MARKET SHARING (AIRLINES): THE SAS / MAERSK CASE

Subject: Market sharing
Cooperation agreements
Non-competition clauses
Fines

Industry: Airlines
(Implications for other industries)

Parties: SAS (Scandinavian Airlines System)
Maersk Air A/S

Source: Commission Statement IP/01/1009, dated 18 July 2001

(Note. Here are two more substantial fines to add to the fine imposed on Michelin. In the present case, the parties notified a cooperation agreement to the Commission. As a rule, the Commission tends to look kindly on cooperation agreements; but this time it considered, rightly as it turned out, that there was more unseen cooperation behind the scenes than there was in the notification itself. In fact, the astonishing evidence emerged that senior executives decided that "the parts of the documents that infringed Article 85(1) would have to be put in escrow in the offices of the lawyers from both sides". The unseen cooperation involved deals by which SAS gained largely exclusive control of a major air route, in exchange for withdrawing from routes in which Maersk had a primary interest.)

The Commission has decided to fine Scandinavian airlines SAS and Maersk Air €39.375 million and €13.125 million respectively for operating a secret agreement which led to the monopolisation by SAS of the Copenhagen-Stockholm route. This was to the detriment of over one million passengers who use that major route every year. In addition, it led to the sharing out of other routes to and from Denmark.

SAS (Scandinavian Airlines System) is a consortium partly owned by the Swedish, Danish and Norwegian states. Maersk Air A/S is a Danish company owned by the A.P. Møller group. Together, they are the two main airlines operating flights to and from Denmark, the country most concerned by the investigation. The two companies concluded a cooperation agreement in October 1998 which they notified to the European Commission for regulatory approval. The notification, however, focused on code-sharing provisions, under which SAS could market Maersk Air's flights as SAS flights, and the extension of SAS's frequent flyer programme to Maersk's clients.

The airlines carefully omitted what amounts to being a broad market-sharing agreement, the most visible part of which led to the withdrawal by Maersk Air from the Copenhagen-Stockholm and SAS's exit from the Copenhagen-Venice

and Frankfurt-Billund routes. Billund is Denmark's second airport in the western province of Jutland. Suspecting that the cooperation agreement was of a greater restrictive scope and restrictive character, the Commission carried out inspections at the companies' headquarters in June 2000, where it gathered evidence that SAS and Maersk Air had agreed to an overall non-competition clause, according to which Maersk Air would not launch any new international routes from Copenhagen without approval from SAS. Conversely, the parties agreed that SAS would not operate on Maersk Air's routes out of Jutland's Billund. The parties also agreed to respect the share-out of the domestic routes.

In addition to the overall non-competition clause, SAS and Maersk Air agreed specifically that Maersk Air would cease competing with SAS on the Copenhagen-Stockholm route as from 28 March 1999, when the overall cooperation agreement came into force. This is a major route in Scandinavia and a big intra-European route with over one million passengers a year and as many as twenty daily flights in each direction.

As compensation for Maersk Air's withdrawal from the Copenhagen - Stockholm route, SAS stopped operating between Copenhagen and Venice at the end of March 1999 and Maersk Air started operations on the route at the same moment. SAS stopped flying on the Billund-Frankfurt route in January 1999, leaving Maersk Air as the only airline on the route. Until then, SAS and Maersk Air had been competing on this route.

This secret agreement between SAS and Maersk Air is a serious violation of the European Community's competition law and damaging for Scandinavian passengers who were left with a reduced choice, or no choice at all, and potentially higher prices. Before the agreement, the Copenhagen-Stockholm route was operated by SAS, Maersk Air and Finnair. Maersk's withdrawal from the route caused the exit of Finnair, as the two airlines previously had a code-sharing agreement. Currently, SAS has close to 100% of the traffic between the Danish and the Swedish capitals.

Commenting on the case, the Competition Commissioner Mario Monti said that this was a clear case of two airlines sharing markets illegally to the detriment of passengers and that the Commission was determined to ensure that the liberalisation achieved in European air transport in the last decade should not be undermined by anti-competitive agreements. He hoped that the fines imposed on SAS and Maersk Air would serve as a deterrent to the two airlines concerned and to others.

The antitrust violation at stake is particularly serious because of its nature, the size of the relevant geographic market and the actual impact on the market. The companies were also fully aware that the agreement was illegal as they deliberately tried to conceal it. A meeting of the project managers' group of 26 June 1998 was "ordered", in a written record, "to maintain strict confidentiality and not to keep documents in the office", while another record of a meeting of the same managers' group two months later stated that "The parts of the documents

that infringe art.85(1)...(will have) to be put in escrow in the offices of the lawyers from *both sides*".
The Commission established that the infringement lasted between September 5, 1998, which is the date of one of the documents that recorded the parties' agreement, and 15 February 2001, when the parties regained their freedom to compete following the receipt of the Commission's statement of objections.

To establish the amount of the fines, the Commission took into account, among other elements, the difference in size between the two airlines, the fact that the agreement in effect extended the market power of SAS, the need to set the fines at a level which ensured that they had a sufficiently deterrent effect, and the degree to which the parties cooperated with the Commission after the on-site *inspections*. ■

Price differentials for cars (see Comment on page 176):

Small segments A and B:	1/5/2001	1/11/2000	1/5/2000
Opel Corsa	37.4%	24.6%	14.3%
Ford Fiesta	16.5%	20.5%	20.1%
Renault Clio*	31.3%	23.0%	24.0%
Peugeot 106*	23.5%	11.4%	14.3%
VW Polo	28.0%	29.1%	26.8%
Medium segment C:	1/5/2001	1/11/2000	1/5/2000
VW Golf	33.1%	32.9%	30.1%
Opel Astra	51.6%	27.6%	28.7%
Ford Focus	18.6%	18.1%	14.5%
Renault Mégane*	25.8%	18.5%	17.6%
Peugeot 306*	24.2%	18.9%	14.6%
Large segments D, E and F:	1/5/2001	1/11/2000	1/5/2000
BMW 318I	13.4%	13.9%	14.1%
Audi A 4	13.7%	21.0%	15.5%
Ford Mondeo	22.2%	29.9%	29.8%
Opel Vectra	48.5%	25.2%	23.6%
VW Passat	22.3%	22.1%	25.2%
Source: Commission Statement IP/01/1051, dated 23 July 2001			

ANCILLARY RESTRAINTS

The Commission has adopted a new Notice on restrictions directly related and necessary to concentrations ("ancillary restraints"), replacing a previous notice of 1990. Under the new policy, the Commission will no longer assess whether any restrictions entered into by parties in the context of a merger, such as non-competition clauses or purchase and supply obligations, are "ancillary", in which case they would automatically benefit from the effect of the clearance decision. Instead, companies and their lawyers will have to assess whether any such restraints can be covered by the merger decision or by a relevant block exemption or whether they might fall under article 81. The Notice provides guidance to the legal and business communities, based on past Commission practice and experience in this field. It is also in line with the ongoing modernisation of the European Community's competition policy.

The new Notice deals with the treatment of restrictions directly related and necessary to the implementation of concentrations, which are more commonly referred to as "ancillary restraints". These are contractual agreements which companies frequently enter into in the context of mergers and include clauses such as service and distribution agreements (to be treated as supply agreements), non-solicitation and confidentiality clauses (to be treated as non-competition clauses), and licences of trademarks, business names, design rights, copyrights and similar rights.

The duration of non-competition clauses which are to be considered "ancillary" has been limited to two years for cases involving the protection of goodwill only, and to three years for cases involving the protection of both know-how and goodwill. The duration of non-competition clauses in the case of joint ventures has been limited to five years in general and may, in any event, not exceed the lifetime of the joint venture in order to be considered « ancillary ». Durations which exceed three years need to be duly justified, based on the particular circumstances of the case.

Clauses which cannot be considered « ancillary » are not per se illegal. They are just not automatically covered by a merger decision of the Commission. Nevertheless, they can be justified under Article 81 of the Treaty or fall within the scope of a block exemption regulation. The Commission has never been under a legal obligation to assess ancillary restraints in its decisions under the Merger Regulation. Any such statements in past merger decisions have been of a purely declaratory nature, without having a legally binding effect on the parties or on national courts.

Source: Commission Statement IP/01/908, dated 27 June 2001