ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
15 December 2000 *

In Case T-113/99,

The Galileo Company, established in Swindon, Wiltshire, United Kingdom,

Galileo International LLC, established in Rosemount, Illinois, United States of America,

represented by R. Plender QC and S. Masters, Barrister, instructed by K. Holmes and D. Austin, Solicitors, with an address for service in Luxembourg at the offices of Elvinger, Hoss and Prussen, 2 Place Winston Churchill,

applicants,

supported by

Amadeus Global Travel Distribution SA, established in Madrid, Spain, represented by M. Caballero Clavijo, of the Madrid Bar, with an address for service in Luxembourg at the offices of Elvinger, Hoss and Prussen, 2 Place Winston Churchill,

intervener,

* Language of the case: English.

Council of the European Union, represented by A. Lopes Sabino and M. Bishop, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of E. Uhlmann, General Counsel of the Legal Affairs Directorate in the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by F. Benyon, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for partial annulment of Article 1(7)(b) of Council Regulation (EC) No 323/1999 of 8 February 1999 amending Council Regulation (EEC) No 2299/89 on a code of conduct for computerised reservation systems (CRS) (OJ 1999 L 40, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A.W.H. Meij, President, A. Potocki and J. Pirrung, Judges,

Registrar: H. Jung,

makes the following

Order

Background to the dispute

1 Before the development of computerised reservation systems (hereinafter 'CRS'), sales of tickets for air travel were arranged directly by airlines. With the development of computers, travel agents were able to access those airlines' computer systems directly to obtain information and make reservations. However, access was limited to the system set up by the airline offering computer access and only the large airlines offered that service. Subsequently 'multiple access' CRSs were developed which made it possible to access the individual systems of certain airlines from one terminal. Such systems did not involve setting up a separate database and were often limited to the main national airlines with limited access for travel agents established in other countries.

2 Airlines then joined forces to set up neutral global CRSs which were independent systems comprising databases drawing information from many travel vendors.

3 Galileo International LLC (hereinafter 'GILLC') owns and operates a global CRS which allows subscribers, *inter alia,* travel agents, to make automated bookings with a large number of service providers in the travel sector, such as airlines, car-hire companies or hotels. The Galileo Company, a 99%-owned subsidiary of GILLC, provides it with support services in the European Union, the Middle East, Africa, Asia, the Pacific, and Latin America in relation to the global CRS.

4 According to the applicants, there are four such CRSs: GILLC, owned *inter alia* by United Airlines, British Airways, SAir Group, KLM Royal Dutch Airlines, US Airways and Alitalia; Amadeus, owned by Lufthansa, Iberia and Air France; Sabre, owned *inter alia* by American Airlines; and Worldspan, owned by Delta Airways, TWA and Northwest. At the material time, those CRSs were the only ones supplying the air transport products available or in use in the Community. Moreover, those were the only CRSs operating globally.

5 Two kinds of information were stored on the CRS database: information contained in booking requests from travel agents and information received from airlines. That information, generally known as 'marketing information data transfer' (hereinafter 'MIDT') can be sold as a separate product. The applicants offer four MIDT products: a product for the American market, an international product (the rest of the world excluding the United States of America), a global product and a regional product.

6 On 24 July 1989, the Council adopted Regulation (EEC) No 2299/89 on a code of conduct for computerised reservation systems (OJ 1989 L 220, p. 1). That regulation was amended, and Article 6 thereof in particular, by Council Regulation (EEC) No 3089/93 of 29 October 1993 (OJ 1993 L 278, p.1).

7 On 9 July 1997, the Commission adopted a proposal for a regulation amending Regulation No 2299/89. No amendment of Article 6(1)(b) of that regulation was envisaged.

8 On 15 May 1998, the European Parliament adopted the Commission's proposal with amendments (OJ 1998 C 167, p. 288 and 293). Those included the addition of a point (v) in Article 6(1)(b) of Regulation No 2299/89.

9 On 15 June 1998, the Commission submitted a new proposal for a regulation which included *inter alia* the above amendment by Parliament.

10 On 24 September 1998, the Council adopted a common position (OJ 1998 C 360, p. 69) which incorporated *inter alia* the addition of a point (v) in Article 6(1)(b) of Regulation No 2299/89.

11 After a second reading by Parliament, on 8 February 1999, the Council adopted Regulation (EC) No 323/1999 amending Regulation No 2299/89 (OJ 1999 L 40, p. 1). Article 6(1)(b) of Regulation No 2299/89 is now worded as follows:

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

...

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

...

(v) a group of airlines and/or subscribers is entitled to purchase data for common processing.'

12 According to the applicants, the purpose of that provision was to ensure that travel agents, mostly small and medium-sized enterprises, should have access to the information contained in databases by forming groups.

Procedure

13 By application lodged at the Registry of the Court of First Instance on 7 May 1999, the applicants brought this action. In essence they submit that Article 6(1)(b)(v) of Regulation No 2299/89, as amended, is unlawful for two reasons. First, it infringes the principle of proportionality. If it is to be construed as permitting airlines to form groups to purchase MIDT, irrespective of the size of the airlines concerned or the number of participants in the group, the measure is excessive and is not necessary to achieve its aim; it is also disproportionate owing to the very serious financial implications it has for CRS operators engaged in

supplying MIDT at the date of adoption of Regulation No 323/1999. Second, the obligation to state reasons was not complied with, since Regulation No 323/1999 contains no reference to the reasoning behind the decision to adopt the provision in question which allows group purchase.

14 By separate document lodged at the Registry of the Court of First Instance on 26 July 1999, the Council raised an objection of inadmissibility, on which the applicants submitted their observations on 2 October 1999.

15 By order of the President of the Second Chamber of the Court of First Instance of 10 February 2000, Amadeus Global Travel Distribution SA (hereinafter 'Amadeus') and the Commission were granted leave to intervene in support of the applicants and the Council respectively. A period was prescribed for them to submit their observations, confined initially to the admissibility of the action. By the same order the request submitted by the applicants for confidential treatment *vis-à-vis* the interveners was granted at this stage in the proceedings.

16 The written procedure on the issue of admissibility was concluded on 21 June 2000.

Forms of order sought

17 The applicants claim that the Court of First Instance should:

— dismiss the objection of inadmissibility raised by the Council;

— annul Article 1(7)(b) of Regulation No 323/1999, in so far as it inserts a point (v) in Article 6(1)(b) of Regulation 2299/89, to the extent to which that measure applies to operators of CRSs in being on the date when Regulation No 323/1999 was adopted;

— order the Council to pay the costs.

18 Amadeus claims that the Court should:

— dismiss the objection of inadmissibility raised by the Council;

— order the Council to pay the costs.

19 The Council contends that the Court should:

— dismiss the application as inadmissible.

— order the applicants to pay the costs.

20 The Commission contends that the Court should:

— dismiss the application as in inadmissible;

— order the applicants to pay the costs.

Admissibility

21 Under Article 114(3) of the Rules of Procedure of the Court of First Instance, the remainder of the proceedings on a plea of inadmissibility is to be oral, unless the Court of First Instance decides otherwise. In the present case the Court of First Instance considers that the documents on the Court file provide sufficient information to enable it to rule in the present case without opening the oral procedure.

Arguments of the parties

22 The applicants submit first that the contested measure is of direct concern to them, given its mandatory terms (Case T-147/97 *Champion Stationery and Others* v *Council* [1998] ECR II-4137, paragraph 31).

23 They submit, next, that the measure in question is of individual concern to them.

24 A regulation may contain a particular provision which, viewed separately from the remainder, is of individual concern to an applicant (Case 113/77 *NTN Toyo Bearing Company and Others* v *Council* [1979] ECR 1185, paragraph 12).

25 Further, in certain circumstances, even a legislative measure may concern certain traders individually (Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 50). This is so, in particular, in two relevant situations in the present case.

26 The first situation is that in which the number and identity of traders liable to be affected by the contested measure is fixed and ascertainable at the time the measure is adopted. This is the case where a measure applies to undertakings which were engaged in the relevant trade at the time when it was adopted, and the measure fails to make transitional arrangements to protect such undertakings against substantial and unforeseeable detriment (see *inter alia* Joined Cases 106/63 and 107/63 *Toepfer and Getreide-Import Gesellschaft* v *Commission* [1965] ECR 405 at 411 and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11).

27 The applicants submit that in the present case, when it adopted Regulation No 323/1999, the Council was in a position to know which companies would be individually concerned by the measure adopted, because there were only four such companies operating. Those four formed a closed category distinct from any other companies which might in future operate a global CRS within the Community.

28 Moreover, before the adoption of the contested provision, the applicants had concluded 36 contracts with individual airlines for the purchase of MIDT. The

value of those contracts was markedly affected by Article 6(1)(b)(v) of Regulation No 2299/89 as inserted by Regulation No 323/1999.

29 Finally, there was no provision for any transitional period and the Council thus imposed an immediate obligation with considerable effects on past investments, budgeting forecasts and revenue from existing contracts.

30 The contested measure must therefore be considered to have been intended to produce or to actually produce distinct legal effects for the applicants (Case 26/86 *Deutz und Geldermann* v *Council* [1987] ECR 941, paragraph 7).

31 The second situation is that in which exceptional economic circumstances differentiate an applicant, either singly or within a group of identifiable similarly placed traders, from all other traders (see *inter alia* Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 17, and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853).

32 In the present case:

— along with the three other operators of global CRSs, the applicants are in a situation which distinguishes them from all other traders: only the four traders in question operated such systems and it is unlikely that a new system could be created, since all the major airlines are already involved in the four existing global CRSs. Further, considerable investment would be necessary to establish a new CRS;

— the adoption of the contested measure brings about a change in the situation of the applicants. For each of the operators of global CRSs, the obligation to supply MIDT only once to one of the groups of airlines having a common interest in the common processing of data reduces the value of existing contracts and may well make it uneconomic to continue supplying MIDT;

— at the time of adoption of Regulation No 323/1999, which affects the effectiveness of CRSs and threatens the continued existence of part of them, the Council was under an obligation to take account of the particular circumstances of the applicants and other operators of global CRSs under Articles 71 and 74 EC.

33 The applicants then submit that the possible existence of a remedy at domestic level, enabling a preliminary ruling to be obtained on the interpretation or validity of the measure adopted, cannot affect the admissibility of the present action (Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] II-3407, paragraph 68).

34 In any event, there is no clear basis for the institution of proceedings in the national courts. The possibility that a dispute might arise between the applicants and a subscriber cannot deprive them of their right to bring an action for annulment. Otherwise the system of legal remedies established by the Treaty would be deficient (Case C-70/97 P *Kruidvat* v *Commission* [1998] ECR I-7183, paragraph 48).

35 The intervener, Amadeus, submits that the action for annulment must be declared admissible.

36 It submits, first, that a 'measure' setting fares, which is binding only on the applicants, itself and two other operators of CRSs, and forces them to change radically the way in which they had been pricing and selling the databases they set up to their respective customers to date under existing contracts, should be considered to be a decision within the meaning of Article 230 EC and not a 'general rule of law'.

37 Amadeus points out, that since 1989, there has not been a single new trader entering the relevant European Union market and that one of the five traders active in 1989 has disappeared after merging with it.

38 Finally, Amadeus submits that the contested measure constitutes a flagrant violation of the rights conferred on proprietors of CRSs by Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

39 The Council contends that the contested measure is a legislative measure of general application (Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471). A single provision cannot at one and the same time have the character of a measure of general application and of an individual measure (Case 45/81 *Moksel* v *Commission* [1982] ECR 1129, paragraph 18).

40 Further, the applicants are neither directly nor individually concerned within the meaning of the fourth paragraph of Article 230 EC (Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605 paragraph 17). The application is therefore inadmissible.

41 The Council observes, finally, that the questions raised by the applicants arise from an interpretation of the contested provision. They thus are not the proper subject matter of a direct action for annulment before the Court of First Instance, which has no jurisdiction to give rulings on the interpretation of Community law, and should be left for the Court of Justice to resolve in a preliminary ruling on a question referred to it.

42 The Commission supports the form of order sought by the Council. It contends that the applicants have not explained why Regulation No 323/1999 should be considered to be a decision taken in the guise of a regulation. Similarly they do not establish how they are individually concerned by the contested measure.

Findings of the Court

43 First of all, it must be noted that, contrary to the contention of the defendant, this dispute constitutes a genuine claim for annulment for the purposes of Article 230 EC and not simply a request for the interpretation of a provision of Regulation No 323/1999. The fact that the pleas relied on in support of the claim for annulment are based on an interpretation of the provision in question falls to be considered with the merits of the dispute and does not go to the admissibility of that claim.

44 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision which, although in the form of a regulation, is of direct and individual concern to him.

45 According to settled case- law, the test for distinguishing between a regulation and a decision is whether the measure is of general application or not. A measure

is of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in the abstract (Case T-138/98 *ACAV and Others* v *Council* [2000] ECR II-341, paragraph 49).

46 Moreover, the fact that the number and even the identity of the persons of whom a measure applies can be determined more or less precisely is not such as to call in question the legislative nature of the measure (Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 30, and Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 34).

47 In the present case, it appears that Article 6(1)(6)(v) of Regulation No 2299/89, as inserted by Regulation No 323/1999, is drafted in general and abstract terms. Like points (i) to (iv) of that article, it lays down the conditions under which a system vendor may provide information, statistics etc., generated by its CRS. In that regard, it is intended to cover objectively determined situations and to that end contains *inter alia* terms defined in Article 2 in a general and abstract manner. It is therefore only under those conditions that it entails legal effects for categories of undertakings. Even if it were established that the persons to whom the provision in question, and indeed all other provisions of Regulation No 2299/89 entailing effects for system vendors, applies, were identifiable at the time it was adopted, its legislative nature would not thereby be called into question, since it envisages only objective legal or factual situations (order in *CNPAAP* v *Council*, cited above, paragraph 35).

48 None the less, the Court of Justice has held that, in certain circumstances a provision of a measure of general application may be of individual concern to certain of the traders concerned (*Extramet Industrie* v *Council*, cited above,

paragraph 13, and *Codorniu* v *Council*, cited above, paragraph 19). That is the case if the provision in question affects a natural or legal person by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, therefore, singles them out in the same way as the addressee of a decision is singled out (*Cordorniu* v *Council*, cited above, paragraph 20).

49 The applicants submit that they form part of a select group of traders covered by the contested provision.

50 However, contrary to their submission, it must be observed that the fact that it is possible to determine more or less precisely the number or even the identity of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question (Case C-213/91 *Abertal and Others* v *Commission* [1993] ECR I-3177, paragraph 17, and Case C-209/94 P *Buralux and Others* v *Council* [1996] ECR I-615, paragraph 24). In the present case the contested provision is of concern to the applicants in their objective capacity as 'system vendor', in the same way as any other system vendor, within the meaning of Article 2 of Regulation No 2299/89, as amended by Regulation No 3089/93. All traders covered by Article 6(1)(b)(v) of Regulation No 2299/89, as amended, are concerned by that provision in their objective capacity as operators active on the relevant market, whether system vendors, airlines or subscribers.

51 Moreover, the applicants cite the existence of exceptional economic circumstances. However, the two judgments of the Court of Justice to which they refer in which it was held that a legal person was individually concerned by the legislative

provision it contested, were based on different facts from those in the present case.

52 Thus in *Extramet Industrie* v *Council*, cited above, which concerns anti-dumping legislation, the Court of Justice stressed that the applicant was both the major importer of the product against which the anti-dumping measure was taken and the end user of the product and that it was encountering difficulties in obtaining supplies from the only producer in the Community, who was also its competitor on the market in the processed product.

53 In *Cordorniu* v *Council*, cited above, the Court of Justice held that an applicant which has held since 1924 an exclusive right to a trademark which it has traditionally used and which is prevented from using it by reason of the adoption of a legislative provision is individually concerned by that provision.

54 It is clear from those judgments that an undertaking is not individually concerned by a legislative provision simply by virtue of the fact that that provision affects its economic activity. The situations contemplated in those judgments concerned a specific combination of circumstances which do not obtain in the present case. Thus, the applicants have not established that they were prevented from exercising an exclusive right comparable to that in the case which gave rise to the judgment in *Cordorniu* v *Council*, cited above. Similarly, while activity in relation to MIDT, which is only an activity derived from the primary function of CRSs, that is to say the computerised reservation of services, is affected by the contested provision, the applicants have not established that they were in a situation comparable to that of Extramet Industrie SA on the market in calcium metal. The applicants are only affected by the regulation in question in their objective capacity as system vendors in the same way as other traders. The specific facts on the basis of which Extramet Industrie SA and Corduniu SA were held to be individually concerned by the measures they contested have no equivalent in the present case.

55 It must be concluded that the applicants have not established that they are individually concerned by the legislative provision whose annulment they seek.

56 The application must, therefore, be dismissed as inadmissible.

Costs

57 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to bear their own costs and pay those of the defendant, as applied for by it.

58 Under the first subparagraph of Article 87(4) of the Rules of Procedure, the institutions which intervened in the proceedings are to bear their own costs. Notwithstanding the form of order sought by the Commission on that point, it must therefore be ordered to bear its own costs

59 Pursuant to the third subparagraph of Article 87(4) of the Rules of Procedure, Amadeus must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicants shall bear their own costs and pay those of the defendant.**

3. **The interveners shall bear their own costs.**

Luxembourg, 15 December 2000.

H. Jung
Registrar

A.W.H. Meij
President