contract complying with this part.

(b) The obligations of a system under this part shall not apply to any foreign carrier that operates or whose affiliate operates an airline computer reservations system for travel agents outside the United

States, if that system discriminates against the display of flights of any United States carrier or imposes discriminatory terms for participation by any United States carrier in its computer reservations system, provided that a system must continue complying with its obligations under this part until 14 days after it has given the Department and such foreign carrier written notice of its intent to deny such foreign carrier any or all of the protections of this part.

Sec. 255.12 Termination.

The rules in this part terminate on March 31, 2002.

[66 Fed. Reg. 17356, March 30, 2001]

APPENDIX B

COUNCIL REGULATION (EEC) NO 2299/89 OF 24 JULY 1989 ON A CODE OF CONDUCT FOR COMPUTERIZED RESERVATION SYSTEMS

Article 1

This Regulation shall apply to any computerised reservation system, insofar as it contains air-transport products and insofar as rail-transport products are incorporated in its principal display, when offered for use 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.

Article 2

For the purposes of this Regulation:

(a) "unbundled 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;

(b) "bundled air transport product" means a pre-arranged combination of an unbundled air transport product with other services not ancillary to air transport, offered for sale and/or sold at an inclusive price;

(c) "air transport product" means both unbundled and bundled air transport products;

(d) "scheduled air service" means a series of flights all possessing the following characteristics;
- performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that seats are available on each flight for individual purchase by consumers either directly from the air carrier or from its authorized agents),
- 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;

(e) "fare" means the price to be paid for unbundled air transport products and the conditions under which this price applies;

(f) "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 may be made, or
- tickets may be issued,
to the extent that some or all of these services are made available to subscribers;

(g) "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;

(h) "system vendor" means any entity and its affilates which is or are responsible for the operation or marketing of a CRS;

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

(j) "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;

(k) "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;

(l) "subscriber" shall mean a person, other than a consumer, or an undertaking, other than a participating carrier, using a CRS under contract or other financial arrangement with a system vendor. A financial arrangement shall be deemed to exist where a specific payment is made for the services of the system vendor or where an air-transport product is purchased;

(m) "consumer" shall mean any person seeking information about or intending to purchase an air-transport product for private use

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

(o) "elapsed journey time" means the time difference between scheduled departure and arrival time;

(p) "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.

(q) "unbundled rail-transport product" shall mean the carriage of a passenger between two stations by rail, including any related ancillary services and additional benefits offered for sale or sold as an integral part of that product;

(r) "bundled rail-transport product" shall mean a pre-arranged combination of an unbundled rail-transport product with other services not ancillary to rail transport, offered for sale or sold at an inclusive price;

(s) "rail-transport product" shall mean both unbundled and bundled rail-transport products;

(t) "ticket" shall mean a valid document giving entitlement to transport or an equivalent in paperless, including electronic, form issued or authorised by the carrier or its authorised agent;

(u) "duplicate reservation" shall mean a situation which arises when two or more reservations are made for the same passenger when it is evident that the passenger will not be able to use more than one.

Article 3

1. A system vendor shall have the capacity, in its own name as a separate entity from the parent carrier, to have rights and obligations of all kinds, to make contracts, inter alia with parent carriers, participating carriers and subscribers, or to accomplish other legal acts and to sue and be sued.
2. 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.

3. (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 not before the end of the first year. In such a case a system vendor shall be entitled to recover more than the costs directly related to the termination of the contract.

4. 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 and offer these improvements to all participating carriers, including parent carriers, with equal timelines 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 3a

1. (a) A parent carrier may not discriminate against a competing CRS by refusing to provide the latter, on request and with equal timeliness, with 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 for 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. The booking fee payable to a CRS for an accepted booking made in accordance with this Article shall not exceed the fee charged by the same CRS to participating carriers for an equivalent transaction;

(c) The parent carrier shall be entitled to carry out controls to ensure that Article 5 (1) is respected by the competing CRS.

2. The obligation imposed by this Article shall not apply in favour of a competing CRS when, in accordance with the procedures of Article 11, it has been decided that that CRS is in breach of Article 4a or of Article 6 concerning parent carriers' unauthorised access to information.

Article 4

1. Participating carriers and other providers of air transport products shall ensure that the data which they decide to submit to a CRS are accurate, non-misleading, 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. Data submitted via intermediaries shall not be manipulated by them in a manner which would lead to inaccurate, misleading or discriminatory information.

The principles stated in the first and second subparagraphs shall apply to rail services in respect of data provided for inclusion in the principal display.

2. A system vendor shall not manipulate the material referred to in paragraph 1 in a manner which 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 4a

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 by means of an application-to-application interface only. 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.

4. The system vendor shall ensure that any third parties providing CRS services in whole or in part on its behalf comply with the relevant provisions of this Regulation.

Article 5

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

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

2. (a) A system vendor shall provide a principal display or displays for each individual transaction through its CRS 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 city-pair for inclusion in a principal display.

(d) Ranking of flight options in a principal display shall be as set out in the Annex.

(e) 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) and system vendor concerned.

4. Information on bundled products regarding, inter alia, who is organizing the tour, availability and prices, shall not be featured in the principal display.

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

Article 6

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

(a) information concerning identifiable individual bookings shall be provided on an equal basis and only to the air carrier or carriers participating in the service covered by and to the subscribers involved in the booking.
Information under the control of the system vendor concerning identifiable individual bookings shall be archived off-line within seventy-two hours of the completion of the last element in the individual booking and destroyed within three years. Access to such data shall be allowed only for billing-dispute reasons.

(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 include no identification, either directly or indirectly, of, or personal information on a passenger or a corporate user;
(iii) all requests for such data are treated with equal care and timeless, subject to the transmission method selected by the individual carrier.
(iv) information is made available on request to participating carriers and subscribers both globally and selectively with regard to the market in which they operate;

(v) a group of airlines and/or subscribers is entitled to purchase data for common processing.

2. A system vendor shall not make personal information concerning a passenger available 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 above 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 can in no way be accessed by one or more of the parent carriers except as permitted by this Article.

Article 7

1. The obligations of a system vendor under Articles 3 and 4 to 6 shall not apply in respect of a parent carrier of a third country to the extent that its CRS outside the territory of the Community does not offer Community air cariers equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91 (*).

2. The obligations of parent or participating carriers under Articles 3a, 4 and 8 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 outside the territory of the Community the parent or participating carrier(s) is (are) not accorded equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91.
(*) OJ No L 10, 15. 1. 1991, p. 9.

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 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.

5. (a) In cases where serious discrimination within the meaning of paragraph 1 or 2 is found to exist, the Commission may by decision instruct CRSs to modify their operations approximately in order to terminate such discrimination. The Commission shall immediately inform Member States of such a decision.
(b) Unless the Council, at the request of a Member State, takes another decision within two months of the date of the Commission's decision, the latter shall enter into force.

Article 8

1. A parent carrier shall neither directly nor 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 neither directly nor indirectly require use of any specific CRS by a subscriber for 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 9

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 not before 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 for:

(a) the principal display, conforming to Article 5, to be accessed for each individual transaction, except where a consumer requests information for only one air carrier or where the consumer requests information for bundled air transport products alone;

(b) the subscriber not to manipulate material supplied by CRSs in a manner which would lead to inaccurate, misleading or discriminatory presentation of information to consumers.

6. A system vendor shall not impose an obligation on a subscriber to accept an offer of

technical equipment or software, but may require that equipment and software used be compatible with its own system.

Article 9a

1. (a) In the case of information provided by a CRS, a subscriber shall use a neutral display in accordance with Article 5(2)(a) and (b) unless another display is required to meet a preference indicated by a consumer.

(b) No subscriber shall manipulate information provided by a CRS in a manner that leads to inaccurate, misleading or discriminatory presentation of that information to any consumer.

(c) A subscriber shall make reservations and issue tickets in accordance with the information contained in the CRS used, or as authorised by the carrier concerned.

(d) A subscriber shall inform each consumer of any en route changes of equipment, the number of scheduled en route stops, the identity of the air carrier actually operating the flight, and of any changes of airport required in any itinerary provided, to the extent that that information is present in the CRS. The subscriber shall inform the consumer of the name and address of the system vendor, the purposes of the processing, the duration of the retention of individual data and the means available to the data subject of exercising his access rights.

(e) A consumer shall be entitled at any time to have a print-out of the CRS display or to be given access to a parallel CRS display reflecting the image that is being displayed to the subscriber.

(f) A person shall be entitled to have effective access free of charge to his own data regardless of whether the data is stored by the CRS or by the subscriber.

2. A subscriber shall use the distribution facilities of a CRS in accordance with Annex II.

Article 10

1. (a) Any fee charged to a participating carrier 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 to see exactly which services have been used and the fees therefor; as a minimum, booking fee bills shall include the following information for each segment:
- type of CRS booking,
- passenger name,
- country,
- IATA/ARC agency identification code,
- city-code,
- city pair of segment,
- booking date (transaction date),

- flight date,
- flight number,
- status code (booking status),
- service type (class of service),
- passenger name record (PNR) locator, and
- booking/cancellation indicator.

The billing information shall be offered on magnetic media. The fee to be charged for the billing information provided in the form chosen by the carrier shall not exceed the cost of the medium itself together with its transportation costs. A participating air carrier shall be offered the facility of being informed when any booking or 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 of disallowing any such booking or transaction, unless the latter has already been accepted. In the event of such a disallowance, the air carrier shall not be charged for that booking or transaction.

(b) Any fee for equipment rental or other service charged to a subscriber 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. Productivity benefits awarded to subscribers by system vendors in the form of discount on rental charges or commission payments shall be deemed to be distribution costs of the system vendors and shall be based on ticketed segments. When, subject to paragraph 5 of Annex II the system vendor does not know whether a ticket has been issued or not, then that system vendor shall be entitled to rely upon notification of the ticket number from the subscriber.

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

2. A system vendor shall, on request, provide interested parties, including consumers, with details of current procedures, fees and system facilities, including interfaces, editing and display criteria used. For consumers that information shall be free of charge and cover the processing of individual data. This provision shall not, however, require a system vendor to disclose proprietary information such as software.

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 nondiscriminatory basis.

Article 11

1. Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate infringement of the provisions of this Regulation.

2. Complaints may be submitted by:

(a) Member States;

(b) natural or legal persons who claim a legitimate interest.

3. The Commission shall immediately forward to the Member States copies of the

complaints and applications and of all relevant documents sent to it or which it sends out in the course of such procedures.

Article 12

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Member States and from undertakings and associations of undertakings.

2. The Commission may fix a time limit of not less than one month for the communication of the information requested.

3. When sending a request for information to an undertaking or association of undertakings, the Commission shall forward a copy of the request at the same time to the Member State in whose territory the head office of the undertaking or association of undertakings is situated.

4. In its request, the Commission shall state the legal basis and purpose of the request and also the penalties for supplying incorrect information provided for in Article 16 (1).

5. The owners of the undertakings or their representatives and, in the case of legal persons or of companies, firms or associations not having legal personality, the person authorized to represent them by law or by their rules shall be bound to supply the information requested.

Article 13

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end, officials authorized by the Commission shall be empowered:
(a) to examine the books and other business records;

(b) to take copies of, or extracts from, the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and vehicles used by undertakings or associations of undertakings.

2. The authorized officials of the Commission shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 16 (1) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the Member State, in whose territory the same is to be made, of the investigation and the identity of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose

of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 16 (1) and the right to have the decision reviewed in the Court of Justice.

4. The Commission shall take the decisions mentioned in paragraph 3 after consultation with the Member State in the territory of which the investigation is to be made.

5. Officials of the Member State in the territory of which investigation is to be made may assist the Commission officials in carrying out their duties, at the request of the Member State or of the Commission.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation.

Article 14

1. Information acquired as a result of the application of Articles 12 and 13 shall be used only for the purposes of the relevant request or investigation.

2. Without prejudice to Articles 11 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information of a kind covered by the obligation of professional secrecy which has been acquired by them as a result of the application of this Regulation.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 15

1. When an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 16 (1) as well as the right to have the decision reviewed by the Court of Justice.

2. At the same time the Commission shall send a copy of its decision to the competent authority of the Member State in the territory of which the head office of the undertaking or association of undertakings is situated.

Article 16

1. The Commission may, by decision, impose fines on undertakings or associations of undertakings from ECU 1 000 to 50 000 where, intentionally or negligently:

(a) they supply incorrect information in response to a request made pursuant to Article 12 or do not supply information within the time limit fixed;

(b) they produce the required books or other business records in incomplete form during investigations or refuse to submit to an investigation pursuant to Article 13 (1).

2. The Commission may, by decision, impose fines on system vendors, parent carriers, participating carriers and/or subscribers for infringements of this Regulation up to a maximum of 10 % of the annual turnover for the relevant activity of the undertaking concerned.
In fixing the amount of the fine, regard shall be had both to the seriousness and to the duration of the infringement.

3. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a penal nature.

Article 17

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has imposed a fine; it may cancel, reduce or increase the fine.

Article 18

For the purposes of applying Article 16, the ecu shall be that adopted in drawing up the general budget of the European Communities in accordance with Articles 207 and 209 of the Treaty.

Article 19

1. Before taking decisions pursuant to Article 11 or 16, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission takes or has taken objection.

2. Should the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications by such persons to be heard shall be granted when they show a sufficient interest.

Article 20

1. The Commission shall publish the decisions which it adopts pursuant to Article 16.

2. Such publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

1. Neither Article 5, Article 9(5) nor the Annexes shall apply to a CRS used by an air carrier or a group of air carriers:

(a) in its or their own office or offices and sales counters clearly identified as such; or

(b) to provide information and/or distribution facilities accessible through a public telecommunications network, clearly and continuously identifying the information provider or providers as such.

2. Where booking is performed directly by an air carrier, that air carrier shall be subject to Article 9a(d) and (f).

Article 21a

1. The system vendor shall ensure that the technical compliance of its CRS with Articles 4a and 6 is monitored by an independent auditor on a calendar year basis. For that purpose, the auditor shall be granted access at all times to any programmes, procedures, operations and safeguards used on the computers or computer systems through which the system vendor provides its distribution facilities. Each system vendor shall submit its auditor's report on his inspection and findings to the Commission within four months of the end of the calendar year under review. The Commission shall examine those reports with a view to taking any action necessary in accordance with Article 11(1).

2. The system vendor shall inform participating carriers and the Commission of the identity of the auditor at least three months before confirmation of an appointment and at least three months before each annual reappointment. If, within one month of notification, any of the participating carriers objects to the capability of the auditor to carry out the tasks as required under this Article, the Commission shall, within a further two months and after consultation with the auditor, the system vendor and any other party claiming a legitimate interest, decide whether or not the auditor is to be replaced.

Article 21b

1. Subject to this Article, this Regulation shall apply to the inclusion of rail-transport products.

2. A system vendor may decide to include rail services in the principal display of its CRS.

3. Where a system vendor decides to include rail products in the principal display of its CRS, it shall choose to include certain well-defined categories of rail services, while respecting the principles stated in Article 3(2).

4. A rail-transport operator shall be deemed to be a participating or parent carrier, as appropriate, for the purposes of the code, insofar as it has an agreement with a system

vendor for the distribution of its products through the principal display of a CRS or its own reservation system is a CRS as defined in Article 2(f). Subject to paragraph 5, those products shall be treated as air-transport products and shall be incorporated in the principal display in accordance with the criteria set out in Annex I.

5. (a) When applying the rules laid down in paragraphs 1 and 2 of Annex I to rail services the system vendor shall adjust the ranking principles for the principal display in order to take due account of the needs of consumers to be adequately informed of rail services that represent a competitive alternative to the air services. In particular, system vendors may rank rail services with a limited number of short stops with non-stop direct air services.

(b) System vendors shall define clear criteria for the application of this Article to rail services. Such criteria shall cover elapsed journey time and reflect the need to avoid excessive screen padding. At least two months before their application those criteria shall be submitted to the Commission for information.

6. For the purposes of this Article, all references to "flights" in this Regulation shall be deemed to include references to "rail services" and references to "air-transport products" shall be deemed to include references to "rail products".

7. Particular attention shall be given to an assessment of the application of this Article in the Commission's report under Article 23(1).

Article 22

1. This Regulation shall be without prejudice to national legislation on security, public-order and data-protection measures taken in implementation of Directive 95/46/EC (*).
(*) OJ L 281, 23. 11. 1995, p. 31.

2. The beneficiaries of rights arising under Article 3 (4), Articles 4a, 6 and 21 (a) cannot renounce these rights by contractual or any other means.

Article 23

Within two years of the entry into force of this Regulation, the Commission shall draw up a report on the application of this Regulation which shall, inter alia, take account of economic developments in the relevant market. That report may be accompanied by proposals for the revision of this Regulation.

ANNEX I

Principal display ranking criteria for flights (1) offering unbundled air transport products

1. Ranking of flight options in a principal display, for the day or days requested, must be in the following order unless requested in a different way by a consumer for an individual transaction:

(i) all non-stop direct flights between the city-pairs concerned;

(ii) all other direct flights, not involving a change of aircraft or train, between the city pairs concerned;
(iii) connecting flights.

2. A consumer must at least be afforded the possibility of having, on request, a principal display ranked by departure or arrival time and/or elapsed journey time. Unless otherwise requested by a consumer, a principal display must be ranked by departure time for group (i) and elapsed journey time for groups (ii) and (iii).

3. Where a system vendor chooses to display information for any city-pair in relation to the schedules or fares of non-participating carriers, but not necessarily all such carriers, such information must be displayed in an accurate, non-misleading and non-discriminatory manner between carriers displayed.

4. If, to the system vendor's knowledge, information on the number of direct scheduled air services and the identity of the air carriers concerned is not comprehensive, that must be clearly stated on the relevant display.

5. Flights other than scheduled air services must be clearly identified.

6. Flights involving stops en route must be clearly identified.

7. Where flights are operated by an air carrier which is not the air carrier identified by the carrier designator code, the actual operator of the flight must be clearly identified. That requirement will apply in all cases, except for short-term ad hoc arrangements.

8. A system vendor must not use the screen space in a principal display in a manner which gives excessive exposure to one particular travel option or which displays unrealistic travel options.

9. Except as provided in paragraph 10, the following will apply:

(a) for direct services, no flight may be featured more than once in any principal display;

(b) for multi-sector services involving a change of aircraft, no combination of flights may be featured more than once in any principal display;

(c) flights involving a change of aircraft must be treated and displayed as connecting flights, with one line per aircraft segment. Nevertheless, where the flights are operated by the same carrier with the same flight number and where a carrier requires only one flight coupon and one reservation, a CRS should issue only one coupon and should charge for only one reservation.

10. 1. Where participating carriers have joint-venture or other contractual arrangements requiring two or more of them to assume separate responsibility for the offer and sale of air-transport products on a flight or combination of flights, the terms "flight" (for direct services) and "combination of flights" (for multi-sector services) used in paragraph 9 must

be interpreted as allowing each of the carriers concerned - not more than two - to have a separate display using its individual carrier-designator code.

2. Where more than two carriers are involved, designation of the two carriers entitled to avail themselves of the exception provided for in subparagraph 1 must be a matter for the carrier actually operating the flight. In the absence of information from the operating carrier sufficient to identify the two carriers to be designated, a system vendor must designate the carriers on a non-discriminatory basis.

11. A principal display must, wherever practicable, include connecting flights on scheduled services which are operated by participating carriers and are constructed by using a minimum number of nine connecting points. A system vendor must accept a request by a participating carrier to include an indirect service, unless the routing is in excess of 130 % of the great circle distance between the two airports or unless that would lead to the exclusion of services with a shorter elapsed journey time. Connecting points with routings in excess of 130 % of that great circle distance need not be used.

ANNEX II

Use of distribution facilities by subscribers

1. A subscriber must keep accurate records covering all CRS reservation transactions. Those records must include flight numbers, reservations booking designators, date of travel, departure and arrival times, status of segments, names and initials of passengers with their contact addresses and/or telephone numbers and ticketing status. When booking or cancelling space, the subscriber must ensure that the reservation designator being used corresponds to the fare paid by the passenger.

2. A subscriber should not deliberately make duplicate reservations for the same passenger. Where confirmed space is not available on the customer's choice, the passenger may be wait-listed on that flight (if wait-list is available) and confirmed on an alternative flight.

3. When a passenger cancels a reservation, the subscriber must immediately release that space.

4. When a passenger changes an itinerary, the subscriber must ensure that all space and supplementary services are cancelled when the new reservations are made.

5. A subscriber must, where practicable, request or process all reservations for a specific itinerary and all subsequent changes through the same CRS.

6. No subscriber may request or sell airline space unless requested to do so by a consumer.

7. A subscriber must ensure that a ticket is issued in accordance with the reservation status of each segment and in accordance with the applicable time limit. A subscriber must not issue a ticket indicating a definite reservation and a particular flight unless confirmation of that reservation has been received.

(1) All references to "flights" in this Annex are in accordance with Article 21b(6).

APPENDIX C.

REGULATIONS RESPECTING COMPUTER RESERVATION SYSTEMS (CRS) OPERATED IN CANADA FOR THE PURPOSE OF DISPLAYING OR SELLING AIR SERVICES

SOR/95-275 (6 JUNE 1995)

Short Title

1. These Regulations may be cited as the Canadian Computer Reservation Systems (CRS) Regulations.

Interpretation

1. In these Regulations,

"affiliate" means an entity, other than a charterer or a subscriber, that is owned by, controlled by or under common control with a carrier; (société affiliée)

"air service" means a service for the transportation of passengers that is provided by means of an aircraft and that is publicly available; (service aérien)

"availability" means information provided in a display with respect to the seats a carrier holds out as available for sale on a particular flight; (places disponibles)

"carrier" means an air carrier that provides an air service that is sold in Canada; (transporteur)

"charter air service" means an air service that is made available by a carrier to a charterer and that excludes any other services not related to air transport; (service aérien affrété)

"charterer" means a travel organizer or wholesaler that has contracted with a carrier to charter all or part of the seating capacity of an aircraft and that makes that seating capacity publicly available for the transportation of passengers; (affréteur)

"consumer" means a person, other than a subscriber, who is seeking information about or who intends to purchase an air service; (consommateur)

"default display" means the display, selected by a subscriber, that appears automatically on the screen unless the subscriber has entered a request, specific to a transaction, for another display to appear; (affichage par défaut)

"discriminate", "discrimination" and "discriminatory" mean, respectively, to discriminate unjustly, unjust discrimination and unjustly discriminatory; (exercer une discrimination, discrimination and discriminatoire)

"display" means the presentation by a system of carrier schedules, fares, rules or availability to a subscriber or consumer by means of a video display terminal; (affichage)

"distribution facilities" means facilities provided to subscribers and consumers by a system vendor for the provision of information about carrier schedules, fares, rules, availability and related services and for making reservations, issuing tickets and any other related services; (infrastructures de distribution)

"edit" means to select and order air service options on the basis of service characteristics; (mettre en forme)

"elapsed journey time" means the time difference between the scheduled departure time from the point of origin and the scheduled arrival time at the point of destination in a given city-pair market; (durée totale du voyage)

"fare" means the price to be paid for an air service and the terms and conditions under which that price applies; (tarif)

"hosted carrier" means a carrier that has an agreement or arrangement with a system vendor for hosting services; (transporteur bénéficiaire)

"hosting services" means services for the management of seat inventory, and ancillary computer services not directly related to displays, that are provided by a system vendor to a carrier in accordance with an agreement or arrangement; (services d'hébergement de données)

"intermediary" means an organization that aggregates carrier information and data and transmits it to a system; (intermédiaire)

"obligated carrier" means
(a) any system owner, or
(b) any carrier and its affiliates, authorized to operate in Canada, that have together carried 10 per cent or more of the total number of passengers carried in domestic air services in the most recent calendar year for which data are available, according to the information held by Statistics Canada, and that choose to participate in a system; (transporteur visé)

"participating carrier" means a carrier that has an agreement or arrangement with a system vendor for the display of its schedules, fares, rules or availability, or for the making of reservations or the issuing of tickets through a system; (transporteur participant)

"service enhancement" means any additional product or service related to air transportation that is offered by a system vendor to participating carriers and made available to subscribers or consumers in conjunction with a system, and may include access links providing last seat availability, seat selection and the issuing of boarding passes; (service supplémentaire)

"subscriber" means a travel agent or other entity that holds itself out to the public as a source of information about the air service industry, that makes reservations and issues tickets for air services and that contracts with a system vendor to use a system; (abonné)

"system" means a computer reservation system that is offered by a system vendor to subscribers or consumers, that contains information about the schedules, fares, rules or availability of more than one carrier and that provides subscribers with the capability to make reservations or issue tickets for air services; (système)

"system owner" means a carrier that holds, directly or indirectly, an ownership interest in a system or in a system vendor, that has one or more affiliates that hold such an interest or that, together with affiliates, holds such an interest; (propriétaire de système)

"system vendor" means an entity that owns, controls, operates, markets or distributes a system; (serveur de système)

"tourism product" means a pre-arranged combination of an air service and other services not related to air transportation that is offered for sale at an all-inclusive price. (produit de tourisme)

Application

3. These Regulations apply in respect of systems that are operated in Canada for the purpose of displaying or selling air services, irrespective of

(a) the legal status or nationality of the system vendor;

(b) the source of the information used or the location of the relevant data processing centre; and

(c) where the air services are provided.

4. These Regulations do not apply in respect of systems that are used by a carrier and its affiliates or a charterer in their own offices and at their own sales counters.

5. Nothing in these Regulations exempts any person from the operation of the Competition Act, as amended from time to time.

System Participation Requirements for Obligated Carriers

6. An obligated carrier shall provide to all systems that are operated in Canada, on the same basis and at the same time as such information is provided to any system, complete, up-to-date and accurate information concerning its schedules, fares, rules and availability in all classes of service.

7. An obligated carrier shall not discriminate against a system by refusing to accept a reservation for air services and to confirm a booking that is in conformity with the terms and conditions respecting bookings agreed to by the carrier and the system vendor and in conformity with the fares offered by the obligated carrier through that system, and shall pay fees charged in conformity with section 20 for such a booking.

8. (1) At the request of a system vendor, every obligated carrier shall

(a) participate in a comparable manner in the distribution facilities of all systems that are operated in Canada; and

(b) provide access links to the levels of "look and book", last seat availability, seat selection and the issuing of boarding passes.

(2) Where a request is made pursuant to subsection (1), the obligated carrier shall pay fees charged in conformity with section 20 for its participation.

(3) A system vendor who has requested an access link shall pay for the incremental costs, before mark-up, of providing the access links.

Display Information

9. (1) A system vendor shall ensure that all displays in a system that include information about the schedules, fares, rules or availability of participating carriers and that are provided to subscribers and consumers meet the requirements of these Regulations.

(2) A system vendor shall ensure that, except in response to requests for information limited to specific carriers, these displays are comprehensive, neutral and non-discriminatory.

10. (1) A system vendor shall construct and order the information in the displays referred to in section 9 in a manner that is applied consistently to all participating carriers and to all city-pair markets within each display.

(2) In ordering the information in these displays, a system vendor shall not use any factor that relates, directly or indirectly, to carrier identity.

(3) A system vendor shall, in constructing and ordering flights to or from a city with more than one airport, ensure that there will be no discrimination on the basis of airport served when that city is requested as the origin or destination.

(4) A system vendor shall ensure that flights involving stops en route, changes of aircraft, carrier or airport or segments carried out by other modes of transportation are clearly identified.

(5) Subject to subsection (6), on payment of a fee charged in conformity with section 20, a system vendor shall include charter air services in these displays and clearly indicate that they are charter air services.

(6) Where more than one charterer is offering charter air service on the same flight in a city-pair market, a system vendor shall ensure that the service appears only once in these displays and that the charterers who are offering this service are clearly indicated.

(7) A system vendor shall ensure that tourism products are not included in these displays.

(8) A system vendor shall not create or maintain any function that automatically prefers one or more participating carriers over other participating carriers.

(9) Where a system vendor chooses to display, for any city-pair market, information about the schedules or fares of non-participating carriers, the information shall be displayed in the same manner for all the non-participating carriers that the system vendor chooses to display.

(10) A system vendor shall provide to any person, on request, the current criteria used in constructing and ordering flights for these displays and the weight given to each criterion.

11. (1) A system vendor shall allow a subscriber, from time to time and at no additional cost, to select one of the displays conforming with these Regulations to be the default display, and shall not override that selection.

(2) A default display shall be at least as useful to subscribers, in terms of the basic functions or service enhancements offered and the ease with which those functions or service enhancements can be performed or implemented, as any other display offered by the system vendor.

(3) For greater certainty, in response to a stated consumer preference, another display may be requested for each transaction without the default display appearing.

(4) A consumer shall be afforded the possibility of having information about all non-stop flights or about all flights, ranked principally by departure time, arrival time or elapsed journey time.

12. Where a system vendor provides information limited to fares, the fares shall be displayed in a neutral and non-discriminatory manner and shall include at least the fares provided to the system vendor by the carrier or charterer for each class of service offered by that carrier or charterer for flights included in the displays.

13. (1) A system vendor shall not intentionally or negligently display incomplete, inaccurate or misleading information in its system.

(2) Where a system vendor knows that a carrier has provided inaccurate or misleading information about its air services or about the identity of the carriers operating its air services, the system vendor shall inform the carriers and the subscribers.

14. (1) Every participating carrier shall ensure that complete, accurate and non-misleading information is provided to each system vendor in a form that enables the system vendor to display information about the flights of the participating carrier in accordance with these Regulations.

(2) Every participating carrier shall ensure that flights involving stops en route, changes of aircraft, carrier or airport or segments carried out by other modes of transportation are clearly identified for the system vendor and that no information respecting tourist products is provided to the system vendor for use in a display referred to in section 9.

(3) Where flights are operated by a carrier other than the carrier identified by the carrier designator code, the carrier whose designator code is being used shall ensure that the carrier operating the flight is, except in the case of short-term ad hoc arrangements, clearly indicated to the system vendor.

(4) A charterer who provides information respecting charter air services to a system vendor shall provide the information in accordance with subsections (1) to (3).

(5) A participating carrier or a charterer may provide information referred to in subsections (1) to (3) directly or through an intermediary acceptable to the participating carrier and system vendor.

Constructing Connecting Flights

15. (1) A system vendor shall not use any factors that relate, directly or indirectly, to carrier identity in constructing connecting flights for a display.

(2) A system vendor shall select the connecting points to be used in constructing connecting flights for each city-pair market on the basis of service criteria that do not

include carrier or airport identity and that are applied consistently to all carriers and to all city-pair markets.

(3) A system vendor shall not discriminate between airports in the cities that are used to construct connecting flights.

(4) A system vendor shall edit connecting flights on the basis of service criteria that do not include carrier identity and that are applied consistently to all participating carriers.

(5) A system vendor shall provide to all subscribers and participating carriers, on request, current information about

(a) all connecting points for each market;
(b) all criteria used to select connecting points;

(c) all criteria used to edit connecting flights; and

(d) the weight given to each criterion referred to in paragraphs (b) and (c).

16. (1) Where a system vendor selects connecting points and double connect points for use in constructing connecting flights, it shall use at least 15 connecting points and 10 double connect points for each city-pair unless

(a) fewer than 15 connecting points and 10 double connect points meet the service criteria described in subsection 15(2); and

(b) the system has used all of the points that meet the service criteria described in subsection 15(2), along with all of the additional connecting points and double connect points requested by participating carriers.

(2) A system vendor shall, on request by a participating carrier, use up to five connecting and double connect points in constructing connecting flights for the display of services in a city-pair market.

(3) A system vendor may require participating carriers to use specified procedures for requests referred to in subsection (2), but no such procedures may be unreasonably burdensome, and any procedures required of participating carriers shall also be used by any system owner when it requests or causes its system to use specific points as connecting points or double connect points.

(4) Where a system vendor selects connecting points and double connect points for use in constructing connecting flights, it shall use every point identified by itself or by a participating carrier, up to the maximum number of points that the system can use, unless

(a) the points selected by the system vendor and by participating carriers do not meet the service criteria described in subsection 15(2); and

(b) the system has used all of the points that meet the service criteria described in subsection 15(2).

Additional Obligations of System Vendors

17. (1) A system vendor shall allow any carrier the opportunity to participate in its distribution facilities and service enhancements on an equal and non-discriminatory basis, subject to any technical constraints that are outside the control of the system vendor.

(2) A system vendor shall not require, as a condition for participation in its system, the purchase or sale of any other goods or services.

18. (1) A system vendor shall apply the same standards of care and promptness in loading the information of each participating carrier.

(2) Where a system vendor provides special loading capability to any participating carrier, it shall offer the same capability to all other participating carriers as soon as this is technically feasible.

(3) A system vendor shall provide on request by any participating carrier all current database update procedures and data formats related to schedule and fare processing.

19. A system vendor is not required to display information provided by a carrier that will not enter into a contract with the system vendor in accordance with these Regulations or that fails to pay a fee that is equivalent to the fee charged by the system vendor to other carriers for equivalent services.

20. (1) A system vendor shall not discriminate among participating carriers in the fees charged for participation in its system, for service enhancements or for other system-related services.

(2) The fees charged by a system vendor shall be reasonable and non-discriminatory and shall be the same for all participating carriers for the same level of service.

(3) A fee that exceeds the fee charged by the system vendor for the same or equivalent service anywhere in North America is presumed to be unreasonable.

(4) A system vendor shall provide to any carrier, on request, information about its current fees and the terms and conditions associated with those fees.

21. (1) The billing for the services of a system shall be in a form and of sufficient detail to allow a participating carrier to verify promptly and exactly which services have been used and the fees for those services.

(2) The billing referred to in subsection (1) shall be provided by an electronic medium that is compatible with the electronic medium used by the participating carrier and shall include the following information for each billable segment:

(a) the type of CRS booking;
(b) the (booking) status code;
(c) the booking/cancellation indicator;
(d) the PNR record locator number;
(e) the passenger name;
(f) the country of origin;
(g) the IATA/ARC/BSP agency identification code;
(h) the pseudo-city code;
(i) the CRS transaction date (booking date);
(j) the city-pair or segment;
(k) the flight date;
(l) the flight number; and
(m) the class of service.

22. (1) A system vendor shall ensure that its distribution facilities are separated by software, either physically or logically, in a clear and verifiable manner from any hosting services that are provided to a carrier.

(2) A system vendor shall ensure equality of treatment of hosted and non-hosted carriers in respect of procedures, protocols, inputs and outputs.

(3) A system vendor shall offer to participating carriers interfaces that are compatible with the relevant, generally accepted industry standards.

23. (1) Where a system vendor offers additional software applications for travel agency accounting, travel management and other non-distribution services, that use, in part, information derived from the system, the system vendor shall provide within a reasonable time after a request for such applications is made

(a) a technically compatible interface that allows these applications to be used in conjunction with other systems or databases; or

(b) the necessary information to permit the development of such an interface.

(2) Where a person requests an interface referred to in paragraph (1)(a) and no such interface exists at the time of the request, the person shall reimburse the system vendor, on request, for the system vendor's actual, out-of-pocket costs expended in the development of the interface.

24. A system vendor shall display the complete unedited text of these Regulations in the reference information maintained in its system.

Service Enhancements

25. Where a system vendor adds any improvement to distribution facilities, service enhancements or the equipment used to provide distribution facilities or service enhancements, it shall offer, and provide information about, that improvement to all

participating carriers with equal promptness and in such a way that there will be no difference between participating carriers in lead time for the implementation of the improvement, subject to any technical constraints that are outside the control of the system vendor.

26. A system vendor shall not make available to subscribers the internal reservations system display of a system owner or other participating carrier unless

(a) all participating carriers are offered the capability to make their internal reservations system displays available to subscribers; and

(b) a subscriber may see the internal reservations system display only by requesting it for a specific transaction.

Marketing Information

27. (1) A system vendor shall provide, on a non-discriminatory basis, to all participating carriers, with equal promptness on payment of a fee charged in conformity with section 20, marketing, booking and sales data relating to carriers that it makes available from its system, and this data shall be as complete and accurate as the data provided to a system owner, but shall not include the identification of, or personal information about, passengers.

(2) Any carrier receiving marketing, booking and sales data from a system shall ensure that no person has access to the data, other than a member of its own personnel, the personnel of its affiliate and the personnel of any outside firm used for processing the data on its behalf, except to the extent that the system vendor provides such access to other persons.

Personal Booking Information

28. (1) A system vendor shall provide the information about individual bookings on an equal basis only to the carriers that provide the service covered by the booking and to the subscriber involved in the booking.

(2) A system vendor shall not make personal information about a passenger available to others not involved in a booking without the consent of the passenger.

Obligations of Subscribers

29. A subscriber shall provide to a consumer all the information provided by participating carriers and charterers pursuant to section 14 respecting each service in which the consumer expresses an interest

(a) orally, at the time the consumer expresses an interest and at the time of reservation or sale; and

(b) in writing, at the time of reservation, when requested by the consumer, and at the time the ticket is issued.

30. In any direct oral communication with a consumer concerning a flight that is part of a code-sharing arrangement or long-term wet lease, a subscriber shall

(a) inform the consumer, before booking transportation, that the transporting carrier is not the carrier whose designator code will appear on the ticket and shall identify the transporting carrier; and

(b) at the time of sale, provide the consumer with written notice of the carrier that will be operating the service or segment of an itinerary.

31. When a transaction between a subscriber and a consumer takes place in an alternative communications medium where there is no oral exchange or written record, the subscriber may maintain evidence of having met the requirements of section 29 by including a notation in the passenger name record (PNR) that the information was communicated to the consumer.

Prohibitions

32. No carrier shall require, directly or indirectly, a subscriber or potential subscriber to use a system as a condition for obtaining any benefit, commission, rebate, discount or other incentive for the sale of, or as a condition for obtaining access to, air services provided by it or its affiliates.

33. No system vendor operating in Canada shall use its sales force responsible for marketing the system to promote, directly or indirectly, any carrier to subscribers.

34. No carrier shall use its sales force responsible for marketing its air services in Canada to promote, directly or indirectly, any system or system vendor to subscribers.

35. No member of a sales force responsible for marketing a system of a system vendor and no member of a sales force responsible for marketing the air services of a carrier shall make or participate in joint marketing calls or presentations to subscribers.

Order Prohibiting Participation in System

36. The Minister of Transport may, by order, prohibit all carriers in Canada from participating in a system where the Minister is of the opinion that the system vendor has contracts with subscribers that include any of the following characteristics:

(a) terms of more than three years;

(b) provisions that automatically extend the contract beyond its stated date of termination because of the addition or deletion of equipment, the passage of time or some other event;

(c) provisions that impede the subscriber, directly or indirectly, from obtaining or using any other system;

(d) provisions that prohibit or restrict, directly or indirectly,

(i) the use of third-party computer hardware or software in conjunction with system services, except as necessary to protect the integrity of the system, or
(ii) the use of equipment to access directly any other system or database providing information about air services, unless the equipment is owned by the system vendor;

(e) provisions that require the subscriber to

(i) use the system for a minimum volume of bookings, or
(ii) lease a minimum number or ratio of system components, based on or related to the number of system components leased from another system vendor or the volume of bookings on any other system;

(f) provisions that provide for the payment of liquidated damages based on segment bookings or carrier revenues; and

(g) prices, benefits, commissions, rebates, discounts or incentives that are conditional, in whole or in part, on the identity of carriers whose flights are sold by the subscriber.

Order Requiring Equivalent Treatment

37. Where the Minister of Transport is of the opinion that the treatment given to Canadian participating carriers by a system vendor operating in a foreign country is not equivalent to the treatment given to foreign participating carriers with regard to any matter contained in these Regulations, the Minister may, by order, require all system vendors operating in Canada to treat carriers of the foreign country in a manner that is equivalent to the treatment given to Canadian participating carriers in that foreign country.

Established by
SOR/95-275 6 June, 1995 pursuant to subsection 4.3(2) and section 4.9 of the Aeronautics Act.

APPENDIX D

CODE OF CONDUCT ON THE REGULATION AND OPERATION OF COMPUTER RESERVATION SYSTEM

ICAO COUNCIL 25 JUNE 1996

Article 1 - Purpose

This Code is based on transparency, accessibility and non-discrimination, and aims at enhancing fair competition among airlines and among computer reservation systems (CRSs) and at affording international air transport users access to the widest possible choice of options in order to meet their needs. To this end, the Code takes into account current market practices, the particular interests of developing countries, and the critical need for harmonization of the various national and regional CRS regulations.

Article 2 - Terminology

In this Code:

a) "Computer reservation system (CRS)" means a computer system that provides displays of schedules, space availability and tariffs of air carriers, and through which reservations on air transport services can be made;

b) "System vendor" means an entity that operates or markets a CRS;

c) "Participating carrier" means an air carrier that uses one or more CRSs to distribute its air transport services, either as the system vendor or as a result of an agreement with the system vendor; and

d) "Subscriber" means an entity such as a travel agent that uses a CRS under contract with a system vendor for the sale of air transport services to the general public

Article 3 - Scope of Application

a) This Code shall apply to the distribution of international passenger air service products through CRSs. Where a State determines it is necessary to meet the purpose of the Code in Article 1, it shall also apply to computer information systems which provide displays of schedules, space availability and tariffs of air carriers, without the capability of making reservations.

b) Where non-scheduled flights are included in principal displays they shall be identified as such, displayed under the same conditions as scheduled services and air transport users shall be informed of any special conditions applying.

Article 4 - Obligations of States

A State that follows this Code shall:

a) ensure compliance with this Code by air carriers, subscribers (where practicable) and system vendors for their CRS activities in its territory;

b) remove regulatory obstacles, if any, to investment in CRSs domiciled in its territory by air carriers or other entities domiciled in the territory of another State which follows this Code;

c) allow system vendors which comply with this Code to provide their CRS services in its territory on a non-discriminatory basis and consistent with any bilateral or multilateral agreements or arrangements to which the State is a party;

d) treat all system vendors impartially regarding their CRS activities in its territory;

e) permit the free flow across and within its national borders of the information needed to meet the reservation and related requirements of air transport users;

f) use intergovernmental consultation processes to resolve any dispute involving another State following this Code, regarding the distribution of air transport products through CRSs, that cannot be resolved satisfactorily by the parties immediately concerned; and

g) not allow or require air carriers or system vendors under its jurisdiction to take actions not in conformity with this Code, except to address, in an appropriate and proportionate manner, a lack of CRS reciprocity or the consequences of a failure of intergovernmental consultation processes to resolve any CRS dispute.

Article 5 - Obligations of System Vendors to Air Carriers

A system vendor shall:

a) permit participation in its CRS by any carrier prepared to pay the requisite fees and to accept the system vendor's standard conditions;

b) not require carriers to participate in its CRS exclusively or for a certain proportion of their activities;

c) not impose any conditions on participation in its CRS that are not directly related to the process of distributing a carrier's air transport products through the CRS;

d) not discriminate among participating carriers in the CRS services it offers, including timely and nondiscriminatory access to service enhancements, subject to technical or other constraints outside the control of the system vendor;

e) ensure that any fees it charges are:
i) nondiscriminatory;
ii) not structured in such a way that small carriers are unfairly precluded from participation; and
iii) 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.

f) provide information on billing for the services of a system in a form (including, if requested, via or on electronic media) and in sufficient detail to allow participating carriers to verify promptly the accuracy of the bills;

g) include in contracts a provision permitting an air carrier to terminate a contract by giving notice:

i) which need not exceed six months, to expire not before the end of the first year, or
ii) as prescribed by national law.

h) load information provided by participating carriers with consistent and nondiscriminatory standards of care, accuracy and timeliness, subject to any constraints imposed by the loading method selected by the participating carrier;

i) not manipulate the information provided by carriers in any way that would lead to information being displayed in an inaccurate or discriminatory manner;

j) make any information in its CRS directly concerning a single reservation available on an equal basis to the subscriber concerned and to all the carriers involved in the service covered by the reservation but to no other parties without the written consent of such carriers and the air transport user; and

k) not discriminate among participating carriers in making available any information, other than financial information relating to the CRS itself, generated by its CRS in an aggregated or anonymous form.

Article 6 - Obligations of System Vendors to Subscribers Regarding Commercial Arrangements

A system vendor shall not:

a) discriminate among subscribers in the CRS services it offers;

b) restrict access by subscribers to other CRSs by requiring them to use its CRS exclusively or by any other means;

c) charge prices conditioned in whole or in part on the identity of carriers whose air transport services are sold by the subscriber;

d) require subscribers to use its CRS for sales of air transport services provided by any particular carrier;

e) tie any commercial arrangements regarding the sale of air transport services provided by any particular carrier to the subscriber's selection or use of the system vendor's CRS;

f) require subscribers to use its terminal equipment or prevent them from using computer hardware or software that enables them to switch from the use of one CRS to another, although it may require technical compatibility with its CRS; and

g) require subscribers to enter into contracts which:
i) exceed five years; or
ii) cannot be cancelled by the subscriber at any time after one year, with notice and without prejudice to recovery of actual costs; and
iii) contain provisions that undermine contract termination.

Article 7 - Obligations of System Vendors Regarding Displays

A system vendor shall:

a) make available a principal display or displays of schedules, space availability and tariffs of air carriers which is fair, nondiscriminatory, comprehensive, and neutral in terms of :
i) not being influenced, directly or indirectly, either by the identity of participating carriers or by airport identity; and
ii) with the information ordered in a manner which is consistently applied to all participating carriers and to all city-pair markets;

b) ensure that any principal display made available is as fully functional and at least as easy to use as any other display it offers;

c) always provide a principal display except where there is a specific request from an air transport user which requires the use of another display;

d) base the ordering of services in a principal display and the selection and construction of connecting services on objective criteria (such as departure/arrival times, total elapsed time between initial flight departure at origin and final flight arrival at destination, routing, number of stops, number of connexions, fares, etc.);

e) provide to subscribers:
i) a principal display of flight options ranked in the order of all non-stop flights by departure time, other direct flights not involving a change of aircraft and all connecting flights by elapsed journey time; or
ii) a principal display of flight options ranked in any other order based on objective criteria; or
iii) principal displays based on i) and ii);

f) in the ordering of services in a principal display, take care that no carrier obtains an unfair advantage;

g) in any principal display of schedule information:
i) clearly identify nonscheduled flights, scheduled en-route changes of equipment, use of the designator code of one air carrier by another air carrier, the name of the operator of each flight, the number of scheduled en-route stops, and any surface sectors or changes of airport required; and
ii) clearly indicate that the information displayed regarding direct services is not comprehensive, if information on participating carriers' direct services is incomplete for technical reasons or if any direct services operated by non-participating carriers are known to exist and are omitted;

h) in the selection and construction of connecting services in a principal display, select as many alternative (single or multiple) connecting points on a nondiscriminatory basis as is necessary to ensure a wide range of options;

i) not intentionally or negligently display inaccurate or misleading information;

j) in cases where States do not find it practicable to ensure that subscribers comply with Article 10, include appropriate provisions regarding compliance in its contract with each subscriber; and

k) where participating carriers have joint venture or other contractual arrangements requiring two or more of them to assume separate responsibility for the offer and sale of air transport products on a flight or combination of flights, permit each carrier concerned up to a maximum of three to have a separate display using its individual designator code.

Article 8 - Other Obligations of System Vendors

A system vendor shall:

a) make available in written form and in a timely manner, on the written request of any interested party, information on the services offered by its CRS, the associated fees, the procedures it applies for entering and storing information in its CRS, and the methods it uses for developing, editing and updating information displays provided to subscribers; and

b) refrain from practices which inhibit or impair competition among system vendors or air carriers.

Article 9 - Obligations of Air Carriers

An air carrier shall:

a) be responsible for the accuracy of information it provides to a system vendor for inclusion in a CRS;

b) in providing information on its air transport services to system vendors:
i) ensure that it does not misrepresent services; and
ii) clearly identify nonscheduled flights, scheduled en-route changes of equipment, use of the designator code of one air carrier by another air carrier, the name of the operator of each flight, the number of scheduled en-route stops and any surface sectors or changes of airport required;

c) not refuse, except where legitimate commercial or technical reasons exist, to participate in any CRS used by subscribers in a State where the carrier holds a dominant market position, if it is financially linked or otherwise affiliated with any other CRS (other than as a result of a participation agreement with the system vendor);

d) not refuse, except where permitted by law, to provide information on schedules or tariffs to a system vendor whose CRS is used by subscribers in the carrier's State of domicile, if it already provides such information to another system vendor whose CRS is used by subscribers in that State; and

e) not require subscribers to use a particular CRS for sales of its air transport services, nor tie any commercial arrangements with subscribers regarding the sale of its air transport services to the subscriber's selection or use of a particular CRS where:
i) the air carrier has a financial interest or is otherwise affiliated with that CRS, or
ii) this would unfairly favour that CRS.

Article 10 - Obligations of Subscribers

A subscriber shall:

a) use or provide a principal display meeting the requirements of Article 7 for each transaction, except where a preference indicated by an air transport user requires the use of another display;

b) not manipulate information supplied by a CRS in a manner that would result in inaccurate or misleading information being given to an air transport user;

c) be responsible for the accuracy of any information it enters into a CRS;

d) where nonscheduled flights are included in a CRS, inform an air transport user if a flight is nonscheduled and of any special requirements concerning it;

e) inform air transport users of all scheduled en-route changes of equipment, use of the designator code of one air carrier by another air carrier, the number of scheduled en-route stops, the name of the operator of each flight, and any surface sectors or changes of airport required in any itinerary provided; and

f) not make fictitious reservations through a CRS.

Article 11 - Safeguarding the Privacy of Personal Data

a) States shall take appropriate measures to ensure that all parties involved in CRS operations safeguard the privacy of personal data.

b) Air carriers, system vendors, subscribers and other parties involved in air transportation are responsible for safeguarding the privacy of personal data included in CRSs to which they have access, and may not release such data without the consent of the passenger.

Article 12 - Application, Revision and Exceptions

a) This Code shall be applicable with effect from 1 November 1996. It may be revised by the Council when it deems that circumstances warrant, and any revised Code shall supersede its predecessor in its entirety.

b) A State which commits itself to follow the Code shall do so by notifying ICAO. A State which decides to discontinue such commitment shall do so by notifying ICAO.

c) A State which is recognized by the United Nations as a developing country and which has notified ICAO that it follows the Code may, until 31 December 2000, decline to follow Article 4 c) provided:
i) it notifies ICAO of such action; and
ii) such action is consistent with any bilateral or multilateral agreement or arrangement to which the State is a party.

d) Any State which has notified ICAO of its commitment to follow the Code and which allows or requires actions not in conformity with the Code in accordance with Article 4 g) shall notify ICAO of such actions.

e) The Council will periodically advise all States of notifications made pursuant to clauses b) through d) above.

f) Multi-access CRSs are exempt from compliance with clauses h) through k) of Article 5 and clauses a) through h) and k) of Article 7.

APPENDIX E

REVISED ECAC CODE OF CONDUCT FOR COMPUTERIZED RESERVATION SYSTEMS

APPROVED BY ECAC/24, 29-30 JUNE 2000

Article 1

This Code shall apply to any computerised reservation system, insofar as it contains air-transport products and insofar as rail-transport products are incorporated in its principal display, when offered for use or used in the territories within Europe of ECAC Member Sates, 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.

Article 2

For the purposes of this Code:

(a) "unbundled 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;

(b) "bundled air transport product" means a pre-arranged combination of an unbundled air transport product with other services not ancillary to air transport, offered for sale and/or sold at an inclusive price;

(c) "air transport product" means both unbundled and bundled air transport products;

(d) "scheduled air service" means a series of flights all possessing the following characteristics;
- performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that seats are available on each flight for individual purchase by consumers either directly from the air carrier or from its authorized agents),
- 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;

(e) "fare" means the price to be paid for unbundled air transport products and the conditions under which this price applies;

(f) "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 may be made, or
- tickets may be issued,
to the extent that some or all of these services are made available to subscribers;

(g) "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;

(h) "system vendor" means any entity and its affilates which is or are responsible for the operation or marketing of a CRS;

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

(j) "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;

(k) "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;

(l) "subscriber" shall mean a person, other than a consumer, or an undertaking, other than a participating carrier, using a CRS under contract or other financial arrangement with a system vendor. A financial arrangement shall be deemed to exist where a specific payment is made for the services of the system vendor or where an air-transport product is purchased;

(m) "consumer" shall mean any person seeking information about or intending to purchase an air-transport product for private use

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

(o) "elapsed journey time" means the time difference between scheduled departure and arrival time;

(p) "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.

(q) "unbundled rail-transport product" shall mean the carriage of a passenger between two stations by rail, including any related ancillary services and additional benefits offered for sale or sold as an integral part of that product;

(r) "bundled rail-transport product" shall mean a pre-arranged combination of an unbundled rail-transport product with other services not ancillary to rail transport, offered for sale or sold at an inclusive price;

(s) "rail-transport product" shall mean both unbundled and bundled rail-transport products;

(t) "ticket" shall mean a valid document giving entitlement to transport or an equivalent in paperless, including electronic, form issued or authorised by the carrier or its authorised agent;

(u) "duplicate reservation" shall mean a situation which arises when two or more reservations are made for the same passenger when it is evident that the passenger will not be able to use more than one.

Article 3

1. A system vendor shall have the capacity, in its own name as a separate entity from the parent carrier, to have rights and obligations of all kinds, to make contracts, inter alia with parent carriers, participating carriers and subscribers, or to accomplish other legal acts and to sue and be sued.

2. 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.

3. (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 not before the end of the first year. In such a case a system vendor shall be entitled to recover more than the costs directly related to the termination of the contract.

4. 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 and offer these improvements to all participating carriers, including parent carriers, with equal timelines 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

1. (a) A parent carrier may not discriminate against a competing CRS by refusing to provide the latter, on request and with equal timeliness, with 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 for 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. The booking fee payable to a CRS for an accepted booking made in accordance with this Article shall not exceed the fee charged by the same CRS to participating carriers for an equivalent transaction;

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

2. The obligation imposed by this Article shall not apply in favour of a competing CRS when, in accordance with the procedures of Article 14, it has been decided that that CRS is in breach of Article 6 or of Article 8 concerning parent carriers' unauthorised access to information.

Article 5

1. Participating carriers and other providers of air transport products shall ensure that the data which they decide to submit to a CRS are accurate, non-misleading, 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 Annex I.

Data submitted via intermediaries shall not be manipulated by them in a manner which would lead to inaccurate, misleading or discriminatory information.
The principles stated in the first and second subparagraphs shall apply to rail services in respect of data provided for inclusion in the principal display.

2. A system vendor shall not manipulate the material referred to in paragraph 1 in a manner which 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

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 by means of an application-to-application interface only. 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.

4. The system vendor shall ensure that any third parties providing CRS services in whole or in part on its behalf comply with the relevant provisions of this Regulation.

Article 7

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

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

2. (a) A system vendor shall provide a principal display or displays for each individual transaction through its CRS 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 city-pair for inclusion in a principal display.

(d) Ranking of flight options in a principal display shall be as set out in Annex I.

(e) 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) and system vendor concerned.

4. Information on bundled products regarding, inter alia, who is organizing the tour, availability and prices, shall not be featured in the principal display.

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

Article 8

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

(a) information concerning identifiable individual bookings shall be provided on an equal basis and only to the air carrier or carriers participating in the service covered by and to the subscribers involved in the booking.
Information under the control of the system vendor concerning identifiable individual bookings shall be archived off-line within seventy-two hours of the completion of the last element in the individual booking and destroyed within three years. Access to such data shall be allowed only for billing-dispute reasons.

(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 include no identification, either directly or indirectly, of, or personal information on a passenger or a corporate user;
(iii) all requests for such data are treated with equal care and timeless, subject to the transmission method selected by the individual carrier.

(iv) information is made available on request to participating carriers and subscribers both globally and selectively with regard to the market in which they operate;
(v) a group of airlines and/or subscribers is entitled to purchase data for common processing.

2. A system vendor shall not make personal information concerning a passenger available 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 above 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 can in no way be accessed by one or more of the parent carriers except as permitted by this Article.

Article 9

1. The obligations of a system vendor under Articles 3 and 5 to 8 shall not apply in respect of a parent carrier of a third country to the extent that its CRS outside the territories within Europe of ECAC Member States does not offer ECAC air carriers equivalent treatment to that provided under this Regulation and under Commission Regulation (EEC) No 83/91 (*).

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 outside the territories within Europe of ECAC Member States the parent or participating carrier(s) is (are) not accorded equivalent treatment to that provided under this code.

3. Member States shall advise the ECAC Secretariat in instances where this Article is invoked.

Article 10

1. A parent carrier shall neither directly nor 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 neither directly nor indirectly require use of any specific CRS by a subscriber for 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

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 not before 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 for:

(a) the principal display, conforming to Article 7, to be accessed for each individual transaction, except where a consumer requests information for only one air carrier or where the consumer requests information for bundled air transport products alone;

(b) the subscriber not to manipulate material supplied by CRSs in a manner which would lead to inaccurate, misleading or discriminatory presentation of information to consumers.

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

Article 12

1. (a) In the case of information provided by a CRS, a subscriber shall use a neutral display in accordance with Article 7(2)(a) and (b) unless another display is required to meet a preference indicated by a consumer.

(b) No subscriber shall manipulate information provided by a CRS in a manner that leads to inaccurate, misleading or discriminatory presentation of that information to any consumer.

(c) A subscriber shall make reservations and issue tickets in accordance with the information contained in the CRS used, or as authorised by the carrier concerned.

(d) A subscriber shall inform each consumer of any en route changes of equipment, the number of scheduled en route stops, the identity of the air carrier actually operating the flight, and of any changes of airport required in any itinerary provided, to the extent that

that information is present in the CRS. The subscriber shall inform the consumer of the name and address of the system vendor, the purposes of the processing, the duration of the retention of individual data and the means available to the data subject of exercising his access rights.

(e) A consumer shall be entitled at any time to have a print-out of the CRS display or to be given access to a parallel CRS display reflecting the image that is being displayed to the subscriber.

(f) A person shall be entitled to have effective access free of charge to his own data regardless of whether the data is stored by the CRS or by the subscriber.

2. A subscriber shall use the distribution facilities of a CRS in accordance with Annex II.

Article 13

1. (a) Any fee charged to a participating carrier 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 to see exactly which services have been used and the fees therefor; as a minimum, booking fee bills shall include the following information for each segment:

- type of CRS booking,
- passenger name,
- country,
- IATA/ARC agency identification code,
- city-code,
- city pair of segment,
- booking date (transaction date),
- flight date,
- flight number,
- status code (booking status),
- service type (class of service),
- passenger name record (PNR) locator, and
- booking/cancellation indicator.

The billing information shall be offered on magnetic media. The fee to be charged for the billing information provided in the form chosen by the carrier shall not exceed the cost of the medium itself together with its transportation costs. A participating air carrier shall be offered the facility of being informed when any booking or 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 of disallowing any such booking or transaction, unless the latter has already been accepted. In the event of such a disallowance, the air carrier shall not be charged for that booking or transaction.

(b) Any fee for equipment rental or other service charged to a subscriber 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. Productivity benefits awarded to subscribers by system vendors in the form of discount on rental charges or commission payments shall be deemed to be distribution costs of the system vendors and shall be based on ticketed segments. When, subject to paragraph 5 of Annex II the system vendor does not know whether a ticket has been issued or not, then that system vendor shall be entitled to rely upon notification of the ticket number from the subscriber.
The billing for the services of a CRS shall be sufficiently detailed to allow subscribers to see exactly which services have been used and what fees have been charged therefore.

2. A system vendor shall, on request, provide interested parties, including consumers, with details of current procedures, fees and system facilities, including interfaces, editing and display criteria used. For consumers that information shall be free of charge and cover the processing of individual data. This provision shall not, however, require a system vendor to disclose proprietary information such as software.

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 14

Member States of ECAC that are not bound by modified Regulation (EC) 2299/89 shall ensure that the Code of Conduct is applied in their territories and enforced with the same effect as in the European Community. Details of such enforcement measures shall be notified to the ECAC Secretariat, which shall advise all ECAC Member States and the EC Commission of the measures taken .

Article 15

1. Neither Article 7, Article 11(5) nor the Annexes shall apply to a CRS used by an air carrier or a group of air carriers:

(a) in its or their own office or offices and sales counters clearly identified as such; or

(b) to provide information and/or distribution facilities accessible through a public telecommunications network, clearly and continuously identifying the information provider or providers as such.

2. Where booking is performed directly by an air carrier, that air carrier shall be subject to Article 12(d) and (f).

Article 16

1. The system vendor shall ensure that the technical compliance of its CRS with Articles 6 and 8 is monitored by an independent auditor on a calendar year basis. For that purpose, the auditor shall be granted access at all times to any programmes, procedures, operations and safeguards used on the computers or computer systems through which the system vendor provides its distribution facilities. Each system vendor shall submit its

auditor's report on his inspection and findings to the competent authorities within four months of the end of the calendar year under review. The competent authorities shall examine those reports with a view to taking any action necessary in accordance with Article 14.

2. The system vendor shall inform participating carriers and the competent authorities of the identity of the auditor at least three months before confirmation of an appointment and at least three months before each annual reappointment. If, within one month of notification, any of the participating carriers objects to the capability of the auditor to carry out the tasks as required under this Article, the competent authorities shall, within a further two months and after consultation with the auditor, the system vendor and any other party claiming a legitimate interest, decide whether or not the auditor is to be replaced.

3. Member States not bound by modified Regulation (EC) 2299/89 shall not take a decision concerning the identity of the auditor without consultation with the other Member States of ECAC.

Article 17

1. Subject to this Article, this code shall apply to the inclusion of rail-transport products.

2. A system vendor may decide to include rail services in the principal display of its CRS.

3. Where a system vendor decides to include rail products in the principal display of its CRS, it shall choose to include certain well-defined categories of rail services, while respecting the principles stated in Article 3(2).

4. A rail-transport operator shall be deemed to be a participating or parent carrier, as appropriate, for the purposes of the code, insofar as it has an agreement with a system vendor for the distribution of its products through the principal display of a CRS or its own reservation system is a CRS as defined in Article 2(f). Subject to paragraph 5, those products shall be treated as air-transport products and shall be incorporated in the principal display in accordance with the criteria set out in Annex I.

5. (a) When applying the rules laid down in paragraphs 1 and 2 of Annex I to rail services the system vendor shall adjust the ranking principles for the principal display in order to take due account of the needs of consumers to be adequately informed of rail services that represent a competitive alternative to the air services. In particular, system vendors may rank rail services with a limited number of short stops with non-stop direct air services.

(b) System vendors shall define clear criteria for the application of this Article to rail services. Such criteria shall cover elapsed journey time and reflect the need to avoid excessive screen padding. At least two months before their application those criteria shall be submitted to the competent authorities for information.

6. For the purposes of this Article, all references to "flights" in this Code shall be deemed

to include references to "rail services" and references to "air-transport products" shall be deemed to include references to "rail products".

7. Particular attention shall be given to an assessment of the application of this Article in the review under Article 20.

Article 18

1. This Code shall be without prejudice to national legislation on security, public-order and data-protection measures taken in implementation where applicable of the Convention for the protection of individuals with regard to automatic processing of data, Council of Europe 28/I/1981 and of Directive 95/46/EC.

2. The beneficiaries of rights arising under Article 3 (4), Articles 6, 8 and 16 cannot renounce these rights by contractual or any other means.

Article 19

1.This code shall enter into force on 1st October 2000.

Article 20

1. A review of the application of this Code shall be undertaken within two years of its entry into force, or earlier if circumstances so warrant, in which case the revision will be undertaken as soon as possible, taking due account of the need for prompt action; this review shall, inter alia, consider economic developments in the relevant market.

2. This review shall be undertaken in co-operation with the EC Commission.

3. The report which will be presented may be accompanied by proposals for the revision of this Code.

ANNEX I

Principal display ranking criteria for flights (1) offering unbundled air transport products

1. Ranking of flight options in a principal display, for the day or days requested, must be in the following order unless requested in a different way by a consumer for an individual transaction:
(i) all non-stop direct flights between the city-pairs concerned;
(ii) all other direct flights, not involving a change of aircraft or train, between the city pairs concerned;
(iii) connecting flights.

2. A consumer must at least be afforded the possibility of having, on request, a principal display ranked by departure or arrival time and/or elapsed journey time. Unless otherwise requested by a consumer, a principal display must be ranked by departure time

for group (i) and elapsed journey time for groups (ii) and (iii).

3. Where a system vendor chooses to display information for any city-pair in relation to the schedules or fares of non-participating carriers, but not necessarily all such carriers, such information must be displayed in an accurate, non-misleading and non-discriminatory manner between carriers displayed.

4. If, to the system vendor's knowledge, information on the number of direct scheduled air services and the identity of the air carriers concerned is not comprehensive, that must be clearly stated on the relevant display.

5. Flights other than scheduled air services must be clearly identified.

6. Flights involving stops en route must be clearly identified.

7. Where flights are operated by an air carrier which is not the air carrier identified by the carrier designator code, the actual operator of the flight must be clearly identified. That requirement will apply in all cases, except for short-term ad hoc arrangements.

8. A system vendor must not use the screen space in a principal display in a manner which gives excessive exposure to one particular travel option or which displays unrealistic travel options.

9. Except as provided in paragraph 10, the following will apply:

(a) for direct services, no flight may be featured more than once in any principal display;

(b) for multi-sector services involving a change of aircraft, no combination of flights may be featured more than once in any principal display;

(c) flights involving a change of aircraft must be treated and displayed as connecting flights, with one line per aircraft segment. Nevertheless, where the flights are operated by the same carrier with the same flight number and where a carrier requires only one flight coupon and one reservation, a CRS should issue only one coupon and should charge for only one reservation.

10. 1. Where participating carriers have joint-venture or other contractual arrangements requiring two or more of them to assume separate responsibility for the offer and sale of air-transport products on a flight or combination of flights, the terms "flight" (for direct services) and "combination of flights" (for multi-sector services) used in paragraph 9 must be interpreted as allowing each of the carriers concerned - not more than two - to have a separate display using its individual carrier-designator code.

2. Where more than two carriers are involved, designation of the two carriers entitled to avail themselves of the exception provided for in subparagraph 1 must be a matter for the carrier actually operating the flight. In the absence of information from the operating carrier sufficient to identify the two carriers to be designated, a system vendor must designate the carriers on a non-discriminatory basis.

11. A principal display must, wherever practicable, include connecting flights on scheduled services which are operated by participating carriers and are constructed by using a minimum number of nine connecting points. A system vendor must accept a request by a participating carrier to include an indirect service, unless the routing is in excess of 130 % of the great circle distance between the two airports or unless that would lead to the exclusion of services with a shorter elapsed journey time. Connecting points with routings in excess of 130 % of that great circle distance need not be used.

(1) All references to "flights" in this Annex are in accordance with Article 17(6).

ANNEX II

Use of distribution facilities by subscribers

1. A subscriber must keep accurate records covering all CRS reservation transactions. Those records must include flight numbers, reservations booking designators, date of travel, departure and arrival times, status of segments, names and initials of passengers with their contact addresses and/or telephone numbers and ticketing status. When booking or cancelling space, the subscriber must ensure that the reservation designator being used corresponds to the fare paid by the passenger.

2. A subscriber should not deliberately make duplicate reservations for the same passenger. Where confirmed space is not available on the customer's choice, the passenger may be wait-listed on that flight (if wait-list is available) and confirmed on an alternative flight.

3. When a passenger cancels a reservation, the subscriber must immediately release that space.

4. When a passenger changes an itinerary, the subscriber must ensure that all space and supplementary services are cancelled when the new reservations are made.

5. A subscriber must, where practicable, request or process all reservations for a specific itinerary and all subsequent changes through the same CRS.

6. No subscriber may request or sell airline space unless requested to do so by a consumer.

7. A subscriber must ensure that a ticket is issued in accordance with the reservation status of each segment and in accordance with the applicable time limit. A subscriber must not issue a ticket indicating a definite reservation and a particular flight unless confirmation of that reservation has been received.

ANNEX F. OWNERSHIP OF CRSs

TABLE 1. *OWNERSHIP OF CRS (1990)*

Sabre	Apollo	System One	Worldspan
100% American Airlines	50% United Air Lines 50% U.S. Airways 4 Eur. Airlines	100% Texas Air General Motors	40% Delta 34% Northwest 26% TWA

Amadeus	Abacus
100% var. Eur. Airl.	100% var.Asian Airl.

TABLE 2. *OWNERSHIP OF CRS (2000)*

Sabre	Galileo	Amadeus	Worldspan
100% Public	73.2% Public 17.6% United A.L. 7.7% Swissair 1.5% U.S. Airways Air Canada Alitalia KLM BA Austrian Air Portugal Aer Lingus Olympic	40% Public 23% Air France 18% Lufthansa 18% Iberia	40% Delta 34% Northwest 26% TWA

Abacus
60% var. Asian Airl. 40% Sabre

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