II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 November 1988

relating to a proceeding under Article 86 of the EEC Treaty

(IV/32.318, London European — Sabena)

(Only the French and Dutch texts are authentic)

(88/589/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (1), as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 thereof,

Having regard to the complaint dated 22 April 1987 made to the Commission pursuant to Article 3 of Regulation No 17 by London European Airways PLC, of Luton International Airport, Bedfordshire LU2 9LY, United Kingdom, that Sabena, Belgian World Airlines, 35 rue Cardinal Mercier, B-1000 Brussels, had infringed Article 86,

Having regard to the Commission decision of 6 May 1987 to initiate proceedings in this case,

Having given Sabena the opportunity of being heard on the matters to which the Commission has taken objection in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (2),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

Introduction

(1) This decision arises from an application pursuant to Article 3 of Regulation No 17 by London European Airways PLC, hereinafter referred to as 'London European', a private British airline company. London European alleged that Sabena, Belgian World Airlines, hereinafter referred to as 'Sabena', had infringed Article 86 of the EEC Treaty by abusing its dominant position on the computerized ticket reservations market in Belgium. London European also applied for an interim-measures decision.

The alleged abusive conduct involved the refusal by Sabena to grant London European access to its Saphir computer reservation system which is managed by Sabena. London European claimed that Sabena, by refusing to grant access to the Saphir system, was using its power on the ticket reservations market to impose minimum air fares on London European, or was attempting to make entry to the Saphir system subject to acceptance by London European of services which had no connection with the reservation system.

(1) OJ No 13, 21. 1. 1962, p. 204/62.
(2) OJ No 127, 20. 8. 1963, p. 2268/63.

(2) The behaviour of which London European complained allegedly started at the beginning of 1987 when representatives of London European and Sabena met in order to discuss the question of London European's access to the Saphir system and, as an auxiliary issue, the terms of a ground handling contract with Sabena for London European aircraft. The complainants alleged that at these meetings Sabena had refused access to the Saphir system on the ground that London European's tariff on the Brussels-Luton route was too low. London European was also allegedly told that Sabena would grant access to the Saphir system provided that London European agreed to give the ground handling contract to Sabena.

(3) In April 1987, the Commission carried out an investigation at Sabena pursuant to Article 14 (3) of Regulation No 17. On completing the investigation, it informed Sabena that it intended to issue an interim-measures decision. At the same time, however, the Commission indicated to Sabena that if it were to change its position as regards the admission of London European to Saphir, an interim-measures decision would no longer be necessary and its cooperative attitude could then be taken into favourable consideration in the course of the proceeding under Article 86 of the EEC Treaty. Some weeks later, Sabena informed the Commission of its decision to accept London European into the Saphir reservation system on normal non-discriminatory commercial terms to be agreed on between the companies.

The undertakings

(4) Sabena is an airline company, a majority of whose authorized capital is owned by the Belgian State. Its main activity is the provision of air transport services. Apart from providing transport services as such, Sabena provides other services which do not as such involve the provision of a transport service. Two examples of this are the aircraft ground handling service and the Saphir computerized reservation service. In 1986, Sabena had a turnover of Bfrs 39 000 million (896 million ECU) and a net profit of Bfrs 146 million (3,35 million ECU).

(5) London European is a privately owned company registered in the United Kingdom. It currently operates a twice-daily service (except Saturdays) between Luton and Brussels and Luton and Amsterdam.

The Saphir system

(6) The Saphir system is a computerized system which allows travel agents to consult the flight schedules, fares and seat availability of airlines included in the system, and to make reservations. This system eliminates the need for travel agents to telephone the company concerned for each booking. Reservations are made directly by the agency on the basis of data provided by the system.

(7) Saphir is the Belgian version of the Alpha-3 system developed by Air France. Sabena is the sole manager of the system and alone has the power to grant or refuse access to the system. The system is operated on a principle of reciprocity. Sabena gives other companies access to its system free of charge provided they reciprocate in like manner. Where such reciprocity is not possible, as in the case in point, Sabena charges a fee to the company using the system.

The commercial conduct of Sabena towards London European

(8) During the investigation carried out on 30 April 1987 pursuant to Article 14 (3) of Regulation No 17 on the premises of Sabena, documents relating to the meetings between Sabena and London European representatives were found in the files of the senior staff responsible. The salient points of the documents are as follows:

(9) At a meeting held in London at the beginning of March 1987, Mr Verdonck, a Sabena representative, informed (note of 6 March 1987) the London European representatives that 'unless it was in Sabena's commercial and positive interest to collaborate (whether by London European changing its tariffs to the IATA rate, through a major interline agreement or a handling contract), Sabena would not authorize the inclusion of London European in its reservation system or access to its system'. 'Should a common interest emerge, we *could* (underlined in the text) consider granting access to Saphir but at the cost of approximately 75 Belgian francs per sector reserved'. In a preceding paragraph Mr Verdonck had noted that: 'this company (London European) thus represents a potential danger for traffic ex Belgium' and that London European fares ex Belgium were half those of Sabena. The note continued as follows: 'they (London European) have pratically nothing to offer SN, as their tariff structure and limited timetable virtually rule out any possibility of interline connections via BRU. In order to penetrate the Belgian market, it is virtually essential that they be

included in Saphir, and that is the only form of cooperation they are seeking'.

In a reply to the abovementioned note, Mr Van Gulck (Sabena-Brussels) reported that he had also met the London European representatives and had given them the same information.

(10) In a note dated 20 March 1987, Mr Verdonck stated that 'the London European representatives have again been informed by us that without a handling contract, they have no chance of being listed in Saphir'. The final price proposed by Sabena for the services provided by the Saphir system was Bfrs 75 per sector reserved. The note also specifies that, in view of London European's fares, it is in Sabena's interests to try to offset possible passenger losses by means of a handling contract and the income provided by Saphir; Mr Verdonck ends by stressing that the Saphir contract and the handling contract must be linked.

In a note dated 31 March 1987, Mr Verdonck repeats that the two contracts (handling and Saphir) 'are linked, no agreement on one without the other'.

In a telegram dated 1 April 1987 from Mr Colleman (Sabena-Brussels) to Mr Verdonck, the Sabena position has hardened: 'At meeting on 31 March it was decided to refuse LEA access to Saphir. Stop. Possible handling contract does not affect this position'.

The position is confirmed in a note of 8 April 1987 from Mr Dekker (Sabena-Brussels): 'I confirm that I maintained our decision not to accept London European in our distribution and reservation system in Belgium'. 'NB: they will probably give the handling to Belgavia'.

In a note dated 9 April 1987, a member of Sabena's legal department states that Sabena's conduct could, in his opinion, give rise to Commission penalties on the basis of Article 86 of the EEC Treaty.

(11) In addition, Sabena had established a similar policy in respect of other companies, even though the policy does not seem to have been implemented. Thus, in a note of 18 February 1987 analysing a request for access to the system submitted by another company, Mr Verdonck indicates that only if the handling were given to Sabena would the latter consider the possibility of allowing that other company to list its services in Saphir, subject to a fee. In a note dated 5 March 1987, Mr Godderis (Sabena-Brussels) confirms that no support would be lent to that other company because it had given its handling contract to the other company.

(12) In a note dated 13 March 1987 concerning the access of another carrier to the Saphir system, Mr Verdonck confirms Sabena's position: 'we should only allow them (access) if there is a related commercial advantage such as a handling contract, interline traffic, etc. Even then, the price of Bfrs 75 should be increased or decreased in function of the advantage expected from other areas'.

II. LEGAL ASSESSMENT

The relevant market

(a) *The relevant product market*

(13) In order to determine whether Sabena occupies a dominant position within the meaning of Article 86, it is necessary first to define the relevant market. This constitutes all substitute products existing in a given geographic area in which the conditions of competition are sufficiently uniform to enable the economic power of the undertakings in question to be judged.

(14) The Commission notes that all the major airlines in Europe have developed or concluded agreements on access to a computerized reservation system. Although as matters stand, other non-computerized methods of reserving seats still exist, computer reservation will in the near future replace all other forms of reservation. The advantages of a computerized system (speed, quantity of data, immediate reservation and issue of ticket, constantly up-dated information, etc.) are such that the other services still in existence cannot be regarded as equivalent, e.g. the consultation by travel agencies of schedules and tariffs or telephoned reservations through airlines. Although London European itself referred to the latter form of reservation in promoting its Brussels-Luton service, its insistence on gaining access to the Saphir system shows that such access is essential for a company wishing to compete with companies already on the market. Reservations by telephone can, however, still serve as a back-up system, especially for companies with few flights and lower fares than their competitors. Nonetheless, the ability to offer customers a computerized reservation service is an important feature of a marketing policy.

(15) The originality of the product in question is due to its situation, halfway between the travel agencies and the airlines. It is in the interests of the latter, and in London European's in the present case, to ensure their flights are displayed in a reservation system so that travel agencies using the system can offer the flights to their customers.

The market in question thus comprises two facets : the market for the provision of computerized reservation services by an operator of such systems to one or more air transport undertakings ; second, the market for the supply of such systems by that operator to travel agencies. This is why when examining whether Sabena holds a dominant position on the market for the provision of computerized reservation services it is necessary to consider both the market share of the Saphir system in relation to other computerized reservation systems and that share in relation to the supply of the system to travel agencies.

(b) *The relevant geographical market*

(16) The geographical market to be taken into consideration is the Belgian market. It is on this territory that customers residing in Belgium reserve their air tickets. Transactions are conducted in one currency, the Belgian franc, and the travel agents operate in a single market, the Belgian national market.

The Commission and the Court of Justice have expressely recognized that 'the territories of both large and medium-sized countries' [1] constitute a substantial part of the common market. It can therefore be inferred that the territory in question meets the criterion of substantiatily.

The Commission therefore concludes that for the purposes of Article 86 the relevant market is that for the provision of computerized flight reservation services in Belgium.

Regulation No 17

(17) As regards the applicability of Regulation No 17 to computerized flight reservation systems, it should be noted that the scope of application of this Regulation is limited by Council Regulation (EEC) No 141/62 [2] only, and not by the provisions of Council Regulation (EEC) No 3975/87 of (EEC) No 3976/87 [3].

Article 1 of Regulation (EEC) No 141/62 excludes the application of Regulation (EEC) No 17 to dominant positions on the transport market.

This provision, since it is a limitation of the scope of Regulation No 17, must be interpreted strictly. There is therefore no doubt that activities ancillary to the transport market as such do not fall within this exception and therefore fall within the scope of Regulation No 17.

(18) It is necessary to examine whether the market as defined above falls within the scope of application of Regulation No 17.

(19) Since the relevant market comprises two parts, the matter can easily be resolved as regards the relationship between an operator of a computerized reservation system and travel agencies. It is clear that Regulation No 17 is applicable on this market. It is well established that the services provided by a travel agent do not comprise the provision of transport itself [4]. Therefore travel agents do not provide a service which relates to the transport market as required by Regulation No 141/62 in order to avoid the application of Regulation No 17.

(20) As regards the second part of the market, Regulation No 17 is also applicable for similar reasons.

Although the provision of ticket reservation services is in many instances connected with the provision of air transport services, it is only indirectly connected and does not consist in the provision of air transport as such. One can clearly conceive of an air transport service being provided without a prior reservation, if seats are available. The sole purpose of a reservation is to ensure that a traveller leaves when he wishes, but it can certainly be separated from the transport service proper. As in many other sectors, the selling of tickets is separate from the service attached to the ticket.

Furthermore, the fact that airlines have themselves developed their own reservation systems does not mean that reservations are indissociable from transportation. There is nothing to prevent a company having no links with airline companies from developing and marketing a system.

[1] For Belgium, see in particular Case 127/73, BRT - SABAM, [1974] ECR 313.
[2] OJ No L 124, 28. 11. 1962, p. 2751/62.
[3] OJ No L 374, 31. 12. 1987, pp. 1 and 9.

[4] See Council Directive 82/470/EEC of 29 June 1982 on measures designed to facilitate the effective exercise of freedom of establishment and of freedom to provide services in respect of the activities of self-employed persons in certain services incidental to transport and travel agencies and in storage warehousing (OJ No L 213, 21. 7. 1982, p. 1).

While it is true that reservations are an integral part of marketing air transport services, the marketing is not in itself a transport service.

Commission Decision 85/121/EEC [1] (Olympic Airways Case), which specifies that ground handling services are not as such air transport services and thus come under Regulation No 17 supports the conclusion reached by the Commission in the present case. In the same way as handling services provided on the ground before and after the transport takes place, the provision of a reservation service prior to the actual provision of transportation cannot be regarded as forming part of the transport market; it therefore falls within the scope of Regulation No 17.

(21) It must also be remembered that at the time when the events which are the subject of this decision took place, Regulation (EEC) No 3976/87 had not yet been adopted. Yet an analysis of the origin of this Regulation reinforces the view of the Commission that Regulation No 17 is applicable to computerized reservation services.

In its proposal of 8 July 1984 [2] for an amendment to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices [3], the Commission adopted the principle that computerized reservations systems do not fall within the scope of Article 1 of Regulation No 141/62 and are already convered by Regulation No 17. The explanatory memorandum to the proposal clearly states that agreements on ticket reservations and the issue of tickets are not of a purely technical nature and are already covered by Regulation No 17. In addition, the recitals of the abovementioned proposal place agreements on computer reservation systems on the same footing as those relating to technical and other operations carried out on the ground in airports.

This Commission position is reflected in the first recital of Regulation (EEC) No 3976/87. The recital draws a clear distinction between agreements directly related to the provision of air transport services and those not directly related. The former are covered by Regulation (EEC) No 3975/87 and the latter by Regulation No 17.

(22) The fact that Article 2 (1) of Regulation (EEC) No 3976/87 empowers the Commission to adopt block exemption regulations 'without prejudice to the application of Regulation (EEC) No 3975/87' does not mean that all the activities listed in Article 2 (2) of Regulation (EEC) No 3976/87 fall within the scope of Regulation (EEC) No 3975/87. The purpose of Regulation (EEC) No 3976/87 is to specify the areas where the Commission may grant block exemptions. These areas relate to air transport as such as well as to services ancillary thereto.

These two categories of service are found in a single regulation only for the purposes of that regulation, which does not affect the scope of Regulations No 17 and No 141/62 in relation to individual cases. As regards the latter, Regulation (EEC) No 3975/87 applies to air transport as such while Regulation No 17 will remain applicable to all other areas which do not consist of the provision of transport services as such.

Moreover, this reasoning is confirmed in Commission Regulation (EEC) No 2672/88 of 26 July 1988 relating to the application of Article 85 (3) of the EEC Treaty to categories of agreements between undertakings relating to computerized reservation systems for air transport services [4]. The penultimate recital of the Regulation states that agreements exempted automatically by virtue of that Regulation do not have to be notified to the Commission pursuant to Regulation No 17.

Furthermore, the scope of Regulations No 17 and No 141/62 is not affected by Article 6 of Regulation (EEC) No 3976/87 which provides for consulation of the Advisory Committee established by Article 8 (3) of Regulation (EEC) No 3975/87 before publication of the draft regulation as well as before its adoption. Article 6 of Regulation (EEC) No 3976/87 does not affect in any way the procedures laid down in Regulation No 17 for the investigation of infringements of the processing of requests for individual exemption or negative clearance inareas which do not relate directly to the transport sector.

[1] OJ No L 46, 15. 2. 1985, p. 51.
[2] Bull. EC 7/8-1986, point 2.1.211.
[3] OJ No L 285, 29. 12. 1971, p. 46.
[4] OJ No L 239, 30. 8. 1988, p. 13.

Existence of a dominant position

(23) It must then be assessed whether Sabena holds a dominant position both in the market for the provision of computerzed services by an operator of such services to travel agencies and in that of the provision of such services to other air transport companies.

(24) As regards the former market Sabena estimates the market share held by Saphir at between 40 and 50 %.

Although the Court has ruled that a 45 % share does not automatically entail control of the market, it is necessary to assess the degree of control in relation to the strength and number of competitors (1), whilst the ratio of market shares held by the undertaking concerned to those held by its competitors is also a reliable indicator (2).

There are five other computerized systems in Belgium, used by no more than some 20 agencies. The fact that 118 agencies use the Saphir system can be regarded as proof of Sabena's pre-eminent strength in the market for the provision of such services to travel agents.

(25) It also emerged that, between June and September 1987, 47 % of seats reserved in Belgium on Brussels-Luton flights were reserved through the Saphir system. This high percentage clearly shows that the success of the Brussels-Luton flights did indeed depend on London European having access to the Saphir system.

(26) In the latter market, Sabena manifestly holds a dominant position as all airlines operating in Brussels (with two exceptions) are listed in the Saphir system. This means that Sabena had always given access to its system to any company which requested access. It is also a clear indication of the capital importance of such access for all companies seeking to operate competitively on the Belgian market.

The fact that two airlines operating in Brussels are not included in the Saphir system simply means that they have their own marketing policy which does not require access to the system, chiefly for reasons of cost.

(27) On the basis of the above considerations, the Commission considers that at the material time Sabena occupied a dominant position in the Belgian market for the provision of computerized reservation services.

Abuse of dominant position

(28) The question whether the behaviour of Sabena constituted one or several abuses of this dominant position may be analysed as follows :

(29) The conduct of Sabena can be viewed, first, as a means of placing indirect pressure on London European to fix a higher level of fares than, as an independent air carrier, it had planned on the basis of its costs structure and commercial strategy. As the conduct in question aimed to produce an artificial increase in fares, it is totally incompatible with a system of free competition.

(30) It should be noted that the conduct of Sabena can equally be construed as a desire to limit production, markets or technical development to the prejudice of consumers (Article 86 (b)), since Sabena's refusal could have result in London European abandoning its plan to open a route between Brussels and Luton.

(31) Finally, the two contracts, Saphir and handling, are not connected : the computer reservation contract enables travel agencies to obtain transport services for passengers as quickly and efficiently as possible. The handling contract involves ground assistance for aircraft.

One of the reasons for Sabena's refusal is thus clearly the fact that it makes the conclusion of a Saphir contract subject to the conclusion by London European of a handling contract which is not related to the subject matter of the first contract. This behaviour therefore constitutes an abusive practice expressly covered by Article 86 (d).

Effect on trade between Member States

(32) The refusal in question has an effect on the flow of trade between Member States. First, the abusive behaviour was implemented by a Belgian company against an undertaking in another Member State. Second, the behaviour was intended to produce anti-competitive effects on the Brussels-London route, since Sabena and London European did not originally enjoy the same reservation facilities. In addition, the fact that London European could not gain access to the Saphir system was liable to

(1) United Brands Judgment, Case 27/76, [1978] ECR 287, paragraph 112.
(2) Hoffman La Roche Judgment, Case 85/76, [1979] ECR 461.

prevent it from operating on the route in question. This elimiantion of London European as a competitor can thus directly and potentially affect trading conditions between Member States since, although reservations are made locally, they involve an intra-Community transaction, namely, air transport between Brussels and Luton.

(33) In any event, the case-law of the Court of Justice is very clear on the question of an undertaking in a dominant position which endeavours to eliminate a competitor. In the Zoja judgment (1) the Court ruled that Article 86 was aimed at practices which undermine a system of effective competition. It is obvious that the structure of competition on the Brussels-London route would have been different if London European had not had full access to that market.

Conclusion

(34) On the basis of the considerations set out above, the Commission concludes that Sabena has infringed Article 86 of the EEC Treaty in that, holding a dominant position on the market for the supply of computerized reservation services in Belgium, it abused that dominant position on that market by refusing to grant London European access to the Saphir system on the grounds that the latter's fares were too low and that London European had entrusted the handling of its aircraft to a company other than Sabena. Trade between Member States has been affected by Sabena's abuse of its dominant position.

Remedies

(35) To the extent that, following the intervention of the Commission, Sabena granted London Euorpean access to its Saphir system, it is no longer necessary for the Commission to require it to bring to an end the infringement referred to in Article 3 of Regulation No 17.

(36) Under Article 15 of Regulation No 17, infringements of Article 86 may be sanctioned by fines of up to one million ECU or 10 % of the turnover of the undertaking in the preceding business year, whichever is the greater. Regard must be had to both the gravity and the duration of the infringmeent.

(37) The Commission considers that the infringement committed is of a particularly serious nature. It consisted in the present case in the refusal to grant a small competitor access to a computerized reservation system in order to deter it from operating on a given route, to impede its actual operation and marketing of the service and to dissuade it from thus introducing an element of competition. By taking this action, Sabena was flouting one of the fundamental objectives of the Treaty, namely the creation of a common market between Member States. The seriousness of the infringement is heightened by the fact that Sabena's behaviour formed part of a well-established company strategy in this area. The fact that it does not appear to have applied it to other airlines is merely due to the fact that the opportunity did not arise. It does not detract from the fact that Sabena applied it to London European (2).

(36) The infringement was committed deliberately and Sabena could not have been unaware that it was infringing the rules of competition: on 9 April 1987, a member of its legal department stated that, in this opinion, its behaviour could give rise to penalties imposed by the Commission pursuant to Article 86.

(39) As regards the duration of the infringement, the Commission considers that it was indeed relatively short. Although it is uncertain whether the infringement would have lasted longer if the Commission had not acted, it is a fact that, on 25 May 1987, Sabena decided to admit London European to the Saphir system. As the decision to refuse London European access to the Saphir system had been taken on 1 April 1987, the infringement lasted barely two months. The fairly short duration of the infringement is therefore taken into account in determining the amount of the fine.

(40) Lastly, the fact that the Commission in applying Regulation No 17 for the first time to the market for the supply of computerized reservation systems also justifies the imposition of a moderate fine,

HAS ADOPTED THIS DECISION:

Article 1

Sabena, Belgian World Airlines, infringed Article 86 of the EEC Treaty by pursuing against London European a course of conduct intended to deter the latter from operating on the Brussels-Luton route and/or hamper its plans to open the route by refusing to grant it access to the Saphir system on the grounds that:

— the tariffs quoted by London European were too low,

— London European had not entrusted the ground handling of its aircraft to Sabena.

Article 2

A fine of 100 000 ECU, is hereby imposed on Sabena. This fine shall be paid, within three months of the date of

(1) Joined Cases 6 and 7/73, [1974] ECR 223; see also United Brands Judgment referred to above.

(2) See notes dated 18 February and 13 March 1987.

notification of this Decision either in Belgian francs to the account of the Commission of the European Communities, No 426-4403001-52 at the Kredietbank, Agence Schuman, Rond-Point Schuman 2, B-1040 Brussels, or in ECU to account No 426-4403003-52 at the same bank.

On expiry of that period interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, that is, 10,75 %.

Should payment be made in the national currency of the addressee, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 3

This Decision is addressed to :

Sabena, Belgian World Airlines,
35 rue Cardinal Mercier,
B-1000 Brussels.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 4 November 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission