

Explanatory note with regard to the definition of a 'parent carrier' in Regulation (EC) No 80/2009 of the European Parliament and of the Council on a Code of Conduct for computerised reservation systems and repealing Council Regulation (EEC) No 2299/89

(2009/C 53/02)

Introduction

1. Regulation (EC) No 80/2009 of 14 January 2009 replaces Regulation (EEC) No 2299/89 on a code of conduct for computerised reservation systems (mentioned below as 'CRS'). One of the elements that have changed with regard to Regulation (EEC) No 2299/89 is the definition of a 'parent carrier' of a CRS. This note aims to clarify to market participants the meaning of the new definition and to indicate how the Commission services would determine the status of an air carrier or rail-transport operator with respect to this definition.
2. This explanatory note is without prejudice of the application of Articles 81 and 82 of the Treaty.
3. This explanatory note is without prejudice to the definition of a parent carrier which may be given by the Court of Justice.

1. THE DEFINITION OF A 'PARENT CARRIER'

4. Article 2 of Regulation (EC) No 80/2009 defines a parent carrier as follows. The definitions of a participation in the capital and of control add further clarification:
 - 'Parent carrier' means any air carrier or rail-transport operator which directly or indirectly, alone or jointly with others, controls or participates in the capital with rights or representation on the board of directors, supervisory board or any other governing body of a system vendor, as well as any air carrier or rail-transport operator which it controls,
 - 'Control' means a relationship constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
 - ownership or 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 organs of an undertaking,
 - 'Participation in the capital with rights or representation on the board of directors, supervisory board or any other governing body of a system vendor' means an investment to which are attached rights or representa-

tion on the board of directors, supervisory board or any other governing body of a system vendor, and conferring the possibility of exercising, alone or jointly with others, decisive influence on the running of the business of the system vendor.

5. These definitions refer to the various means conferring the possibility to exercise decisive influence on the running of the business of the system vendor, with a special emphasis on the participation in the capital. Indeed, the definition of 'control' covers situations where ownership confers the possibility of exercising decisive influence on the system vendor. But the definition of a 'parent carrier' in the Code of Conduct adds an explicit reference to the participation in the capital of a system vendor, to the linked rights or the representation on a governing body and to the decisive influence the participation may confer to the air carrier or rail-transport operator over the running of the business of the system vendor.

2. ASSESSMENT OF THE PARENT CARRIER STATUS

6. The concepts of 'control' and 'decisive influence' stand central in the definition of a parent carrier. The definition of 'control' as provided by Article 2 of Regulation (EC) No 80/2009 is identical to the definition of control given in Article 3(2) of Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC merger regulation')⁽¹⁾. It follows that the concepts of 'control' and 'decisive influence' must be interpreted in the same way as in the *Commission Consolidated Jurisdictional Notice* published in the *Official Journal of the European Union* C 95 of 16 April 2008, in particular Chapters II.2 and II.3. The following will point out the main concepts of relevance for the purposes of Regulation (EC) No 80/2009.

2.1. Means of acquiring decisive influence

7. Control is defined as the possibility of exercising decisive influence on an undertaking. It is not necessary that the decisive influence is or will be actually exercised. The possibility of decisive influence can be acquired by various means, such as:

1. *Participation in the capital*: the most common means for the acquisition of control or decisive influence is the acquisition of shares, possibly with a shareholders'

⁽¹⁾ OJ L 24, 29.1.2004, p. 1.

agreement in cases of joint control, or the acquisition of assets. A participation in the capital may be acquired, either by direct investment or indirectly via an ownership stake in a company directly invested in the system vendor. The attached rights or a representation on the board or on any other governing body may give the investor the possibility of exercising decisive influence, i.e. the possibility for the shareholder either to take decisions or to block decisions with regard to the running of the business of the system vendor;

2. *Contracts*: decisive influence can also be acquired on a contractual basis. In order to confer decisive influence, such contracts must lead — over a long period — to a similar control of the management and the resources of the system vendor as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration;
3. *Any other means*: purely economic relationships may play a decisive role for the acquisition of control. For example, a very important long-term supply agreements or credits provided by suppliers or customers could, under certain circumstances, confer a decisive influence over the system vendor.

2.2. The case of the single parent carrier

8. One single air carrier or rail-transport operator may exercise decisive influence over a system vendor. Two general situations can be distinguished in which an undertaking has such sole control. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the undertaking. This power is typically achieved by the acquisition of a majority of voting rights. In this context, *decisive influence* means the power to take decisions with regard to the strategic commercial behaviour of the undertaking. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control). In these circumstances, *decisive influence* refers to the power to block the adoption of strategic decisions.
9. Sole control can be acquired on a *de jure* and/or *de facto* basis.
10. Sole control is normally acquired on a *de jure* basis where an undertaking acquires a majority of the voting rights of a company. Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding (e.g. the power to appoint more than half of the members of the supervisory board or the administrative board).
11. A minority shareholder may also be deemed to have sole control on a *de facto* basis, for example where, on the basis of its shareholding, the historic voting pattern at the share-

holders' meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting. This depends on the factors such as the dispersion of the remaining shares, the structural and economic links between shareholders and the strategic interests of other shareholders in the company. Such criteria need to be assessed on a case-by-case basis and taking account of foreseeable changes of the shareholders' presence which might arise in the future following a modification in the system vendor's control and ownership structure.

2.3. The case of multiple parent carriers

12. Several air carriers and/or rail-transport operators may share decisive influence on a system vendor.
13. The clearest form of such joint control exists where there are only two parent companies which share equally the voting rights in the system vendor. But joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to block decisions which are essential for the strategic behaviour of the joint venture. These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies (e.g. shareholders' agreement).
14. These veto rights must be related to strategic decisions on the business policy of the company. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation.
15. In contrast, veto rights which confer control typically include decisions on issues such as the budget, the business plan (insofar as it gives details which go beyond general declarations concerning business aims), major investments (insofar as the level of investment is not so high as to render the veto right closer to the normal protection of the interests of the minority shareholder) or the appointment of senior management.
16. Even in the absence of specific veto rights, two or more undertakings holding minority shareholdings in a system vendor may obtain joint control. This may be the case where the minority shareholders, together, will have a majority of the voting rights and where they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established — exceptionally — on a *de facto* basis where there is a strong commonality of interests between the concerned minority shareholders.

17. With regard to minority ownerships, it must be stressed that the Code of Conduct aims to make a clear difference between a purely financial participation in the capital of a system vendor and a more active involvement of the air carrier in the business of the system vendor. A prominent involvement of an air carrier or rail-transport operator in the decision process of the system vendor may create incentives to influence the business decisions of the system vendor in a way that would distort competition in the air or rail transport sector. With regard to the distribution of its products, it may also create a significant incentive for the 'parent carrier' to discriminate among CRSs in favour of its own.
 18. This distinction is important in the presence of air carriers or rail-transport operators as minority shareholders of a system vendor. If such participation provides rights to the air carrier or rail-transport operator in question which go beyond the rights normally accorded to minority shareholders in order to protect their financial interests, or if the air carrier or the rail-transport operator were able, alone or jointly with other shareholders, to influence business decisions of the system vendor with regard to other participating carriers, then it should be considered as a parent carrier.
- 3. PROCEDURAL ISSUES**
19. Acting on a complaint or on its own initiative, the Commission may investigate alleged infringements of the Code of Conduct. Investigations will be carried out in accordance with the principle of good administrative practice. For alleged infringements with regard to the obligations of parent carriers of a system vendor, the Commission's investigation will first assess whether the concerned air carrier or rail transport operator is to be considered as a parent carrier of the system vendor.
 20. Article 14 of the Code of Conduct provides the Commission with all the necessary powers of investigation to require the information needed for this assessment. Indeed, the Commission may require undertakings or associations of undertakings to provide all necessary information, including the provision of specific audits, including on issues covered by Article 10 which contains the obligations of parent carriers.
 21. In addition, Article 12 requires from each system vendor to submit every four years an independently audited report detailing the ownership structure and the governance model. The Commission may also request such report at any moment. Hence, Articles 12 and 14 allow the Commission to collect all pertinent information to assess the status of the air carrier or rail-transport operator with regard to the definition of a parent carrier.
 22. Such assessment will typically be based on an analysis of documents detailing the system vendor's ownership and control structure, such as its statutes or agreements between shareholders. It may also assess other relevant documents such as minutes of meetings of the board or of other governing bodies.
 23. If the air carrier or rail-transport operator is indeed identified as a parent carrier, the Commission will investigate the alleged infringements of the Code of Conduct by this parent carrier. Article 16 of the Code of Conduct sets the procedures and guarantees the protection of business secrets, which enhances the Commission's capacity to collect the needed information.
 24. Where such infringement does indeed take place, the Commission may take the needed decision to bring the infringement to an end. It may also fine the undertaking responsible for the infringement of the Code of Conduct.
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