COMMISSION

COMMISSION DECISION

of 18 July 2001

relating to proceedings pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area

(Case COMP.D.2 37.444 — SAS Maersk Air and Case COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air)

(notified under document number C(2001) 1987)

(Only the English text is authentic)

(Text with EEA relevance)

(2001/716/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [1], as last amended by Regulation (EEC) No 2410/92 [2], and in particular Article 3 and Article 12(2) thereof,

Having regard to the Commission Decision of 31 January 2001 to initiate proceedings in these cases,

Having given the parties concerned the opportunity to make known their views on the objections raised by the Commission and the opportunity to develop their arguments at an oral hearing, pursuant to Article 16 of Regulation (EEC) No 3975/87 and Article 3(4) and Article 5 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [3],

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

Whereas:

I. THE PARTIES

A. *SCANDINAVIAN AIRLINES SYSTEM*

(1) Scandinavian Airlines System ('SAS') is a consortium owned by SAS Sverige AB (3/7), SAS Danmark A/S (2/7) and SAS Norge ASA (2/7). Each of the three companies is 50 % owned by the State and 50 % by industry. According to SAS 2000 annual report, the turnover of SAS in 2000 was SEK 44 481 million (EUR 4 917 million).

SAS is part of the Star Alliance [4] and serves 105 scheduled destinations (40 within Scandinavia, 56 in the rest of Europe and nine outside Europe).

[1] OJ L 374, 31.12.1987, p. 1.
[2] OJ L 240, 24.8.1992, p. 18.
[3] OJ L 354, 30.12.1998, p. 18.
[4] With Air Canada, Air New Zealand, All Nippon Airways (ANA), Ansett Australia, Austrian Airlines, British Midland, Lauda Air, Lufthansa, Mexicana Airlines, Singapore Airlines, Thai Airways International, United Airlines and Varig Airlines.

B. *MAERSK AIR A/S*

(2) Maersk Air A/S is a Danish company owned by the A. P. Møller group, which is also active in other activities, such a shipping and oil and gas. The A. P. Møller group also controls Maersk Air Ltd, UK. Maersk Air A/S and Maersk Air Ltd, UK together form the Maersk Air group. The Maersk Air group controls 49 % of AS Estonian Air. According to the 2000 preliminary annual accounts of the A. P. Møller group, the turnover of the Maersk Air group in 2000 was DKK 3 422 million (EUR 458,6 million).

Maersk Air A/S ('Maersk Air') operates four Danish domestic routes and 15 scheduled international routes, to and from Copenhagen and Billund.

II. **THE PROCEDURE**

(3) By letter of 8 March 1999, SAS and Maersk Air notified to the Commission a cooperation agreement, dated 8 October 1998, and five ancillary agreements. The cooperation agreement entered into force on 28 March 1999. The parties applied for negative clearance under Article 3(2) of Regulation (EEC) No 3975/87 and for exemption under Article 5 of that Regulation.

(4) By letter of 23 November 1998, Sun-Air of Scandinavia A/S ('Sun-Air'), a small Danish airline that operates as a British Airways franchisee, submitted a complaint to the Commission against the cooperation between SAS and Maersk Air. The complaint was registered on 7 January 1999. In relation with the SAS/Maersk Air cooperation, Sun-Air stated that:

> 'there is a history of SAS working far more closely, coordinating far more business activities with its partner airlines than it has announced publicly. It is this surreptitious cooperation that I [the chief executive officer of Sun-Air] asked the Commission to investigate.'

(5) In the course of the preliminary enquiry that followed the notification and the complaint, it appeared that, coinciding with the entry into force of the cooperation agreement, Maersk Air had withdrawn from the Copenhagen-Stockholm route where it had until then been competing with SAS. It also appeared that, at the same moment, SAS had stopped flying on the Copenhagen-Venice route and Maersk Air had started operations on this route. Finally, it appeared from the preliminary enquiry that SAS had withdrawn from the Billund-Frankfurt route, leaving Maersk Air — its previous competitor on the route — as the only carrier. These entries and withdrawals were not notified as part of the agreement between SAS and Maersk Air.

(6) Given the likelihood that these entries and withdrawals had not been unilaterally decided and that the SAS/Maersk Air cooperation extended beyond what the parties had notified, by Decision of 9 June 2000, the Commission ordered SAS, Maersk Air and the A.P. Møller group (Maersk Air's parent company) to submit to an investigation pursuant to Article 14(3) of Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1] and Article 11(3) of Regulation (EEC) No 3975/87. The inspections were carried out on 15 and 16 June 2000.

(7) A few days after the inspection, on 22 June 2000, Maersk Air voluntarily submitted to the Commission additional information that had been kept at the home of one of its former employees.

(8) By letter of 24 August 2000, in response to a request for information of 1 August 2000, SAS transmitted to the Commission one volume with the title 'private files'. By letter of 13 September 2000, SAS informed the Commission that more additional files had appeared after the SAS employees returned from their summer holidays. Two files with these additional documents were attached to the letter of 13 September 2000.

(9) The documents obtained as a result of the inspection confirmed that the agreement between SAS and Maersk Air was broader that what the parties had notified to the Commission.

(10) By letter of 12 October 2000, SAS and Maersk Air submitted a supplementary application for negative clearance under Article 3(2) of Regulation (EEC) No 3975/87 and for exemption under Article 5 of that Regulation. This supplementary notification related to the extension of the parties' cooperation to four additional routes and contained new technical annexes to the cooperation agreement (as well as modifications of the existing implementing agreements) that had been agreed after the initial notification was submitted.

[1] OJ 13, 21.2.1962, p. 204/62.

(11) The Commission analysed both the notified and the non-notified aspects of the cooperation and decided, on 31 January 2001, to initiate proceedings and send a statement of objections to SAS and to Maersk Air, in accordance with Article 3(1) and Article 16(1) of Regulation (EEC) No 3975/87 and Article 3(1) of Regulation (EC) No 2842/98. The parties received the statement of objections on 2 February 2001. The statement of objections related to the non-notified aspects of the cooperation that the Commission discovered as a result of the inspection and to those notified aspects that cannot be understood in isolation from the non-notified aspects, such as the cooperation on the Billund-Frankfurt and Copenhagen-Venice routes. In the statement of objections, the Commission took the preliminary view that SAS and Maersk Air infringed Article 81 of the Treaty and Article 53 of the EEA Agreement and that the infringement of Community law might be regarded as very serious. The Commission also informed the parties that it intended to impose fines.

(12) According to Article 5(2) of Regulation (EEC) No 3975/87, when a notification ('application', in the wording of the Regulation) is submitted, the Commission publishes a summary of the application and invites comments, if it judges the application admissible, is in possession of all the available evidence and has not taken any action, pursuant to Article 3 of the Regulation, to terminate an infringement of Articles 81 and 82 of the Treaty. Thereafter, unless the Commission notifies applicants, within 90 days of such publication, that there are serious doubts as to the applicability of Article 81(3), the notified agreement is deemed exempt (Article 5(3)). This procedure is known as the 'objections' procedure.

(13) The Commission has not published the notice provided for in Article 5(2), so that the 90-day period laid down in Article 5(3) did not begin to run. In the present case, the objections procedure provided for in Article 5(2) does not apply, since the statement of objections sent to the parties constitutes action within the meaning of Article 3 of Regulation (EEC) No 3975/87.

(14) In their responses of 4 April 2001 to the Commission's statement of objections, the parties acknowledge the facts and the existence of the infringements as described in the statement of objections. The parties also responded that they did not wish to request an oral hearing. In their responses, the parties limit their comments to those elements which could affect the Commission's calculation of the fine, such as the gravity and the duration of the infringements and the parties' behaviour after the June 2000 inspection. Finally, the parties declare their intention to negotiate a new cooperation agreement, compatible with Community competition law.

III. **THE NOTIFIED AGREEMENTS**

A. *THE 8 OCTOBER 1998 COOPERATION AGREEMENT*

The main content of the cooperation agreement

(15) In the notification of 9 March 1999, SAS and Maersk Air indicate that the cooperation agreement includes two main arrangements: (a) code-share on a number of Maersk Air routes (four domestic and nine international), thereby making it possible for SAS to market seats in the code-shared flights and (b) FFP participation, which allows Maersk Air passengers to earn points on SAS' FFP (called 'EuroBonus'), and, conversely, to allow EuroBonus members to redeem the points they have on Maersk Air flights. The FFP cooperation covers all of Maersk Air's routes.

(16) The main clauses of the cooperation agreement are:

(a) the parties remain independent and retain their own corporate identity, brand name and capacity to take autonomous decisions;

(b) in circumstances where SAS is not in a position to operate certain routes or flights to/from Copenhagen or to/from Jutland, SAS will invite Maersk Air to start operations on such routes (subject to SAS' regulatory, commercial and strategy considerations);

(c) the costs for services provided by one party to the other under the implementing agreements shall not be less favourable than the costs for such services offered by such party to any third carrier;

(d) each party shall develop at its own cost automated procedures to provide the non-operating carrier [1] with its seat inventory information, in order to enable the non-operating carrier to sell seats under its own designator code;

(e) both parties undertake to achieve the shortest possible connection time between flights. In particular, Maersk Air will coordinate its schedules of the code-shared flights, to maximise passenger connection opportunities and minimise the waiting time for connecting passengers;

(f) the parties shall as soon as technically feasible provide passengers travelling on the code-shared flights with through check-in, seat assignments, boarding passes, documentation checks, baggage tags and FFP credits for connecting flights.

The routes covered by the notified cooperation agreement

(17) The cooperation agreement does not specify the individual routes affected by the cooperation. It simply states (in point 3.1) that the parties shall enter into a code-sharing agreement in respect of routes operated by Maersk Air. Conversely, the agreement foresees the possibility that similar code-sharing agreements in respect of routes operated by SAS may also be established.

(18) According to the information provided by the parties, the cooperation agreement affects the routes operated by Maersk Air between the following city pairs.

Domestic routes in Denmark:

— Copenhagen-Billund

— Copenhagen-Esbjerg

— Copenhagen-Bornholm

— Billund-Aalborg

International routes:

— Copenhagen-Athens

— Copenhagen-Faroe Islands*

— Copenhagen-Kristiansand

— Copenhagen-London (Gatwick)

— Copenhagen-Venice

— Billund-Amsterdam*

— Billund-Brussels*

— Billund-Frankfurt

— Billund-Faroe Islands*

— Billund-London (Gatwick)

— Billund-Nice

— Billund-Paris*

— Billund-Stockholm.

(19) As regards the individual routes on which the parties cooperate, the following should be pointed out.

(a) SAS and Maersk Air do not code-share on the following five routes, marked with an asterisk (*) above: Billund-Brussels (which Maersk Air operates in code-share with Sabena), Billund-Paris (which Maersk Air operates in code-share with Air France), Billund-Amsterdam (code-share with KLM), Billund-Faeroe Islands and Copenhagen-Faeroe Islands. The EuroBonus participation agreement however applies to all the above routes.

[1] The non-operating carrier is the marketing carrier, who sells tickets for the code-shared flights but does not operate the aeroplane.

It appears from the documents obtained during the inspection that the decision not to terminate all of Maersk Air's code-sharing agreements on the occasion of the entry into force of the SAS cooperation, and to maintain instead certain routes where Maersk Air code-shared with other airlines was taken by Maersk Air in coordination with SAS, with the aim of avoiding visibility and 'problems with the Commission' (record of the 17 July 1999 meeting between SAS and Maersk Air) [1]. The parties foresaw (as reflected in the status report of 5 September 1998) that the remaining Maersk Air cooperation with carriers other than SAS would continue during the initial cooperation stage ('phase 1') but terminate at a later stage ('phase 2').

(b) Among the international routes on which the parties code-share, there are certain routes where the entry into force of the cooperation agreement did not result in one of the parties ceasing operations on the route concerned. These Maersk Air-operated routes are the following: Copenhagen-Athens, Copenhagen-Kristiansand, Copenhagen-London (Gatwick), Billund-London (Gatwick) and Billund-Stockholm.

(c) The Copenhagen-Venice and Billund-Frankfurt routes, which were covered by the notification, are examined below.

B. *THE NOTIFIED IMPLEMENTING AGREEMENTS*

(20) Five ancillary agreements to the cooperation agreement were also notified. The aim of the ancillary agreements is to provide the necessary technical and financial details to allow the code-share and the cooperation regarding the EuroBonus programme. The content of the ancilliary agreements may be summarised as follows:

(a) *EuroBonus participation agreement*, dated 30 November 1998. Pursuant to the cooperation agreement, Maersk Air participates in SAS's EuroBonus programme. The EuroBonus participation agreement contains the technical details relating to the award and redemption of points, such as the number of points earned when travelling to Maersk Air's destinations and the number of EuroBonus points needed for award tickets used in Maersk Air's flights;

(b) *code-share agreement*, of 21 December 1998. This agreement contains provisions relating to the schedules of the code-shared flights, computer reservation charges, applicable conditions of carriage; passenger and cargo claims; liability, insurance, and the handling of flight delays, cancellations and emergencies; station and ground handling procedures; reservations of seats, including how and when to inform SAS of Maersk Air's changes of schedule; accounting procedures and statistical follow-up; in-flight services and the use of trademarks;

(c) *standard ground handling agreement*, of 15 December 1998. According to the cooperation agreement, Maersk Air is to obtain passenger ground handling from SAS or from the same passenger ground handling agent used by SAS at airports used for its international code-shared flights;

(d) *main agreement on hosting services*, dated 11 January 1999. According to the cooperation agreement, SAS is to supply Maersk Air with so-called hosting services. These are a total of nine SAS systems (*inter alia*, for inventory control, yield management, level prognoses, ticketing, and traffic planning). The terms and conditions of the sale and delivery of the systems are set forth in the main agreement on hosting services;

(e) *special prorate agreement* ('SPA'), of 1 February 1999. The SPA regulates the manner in which the revenue derived from the fares is shared between the parties in the case of interlining (interline exists when a passenger buys a ticket from SAS but flies with Maersk Air or vice versa). The SPA extends beyond the code-shared flights since it also covers those cases where SAS is a transporting carrier. An example of interlining in the latter case is that of a passenger with a ticket Billund-Copenhagen-Moscow, where the first leg is operated by Maersk Air and the second by SAS. The SPA then allows the parties to calculate how much each carrier receives for their sector.

[1] Most of the quotes are English translations of documents written in Danish. Certain negotiation documents were written by the parties in English. The language of the case is English because the notifications and the ensuing correspondence with the parties were in English.

C. *THE SUPPLEMENTARY NOTIFICATION*

(21) After the on-site inspections had taken place, SAS and Maersk Air submitted a supplementary notification by letter of 12 October 2000. The supplementary notification contained new technical annexes to the cooperation agreement (as well as modifications of the existing implementing agreements) that had been agreed after the initial notification was submitted. Also, the parties' cooperation (SAS code-share on the flights operated by Maersk Air and Maersk Air's participation in SAS' EuroBonus programme) was extended to four additional routes, namely Billund-Dublin, Copenhagen-Lisbon, Copenhagen-Cairo and Copenhagen-Istanbul, all of which are operated by Maersk Air.

IV. **THE PARTIES' BROADER COOPERATION**

A. *THE PARTIES PURSUED OTHER OBJECTIVES NOT DECLARED IN THE NOTIFICATION*

(22) The fact-finding carried out by the Commission shows that the parties pursued a number of objectives that they did not declare in the notification. This is particularly clear from a Maersk Air document of 8 January 1998 ([1]), at the early negotiation stage. This document indicates Maersk Air's requests regarding the cooperation with SAS and lists SAS counter-demands:

— first, a key (shared) objective of SAS and Maersk Air during the negotiations that they held during the whole of 1998 was to determine which routes should be operated by which carrier after the cooperation had entered into force. For example, Maersk Air requested that 'SAS should withdraw from Billund and leave its future development to us'; or that 'Maersk should take over all Danish domestic routes'. The document also records the SAS demand to Maersk Air to 'limit development of routes out of Copenhagen to what is mutually agreed',

— second, SAS wished Maersk Air to cease cooperating with other airlines. SAS demanded that Maersk Air should 'refrain from participation in other alliances', 'abandon cooperation with Finnair' and 'abandon cooperation with Swissair at Geneva',

— third, SAS aimed at avoiding price competition. One of SAS' demands at the early negotiation stage was that 'Maersk should allow SAS to determine prices in Scandinavia'.

B. *OVERALL ROUTE POLICY*

(23) In addition to the cooperation on specific routes, SAS and Maersk Air negotiated an overall arrangement regarding their future operations on domestic routes and on all international routes from/to Denmark. This arrangement covers the following aspects:

(a) as regards routes out of Copenhagen, Maersk Air and SAS agreed that Maersk Air would not operate new international routes without specific request or approval by SAS and, conversely, that SAS would not operate on domestic or international routes that are operated by Maersk Air.

This agreement is reflected in one of the documents obtained during the June 2000 inspection, dated 16 July 1998. This document bears the title 'Policy regarding international (including intra-Scandinavian) routes from Copenhagen'. Despite the fact that the title refers to international routes, the document also covers domestic routes:

> 'DM [Maersk Air] will not operate, alone or in cooperation with other carriers, without specific request or approval by SAS, international routes from CPH — apart from those operated by DM or agreed by SAS initially, i.e. CPH-ARN, CPH-LGW, CPH-OSL, CPH-KRS, CPH-FAE, CPH-ATN, CPH-LIS, and CPH-IST — to airports in Europe to which SAS is operating from CPH in 1998 or to those airports in IATA TC1 and TC3 served by SAS.
>
> …

([1]) Memorandum dated 8 January 1998, from […] to […], with the title 'Meeting with SAS on 12 January 1998'.

SAS will not operate, either with their own aircraft or in some form of cooperation, including, but not limited to, codesharing, with other carriers, on domestic or international routes from CPH operated by DM, with the exception of CPH-ARN, CPH-LON and CPH-OSL.

…

Routes from CPH started by DM or taken over by DM from SAS cannot be taken over by SAS at a later date except by mutual agreement between SAS and DM';

(b) As regards the routes to/from Jutland, SAS and Maersk Air agreed that SAS would not operate domestic routes from Jutland:

'It was also originally agreed that... SAS would not fly international routes from Jutland either by itself or in cooperation with other airlines, and that SAS/its partners and Maersk would not encroach on each others' existing domestic routes. These principles should be confirmed.'

('Status Report' of 5 September 1998, letter j);

(c) A later Maersk Air note on the cooperation with SAS, dated 29 September 1998, summarises the agreed route policy as follows:

'SAS will not operate on DM's routes out of Jutland, and DM will be able to launch routes from Copenhagen which SAS does not operate or does not wish to operate.

The share-out of the domestic routes will be respected [...]'.

C. *THE COOPERATION ON THE INDIVIDUAL ROUTES IS BROADER THAN WHAT THE PARTIES NOTIFIED TO THE COMMISSION*

(24) The cooperation also covers a negotiated package according to which:

— Maersk Air would withdraw from the Copenhagen-Stockholm and Copenhagen-Geneva routes, where it was previously competing with SAS,

— as compensation for Maersk Air's withdrawal from the Copenhagen-Stockholm route, Maersk Air took over the Copenhagen-Venice route from SAS (which ceased flying on this route),

— SAS would cease flying on the Billund-Frankfurt route and Maersk Air would take over from it.

(25) The Commission's objections related, first, to the overall route policy agreed between SAS and Maersk Air and, second, to the parties' behaviour on the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes. The following sections contain the pertinent information on these routes.

(26) The Commission did not raise objections in respect of the parties' behaviour on the Copenhagen-Geneva route. Despite the fact that the Commission file clearly shows that Maersk Air ceased to compete with SAS on this route as from 27 March 1999 because (as part of the global package) the two parties had agreed on Maersk Air's withdrawal, Regulation (EEC) No 3975/87 only applies to air transport between the EEA airports and does not include within its scope a route between a Community airport and Switzerland.

V. **THE RELEVANT MARKETS**

A. *THE COMMISSION'S APPROACH TO MARKET DEFINITION*

(27) In the 8 March 1999 notification, the parties submit that the relevant market should be the provision of scheduled air transport of passengers in the EEA market; they also state that it would not be possible to isolate individual routes or groups of routes and appraise them separately, since, from a commercial viewpoint, the cooperation agreement constitutes a unified whole. Such a broad definition appears inappropriate. In accordance with the Commission notice on the definition of the relevant market for the purposes of Community competition law [1], the consumer's viewpoint is the most important element to take into account to define the product market.

[1] OJ C 372, 9.12.1997, p. 5.

(28) To establish the relevant market in air transport cases, the Commission applies the so-called 'point of origin/point of destination' (O & D) pair approach. According to this approach, every combination of a point of origin and a point of destination should be considered to be a separate market from the customer's viewpoint. To establish whether there is competition on an O & D market, the Commission looks at the different transport possibilities in that market, that is, not only at the direct flights between the two airports concerned, but also, to the extent that they are substitutable to these direct flights, at other alternatives. These alternatives may be direct flights between the airports whose respective catchment areas significantly overlap with the catchment areas of the airports concerned at each end, indirect flights between the airports concerned, or other means of transport such as road, train or sea.

(29) Whether one of those alternatives is substitutable to the direct route depends on a multiplicity of factors, such as the travel time, frequency and the price of the different alternatives.

(30) Depending on their different requirements, the Commission distinguishes between 'time-sensitive' and 'non-time-sensitive' customers. For the first group, time is of the essence, either as regards the need to ensure a minimum travel time or the need to travel at a precise time of the day and not at any other given moment, or both. Also, certain time-sensitive passengers may need to book a flight at short notice or require flexibility (the possibility of missing one flight and booking onto the next). Time-sensitive passengers are willing to pay a premium to have their requirements satisfied. On the contrary, for non-time-sensitive passengers, savings on the price of the trip have priority over time constraints.

(31) The distinction between business and leisure travellers does not coincide with the difference between time-sensitive and non-time-sensitive passengers. For example, leisure travellers going to their destination for a week-end or city trip will prefer not to spend a substantial part of their leisure time travelling in more time-consuming means of transport.

B. *THE AFFECTED RELEVANT MARKETS*

Copenhagen-Stockholm

(32) The Copenhagen-Stockholm route is characterised by:

— being a short-haul route (flight duration of 1h 20),

— with a large number of frequencies (over 18 daily flights in each direction),

— and with a large number of passengers (approximately one million per year).

(33) To determine the relevant market, the Commission has to take into account the alternatives that both time-sensitive and non-time-sensitive passengers would consider appropriate substitutes for the direct flight. In this context, the opening of the Øresund link in July 2000 should be taken into consideration:

(a) the opening of the Øresund link, which links Denmark and Sweden, offered new possibilities to travel between Copenhagen and Stockholm. At present, the alternatives to the direct flight between Copenhagen and Stockholm are the following:

— travelling by train between Copenhagen and Stockholm. The train trip takes five and a half hours,

— by road, the distance between the two cities is approximately 650 km, which can be covered on average in seven and a half hours.

— Another possibility is to travel from Copenhagen to Malmö airport and catch a plane to Stockholm. The first leg of the trip would take approximately 45 minutes by car and no less than an hour by public transport (train to Malmö and then an airport bus). As regards the second leg (the Malmö-Stockholm flight), there are two airlines on the route, SAS and Braathens. At present, SAS flies to Arlanda airport with 19 daily frequencies (1h 10) and Braathens flies to Bromma airport with 12 daily frequencies (1h 05).

Rail transport is a likely alternative for non-time-sensitive passengers; the train trip links the two central stations, while to the 1h 20 duration of the direct flight should be added the necessary check-in time and the travel time to/from the airports at both ends.

Flying to/from Malmö may be an alternative for certain non-time-sensitive travellers despite the inconvenience of having to break up the trip in various legs and, for those passengers departing from Copenhagen, of having to book a ticket departing from another country.

By contrast, the duration of travel by road does not render this alternative convenient to the point that it would be substitutable to the direct air route in the eyes of non-time-sensitive travellers.

As regards time-sensitive passengers, the Commission is of the opinion that none of the above alternatives would be substitutable for the convenience of the direct flight, especially taking into account the relatively short flight time (1 hour 20 minutes) and the large number of frequencies available on the Copenhagen-Stockholm route. As compared to the duration of the direct Copenhagen-Stockholm flight, the additional time needed to travel to/from Malmö airport would render flying between Malmö and Stockholm an unattractive alternative for time-sensitive passengers wishing to travel between the two capitals.

(b) The Øresund link did not exist when Maersk Air withdrew from the Copenhagen-Stockholm route in March 1999, or, *a fortiori*, when SAS and Maersk Air agreed that Maersk Air would withdraw from the route. As indicated at recital 50, evidence of this agreement exists since 5 September 1998. Between those dates and the opening of the Øresund link on 1 July 2000, a sea crossing was necessary in addition to land transport or to air transport from Malmö. For this reason, the Commission is of the opinion that time-sensitive travellers did not have substitutable alternatives to the direct flight.

Before the opening of the Øresund link, non-time-sensitive travellers had different options, such as the combination of a sea crossing to Malmö and a train to Stockholm (an estimated total travel time of 5h 45). A second, less attractive, option was to catch a train between Copenhagen and Stockholm via Helsingør/Helsingborg, the ports on the Danish and Swedish coasts (6h 52 for the day train and 8h 42 for the night train).

(34) For these reasons, the Commission considers that there exists a market for the scheduled air transport of time-sensitive travellers between Copenhagen and Stockholm.

Copenhagen-Venice

(35) The parties point out that leisure traffic on the route is substantial (40 % to 50 % of passengers) and that regular flights to Milan and Bologna and charter flights to Verona could constitute alternatives to direct flights.

(36) The Commission is of the opinion that the above alternatives are not suitable as regards time-sensitive travellers ([1]), who would not fly to Milan (which is approximately 250 km away from Venice) or Bologna (some 150 km away) and then catch a connecting train to Venice. These travellers are also unlikely to take a charter flight.

(37) For this reason, the Commission considers that there exists a market for the scheduled air transport of time-sensitive passengers between Copenhagen and Venice.

Billund-Frankfurt

(38) According to the information provided by the parties, approximately three quarters of passengers to and from Frankfurt are connecting in Frankfurt. For these passengers, the application of the O & D approach means that their origin/destination city is not Frankfurt, but the city to/from which they are connecting. For example, the O & D city pair for a passenger on the Billund-Frankfurt route who connects in Frankfurt with a flight to Tokyo is Billund-Tokyo. On this O & D pair, the passenger will have other air transport alternatives via other European airports. Even in this case, the likelihood that the first/last leg of the flight (to/from Billund) is operated by Maersk Air is strong, since Maersk Air is the main airline flying to/from Billund.

([1]) As mentioned above, certain leisure travellers (tourists going to Venice for a week-end city-trip) will prefer not to spend additional time connecting in an alternative airport and are therefore included within the category of time-sensitive passengers.

(39) As regards point-to-point passengers, the distance between Billund and Frankfurt (approximately 725 km) is too long for road (7 to 8 hours) or rail transport (8h 30 by night train and 10h 30 [1] during the day) to be considered as convenient alternatives to air transport, even by non-time-sensitive travellers. On the other hand, connecting flights on this short-haul route are not a realistic option, at least for time-sensitive travellers. As for non-time-sensitive passengers, the Commission has no evidence that alternative connections provided by competing airlines are actually used by this category of passengers.

(40) The Commission therefore considers that there exists a market for the scheduled air transport of passengers (both time-sensitive and non-time-sensitive) between Billund and Frankfurt.

The agreement affects a large but undetermined number of routes to and from Copenhagen and Billund

(41) Copenhagen and Billund are the two main airports in Denmark. Since Maersk Air agreed with SAS that it would only launch routes from Copenhagen if SAS agreed, all routes to/from Copenhagen are affected by the agreement.

(42) Conversely, because SAS agreed that it would not operate on Maersk Air's routes out of Jutland, the agreement also affects all such routes. In practice, all routes to/from Billund are affected by the agreement, because (a) SAS withdrew from Billund (meeting Maersk Air's demand that SAS 'should withdraw from Billund and leave its future development to us'; (b) the only case where SAS flies from Jutland is on the Aarhus-London route, which it already operated prior to the conclusion of the cooperation agreement; (c) since the agreement entered into force, only Maersk Air has launched new routes out of Billund (such as Billund-Dublin) and (d), SAS would clearly not launch a new route out of Billund if Maersk Air wished to operate it (Maersk Air would invoke the symmetry with the agreement on Copenhagen, which does not only relate to the routes which SAS operates, but also to all those routes that it might wish to operate).

(43) For these reasons, the cooperation affects a large but undetermined number of O & D markets for the domestic and international scheduled air transport of passengers to/from Copenhagen and to/from Billund.

The domestic routes

(44) As regards the domestic routes in Denmark, the opening of the Great Belt between Copenhagen and Jutland in 1997 for rail and in 1998 for road traffic led to convenient road and rail alternatives to air transport on the Copenhagen-Billund and Copenhagen-Esbjerg routes. Since the opening of the Great Belt link, the number of air passengers between Copenhagen and the western part of Denmark has halved (as compared to the situation before the Great Belt link). These two routes therefore form part of a wider transport market. Similarly, since all passengers on the Aalborg-Billund route (207 km by road, 2h 46 by land public transport) are connecting to/from international flights and the route is not available to direct passengers, the Aalborg-Billund route does not constitute a separate market.

(45) By contrast, other means of transport are not convenient substitutes to air transport between Copenhagen and the island of Bornholm, at least for time-sensitive passengers. Bornholm is some 30 km off the Swedish coast and is a popular tourist destination. The shortest alternative to air transport between Copenhagen and Bornholm (by land [2] and high-speed ferry) takes approximately three hours at present. However, this improved alternative to air transport did not exist when the parties negotiated their cooperation (in 1998) or when they notified the cooperation agreement. Prior to the opening of the Øresund link between Copenhagen and the Swedish coast in July 2000, the alternatives to air transport were either a direct ferry route between Copenhagen and Bornholm (approximately a six-hour trip) or via Sweden (ferry between Dragør and Limhamn, plus road trip in

[1] The rail travel times are from Vejle, which is the closest train station to Billund. An airport bus (30 minutes) links Billund Airport to Vejle.
[2] Following the opening of the Øresund link between Copenhagen and Malmö, in July 2000.

Sweden, in either private car or high speed bus service ([1]), plus ferry between Ystad and Bornholm). In this case, a minimum of 5 hours was needed to travel from Copenhagen to Bornholm or vice versa. The convenience of the 30-minute flight cannot be matched by the combination of road transport and a sea connection. The fact that the parties estimate the size of the route at approximately 180 000 passengers per year for a population of some 45 000 supports this view. Consequently, there is a separate market for air transport between Copenhagen and Bornholm, at least as far as time-sensitive passengers are concerned.

VI. THE PARTIES' POSITION ON THE MARKETS AND THEIR BEHAVIOUR

A. *THE COPENHAGEN-STOCKHOLM (CPH-STO) AND COPENHAGEN-VENICE (CPH-VCE) ROUTES*

(46) The Copenhagen-Stockholm route is an important route, with approximately 1 million passengers a year. On 27 March 1999, the day before the SAS-Maersk Air cooperation agreement entered into force, Maersk Air stopped operating on this route. Maersk Air had, until then been code-sharing with Finnair (which also operated on the route). Maersk Air also stopped code-sharing with Alitalia and Swissair (which did not operate).

SAS benefited from Maersk Air's withdrawal from the Copenhagen-Stockholm route

(47) The following table shows the market shares and frequencies of the carriers operating the Copenhagen-Stockholm route, comparing the data for the year that preceded the entry into force of the cooperation agreement with the year that followed.

	April 1998 to March 1999 (year preceding the entry into force of the cooperation agreement)		April 1999 to March 2000 (year that followed the entry into force of the cooperation agreement)	
	Market shares	Daily roundtrips	Market shares	Daily roundtrips
SAS	[...] %	17,5	[...] %	18,3 (*)
Finnair (and Maersk Air until 27 March 1999)	[...] %	First 8, then 5 to 6 (as from the announcement of the Maersk Air/SAS cooperation)	[...] %	2
TAP	2,1 %	5 times a week	2,8 %	5 times a week until September 1999; afterwards, daily

(*) Until 16 August 1999, SAS flew 20 times in one direction and 21 times in the opposite direction (letter of 18 June 1999 from SAS). According to the letter of 1 March 2000 from SAS, SAS was at that moment operating 19,5 daily roundtrips on this route.

(48) In May 2000, Finnair withdrew from the route. The present SAS market share on the Copenhagen-Stockholm route is therefore an estimated [...] %.

The Copenhagen-Stockholm route was a key issue in the SAS/Maersk Air negotiations and Maersk Air's withdrawal from this route was negotiated with SAS

(49) According to the explanation provided by the parties, the joint venture agreement that Maersk Air had concluded with Finnair, pursuant to which Maersk Air commenced operations on this route in April 1997, had an initial duration of two years. The two years expired at the end of the winter period on 27 March 1999. Maersk Air invokes the losses on the route in 1997 and 1998 as the reason why it stopped operating and did not extend the agreement.

([1]) The high speed bus service links Copenhagen to Bornholm two to four times a day; until the opening of the Øresund link, the bus was loaded on both ferries, the one between Dragør and Limhamm and the one between Ystad and Bornholm.

(50) One of the purposes of the inspections ordered by the Commission Decisions of 9 June 2000 was to obtain information on the reasons that motivated Maersk Air's withdrawal from the Copenhagen-Stockholm route. The documents obtained from the inspections show how the negotiations on the Copenhagen-Stockholm route evolved.

(a) At the early negotiation stages (January 1998), the aim of Maersk Air was to code- share with SAS on the Copenhagen-Stockholm route and obtain 50 % of the joint SAS/Maersk Air operation

'DM [Maerk Air] demands to SAS

Copenhagen: A timetable should be established at Stockholm (e.g. 20 daily departures/50 % for DM) with space for both (conditional on end to cooperation with Finnair and establishment of code-sharing with SAS)'

(third paragraph of the 8 January 1998 memorandum with the title 'Meeting with SAS on 12 January 1998').

In the end, however, SAS and Maersk Air did not agree on the code-sharing and the 50/50 split initially desired by Maersk Air;

(b) At a later negotiation stage (May 1998), SAS and Maersk Air were negotiating on the understanding that Maersk Air would fly on the route four times a day (once or twice on weekends) and give up the cooperation with Finnair, Alitalia and Swissair. The SAS position, to which Maersk Air agreed, was reported as follows on 25 May 1998:

'DM can fly 4 times/weekday + 1-2 times/day on weekends on CPH-STO … in peak hours, and the partners will coordinate the traffic programme and adjust the overall capacity to the market.

…

DM shall give up the cooperation with Finnair, Alitalia and Swissair on CPH-STO …'

('Status report' of 25 May 1998);

(c) On 5 September 1998, Maersk Air and SAS had agreed that Maersk Air would cease flying the Copenhagen-Stockholm route on 28 March 1999:

'Route network

Because code-sharing and Maersk Air's participation in Eurobonus on CPH-STO is regarded as impossible, at least in Phase 1 (summer 1999 to winter 1999/2000) and possibly for a longer period, and because there is a significant risk of EU investigations/requirements concerning cooperation between Maersk Air and SAS if all the elements included in the verbal agreement of principle (between [Maersk Air and SAS representatives]) are implemented in one go from summer 1999, we agree in principle to amending certain parts of the verbal agreement of principle …

Consequently, there is currently agreement on the following:

(a) Maersk Air will cease flying CPH-STO and CPH-GVA on 28 March 1999.'

('Status Report' of 5 September 1998).

(d) Later documents confirm that Maersk Air's withdrawal from the Copenhagen-Stockholm route was agreed with SAS. For example, according to a note of 29 September 1998 on the SAS/Maersk Air cooperation:

'Final agreement has now been reached with SAS on the content of a future cooperation agreement. This agreement … has the following content:

…

From 1 April 1999, DM will operate the routes indicated in Annex 1.'

Annex 1 foresees:

'Routes to be abandoned as from 1 April 1999:

— Copenhagen — Geneva (Swissair code-share)
— Stockholm (Finnair code-share)'

(51) In any case, the agreement that Maersk Air reached with SAS, pursuant to which Maersk Air would stop operating on the Copenhagen-Stockholm route, took place before Maersk Air had even started to analyse which action, if any, should be taken to reduce the losses it was making on the route. On 28 October 1998, more than one month and a half after the Maersk Air top management had agreed with SAS on Maersk Air's withdrawal, the Maersk Air accounting department was still calculating the financial implications of three alternative options (1. 'base-line', that is, absence of changes; 2. 'reduced programme', involving a frequency reduction and 3. withdrawal), on the understanding that the preferred option was option 2. Indeed, option 2 was implemented by Maersk Air as from January 1999 and served as a transitional phase-out to the withdrawal from the route.

Maersk Air sought (and obtained) compensation from SAS for giving up the Copenhagen-Stockholm route.

(52) Maersk Air negotiated with SAS a compensation for giving up the Copenhagen-Stockholm route:

'…

(e) Maersk Air will launch a further route from CPH as "compensation" for giving up CPH-STO (with 24 return flights per week, as originally agreed). It has not yet been agreed which routes SAS will transfer to Maersk Air by giving up the route and allow us to operate it in full. We want CPH-ROM, while SAS wants to give us weaker routes (CPH-HAM, CPH-Venice, CPH-Bologna)'

('Status report' of 5 September 1998).

(53) The documents obtained from the inspection show that choice of the compensation route was discussed in detail both between Maersk Air and SAS and internally in the companies concerned. For example, the parties foresaw that the calculation of the compensation

'might be done in various ways, such as, for example, a combination of the passengers number and yield structure, and the circumstance that DM would be steering clear of STO and OSL [Oslo] was estimated, on the basis of the known passenger volume and the possibility of a DKK 100 price rise, as giving an annual additional revenue of some DKK [...] million (that is, an annual additional revenue of EUR [...] million).

…

[A SAS representative] indicated that SK [SAS] would not have any problem with renouncing BLQ [Bologna], VCE [Venice] and HAM [Hamburg]...'

(Record of the project managers' group (SAS/Maersk Air) meeting of 25 August 1998).

The Copenhagen-Venice route

(54) One of the compensation possibilities mentioned in the project managers' group meeting of 25 August 1998 and in the 5 September 1998 status report was the Copenhagen-Venice route. SAS was the only airline operating the route until 28 March 1999. In the information submitted to the Commission before the inspection took place, SAS explains its withdrawal from the Copenhagen-Venice route on the grounds that this route was too 'thin' for a high cost airline like SAS to secure a viable operation. SAS also explained that it made losses on the route in 1997 and 1998 and that these losses had been a feature of the route since the start of the operation in 1992.

Maersk took over the route from SAS on 28 March 1999, and since that date Maersk Air has been the only airline operating on the route.

An internal Maersk Air document of 29 September 1998 records the agreement as regards the Copenhagen-Venice route (the date mentioned for the switch-over is however four days later, 1 April 1999):

'This [SAS/Maersk Air] agreement has the following content:

…

SAS will cease flying … Copenhagen-Venice as of 1 April 1999.

…

Thereafter, the following changes to DM routes are expected …

1 April 1999: Copenhagen-Venice with SAS code-share from 1 November 1999'

(Maersk Air note on the cooperation with SAS, 29 September 1998).

B. *THE BILLUND–FRANKFURT (BLL–FRA) ROUTE*

(55) It appears from the notification and subsequent correspondence that, during 1997 and 1998, SAS and Maersk Air were the only carriers on this route. The parties competed with each other on this route until 3 January 1999, when SAS withdrew and left Maersk Air as the only airline on the route. Maersk Air operates 18 weekly frequencies. Approximately three quarters of the passengers to and from Frankfurt are connecting in Frankfurt.

(56) The SAS operation was included in a joint-venture agreement between Lufthansa (LH) and SAS. The 1998 estimates of market shares were as follows:

Maersk Air […] %

SAS+LH: […] %

(57) SAS initially argued that it had unilaterally decided to withdraw from this route for financial reasons, having incurred losses in 1997 and in 1998.

(58) However, the documents obtained from the inspection show that SAS's withdrawal from the Billund-Frankfurt route was negotiated with Maersk.

(a) At the initial negotiation stage (January 1998), one of Maersk Air's demands to SAS was that 'SAS should withdraw from Billund and leave its future development to us'.

(b) By 5 September 1998, the parties had agreed that SAS would cease flying on this route:

'…[T]here is currently agreement on the following:

(c) SAS will cease flying BLL-FRA … by 28 March 1999 at the latest (SAS has indicated its interest in doing this from winter 1998/1999)'

('Status report' of 5 September 1998, letter j).

(c) On 14 September 1998, Maersk Air indicated to SAS its wish that SAS' withdrawal from Frankfurt should take place before the beginning of the 1999 summer season. This withdrawal was described as part of a 'package solution' where the timing of the withdrawals and entries was critical:

'*Compensatory routes*

[A Maersk Air representative] summarised DM's position as follows: (i) this was a "package solution" and the timing was crucial; (ii) it would be best for SK to withdraw from BLL-FRA and BLL-OSL from winter 1998/1999, i.e., a half year before phase 1; (iii) DM would withdraw from CPH-GVA and CPH-STO from summer 1999; (iv) DM would launch a CPH-VCE service from summer 1999 …'

(Record of the 14 September 1998 meeting in Copenhagen of the project manager group, point 5)

(d) By 29 September 1998, agreement had been reached that 'SAS will cease flying Billund-Frankfurt … as of 1 January 1999'.

(Maersk Air note on the cooperation with SAS, 29 September 1998).

VII. **ARTICLE 81(1) OF THE TREATY**

(59) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings and all concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which share markets.

(60) Article 53(1) of the EEA Agreement prohibits as incompatible with the Agreement all agreements between undertakings and all concerted practices which may affect trade between the Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the Agreement.

In this Decision, all references to Article 81(1) of the Treaty are understood to encompass also Article 53(1) of the EEA Agreement.

A. *AGREEMENTS BETWEEN UNDERTAKINGS*

(61) Maersk Air and SAS are undertakings within the meaning of Article 81(1) of the Treaty.

(62) Maersk Air and SAS agreed that SAS would not operate on Maersk Air's routes out of Jutland (where Billund is situated) and that Maersk Air would not be able to launch routes from Copenhagen which SAS operated or wished to operate. The agreement also included an obligation for the parties to respect the share-out of the domestic routes.

(63) In addition, Maersk Air and SAS agreed that:

— Maersk Air would cease flying between Copenhagen and Stockholm as from 28 March 1999 and obtain compensation for its withdrawal,

— in compensation, SAS would stop operating between Copenhagen and Venice at the end of March/beginning of April 1999 and Maersk Air would start operations on the route at the same moment,

— SAS would stop flying on the Billund-Frankfurt route in January 1999.

(64) The parties initially argued that Maersk Air's withdrawal from the Copenhagen-Stockholm route and SAS' withdrawals from the Copenhagen-Venice and Billund-Frankfurt routes were unilateral decisions. More specifically,

(a) Maersk Air pointed out that it was already clear at the end of 1997 that the results of the Copenhagen-Stockholm route were disappointing and that, as indicated in the monthly report for the Maersk Air Group for December 1997, SAS' dominance in the feeder traffic into and out of Copenhagen, plus the traveller's loyalty towards the SAS frequent flyer programme, were the reasons for the bad result. In addition, Maersk Air pointed out that, by a fax of 23 September 1998, it had expressed to Finnair its deep concern about the poor economic results of the route so far. On the same occasion, Maersk Air wrote to Finnair that Maersk Air would be obliged to conduct a thorough evaluation of continued operations on the route beyond the 1998/1999 winter. On 26 November 1998, Maersk Air finally informed Finnair of its decision to stop operating on the route as from 27 March 1999.

(b) SAS maintained that Maersk Air's continuation on the Copenhagen-Stockholm route would have been beneficial to SAS, because this route is one of SAS' biggest routes in terms of number of passengers, who are affected by undesirably high cabin factors. In spite of some 20 daily frequencies in each direction, SAS had experienced severe bottlenecks on this route. The continuation of Maersk Air as a competitor would have helped SAS to satisfy demand fluctuations, by allowing SAS to direct the lowest fare passengers to the competitor in situations of high demand. SAS also maintained that it withdrew from the Copenhagen-Venice and Billund-Frankfurt routes because it was making losses on these routes.

(65) The Commission does not question the unsatisfactory performance of Maersk Air or of SAS on the routes from which they withdrew. The facts, however, demonstrate that the withdrawals were agreed between SAS and Maersk Air and were implemented as agreed by the parties. After receiving the statement of objections, SAS and Maersk Air decided not to contest the facts or the Commission's assessment that the parties had agreed on the above-described withdrawals and entries.

(66) As regards in particular the Copenhagen-Stockholm route, the facts show that — despite the statement in Maersk Air's fax to Finnair on 23 September 1998 that Maersk Air would be conducting a thorough evaluation of its continued operations on the route after the 1998/1999 winter season — Maersk Air and SAS had already agreed on 5 September 1998 that Maersk Air would cease flying the route on 28 March 1999. That is, Maersk Air had agreed with SAS that it would withdraw from the Copenhagen-Stockholm route without having conducted the 'thorough economic evaluation' to which the 23 September 1998 fax refers.

(67) Similarly, SAS' argument that it would have been in its interest for Maersk Air to continue competing on the Copenhagen-Stockholm route to absorb the peaks in demand cannot be accepted as evidence of lack of agreement. First, the Commission does not infer the existence of an agreement from the withdrawal of Maersk Air. The Commission decided to conduct inspections precisely to check whether the withdrawal had been decided unilaterally or had been agreed, and the documents obtained from the inspections prove that the parties agreed that Maersk Air would withdraw from this route as from the end of the 1998/1999 winter season. Second, the Maersk Air withdrawal benefited SAS in that its market share increased from [...] % during the year that preceded the entry into force of the cooperation agreement to [...] % during the following year. Third, the increase in the market share proves that SAS could absorb additional demand, as compared with the situation that existed before the agreement with Maersk Air. Fourth, as can be seen from the record of the project managers' group meeting of 25 August 1998 (see recital 53), the parties themselves estimated that SAS would obtain substantial additional revenue from Maersk Air's withdrawal from the Copenhagen-Stockholm route.

(68) The fact that Maersk Air incurred losses on an individual route is irrelevant for the qualification of the parties' behaviour as an agreement under Article 81(1). In addition, the Commission does not believe that the losses incurred by Maersk Air on the Copenhagen-Stockholm route would have necessarily led to its withdrawal from that route. Even in the case of losses on a given route, experience shows that withdrawal is not the only option: an airline may decide to continue operating a loss-making route because of reasons of overall network profitability. In the present case, the 5 September 1998 agreement with SAS obliged Maersk Air to withdraw and other courses of action were excluded.

B. *THE AGREEMENTS HAVE AS THEIR OBJECT AND EFFECT THE PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION (MARKET–SHARING)*

(69) The agreements share markets between SAS and Maersk Air. Market-sharing agreements are expressly mentioned by Article 81(1)(c) as an example of the agreements that fall under Article 81(1).

First, the parties concluded an overall market-sharing agreement, according to which SAS would not operate on Maersk Air's routes to/from Jutland and Maersk Air would not launch competing services from Copenhagen on the routes which SAS operated or wished to operate. Also, the parties agreed to respect the share-out of the domestic routes.

Second, the parties concluded specific market-sharing agreements regarding individual routes. In particular, the parties agreed that (a) Maersk Air would cease flying between Copenhagen and Stockholm as from 28 March 1999 and obtain compensation for its withdrawal; (b) as compensation, SAS would stop operating between Copenhagen and Venice at the end of March/beginning of April 1999 and Maersk Air would start operations on the route at the same moment; and (c) SAS would stop flying on the Billund-Frankfurt route in January 1999.

(70) These specific agreements were, however, considered by SAS and Maersk Air as part of a 'package', where the timing of the withdrawals and entries was crucial.

(71) By their very nature, these market-sharing agreements have the object of restricting competition. Therefore, they are caught by the prohibition in Article 81(1).

(72) While the fact that an agreement has as its object a restriction of competition is sufficient for the agreement to be caught by Article 81(1), the agreements also have the effect of significantly restricting competition. The effect on the market is however not always the same. Actual competition was restricted on the Copenhagen-Stockholm and Billund-Frankfurt routes; potential competition was restricted on the Copenhagen-Venice route. The overall market-sharing agreement also restricts potential competition between the parties:

(a) Maersk Air's withdrawals from the Copenhagen-Stockholm route and SAS' withdrawal from the Billund-Frankfurt route eliminated actual competition because both SAS and Maersk Air were operating on those routes prior to the entry into force of the agreement:

— prior to the entry into force of the SAS/Maersk Air cooperation agreement, SAS already had a [...] % market share on the Copenhagen-Stockholm route. The only competing operations were, first, Finnair and Maersk Air, who code-shared on the route and had a joint market share of [...] % and, second, TAP, which had a token presence estimated at 2,1 % [1].

Following the agreement, Maersk Air withdrew from the route. SAS increased its market share to over [...] %, while Finnair's market share diminished to [...] % and TAP continued to have a token presence (estimated at 2,8 %).

— As regards Billund-Frankfurt, SAS and Maersk Air were the only carriers operating on the route during 1997 and 1998. Maersk Air had a [...] % market share and SAS had, together with Lufthansa (with whom SAS was code-sharing) a [...] % market share. In 1998, there were [...] passengers on this route, and in 1999, [...] passengers.

Following the agreement with Maersk Air, SAS withdrew from the route, which is now operated exclusively by Maersk Air;

(b) SAS was the only airline operating the Copenhagen-Venice route until the entry into force of the cooperation agreement. As from that moment, SAS withdrew and left Maersk Air as the only carrier on the route. The situation on the market did not change in the sense that prior to the agreement one airline had a 100 % market share and following the agreement another airline had a 100 % market share. However, potential competition was restricted because, in the absence of agreement, SAS and Maersk Air could have competed on the route. The fact that this route is relatively thin, with some [...] passengers in 1998, does not alter this conclusion, given that the parties had been competing on the Billund-Frankfurt route, which at the same moment (1998) was slightly thinner.

It was not possible for SAS subsequently to reenter the Copenhagen-Venice route after its withdrawal, in view of the fact that SAS undertook that the routes from Copenhagen 'taken over by DM from SAS cannot be taken over by SAS at a later date except by mutual agreement between SAS and DM' and that this route had been given to Maersk Air by SAS as a compensation for Maersk Air's withdrawal from Copenhagen-Stockholm;

(c) the overall market-sharing agreement restricts potential competition between SAS and Maersk Air. The restriction consists, first, in obliging Maersk Air not to enter new routes to/from Copenhagen unless SAS has no interest in operating them, second, in ensuring that SAS will not operate on routes to/from Billund and, third, in respecting the share-out of the domestic routes.

The background to this restriction is as follows:

— SAS is the main carrier to/from Denmark, while Maersk Air was, prior to the cooperation agreement with SAS, the main Danish airline capable of competing with SAS,

— Copenhagen airport is the main airport in Denmark and Billund is the second; the vast majority of air traffic to, from and within Denmark has its origin or destination in one of the two airports,

[1] The figures are estimates provided by the respective airlines.

— Copenhagen is, together with Stockholm and Oslo, one of SAS' three hubs, while the main airports from/to which Maersk Air operates are Copenhagen and Billund,

— Billund was developed in Jutland as a 'greenfield airport', capable of serving as a hub to the population in west Denmark.

C. *THE AGREEMENTS AFFECT TRADE BETWEEN MEMBER STATES AND BETWEEN THE COMMUNITY AND THE EEA*

(73) The agreements affect trade between Member States since the international routes concerned link Denmark with other Member States. As regards the domestic routes, the agreements affect trade between Member States because the domestic routes are routes to/from Copenhagen and Billund, where passengers connect to/from other Community destinations. The agreements also affect trade between the Community and the EEA in so far as among the many routes to and from Copenhagen and Billund there are routes linking these airports to the EEA countries.

VIII. **ARTICLE 81(3) OF THE TREATY**

(74) Article 81(3) of the Treaty provides for the possibility that Article 81(1) may be declared inapplicable if the agreements or concerted practices concerned contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that those agreements or concerted practices do not:

— impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,

— afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

(75) Article 53 of the EEA Agreement contains the same provision. All references to Article 81(3) of the Treaty should be understood as also referring to Article 53(3) of the EEA Agreement.

(76) In general, market-sharing agreements are, together with price-fixing, the clearest examples of 'hard-core' competition restrictions.

(77) In the present case, the Commission is of the opinion that the cooperation between SAS and Maersk Air cannot benefit from an individual exemption pursuant to Article 81(3).

(a) The market-sharing agreements between SAS and Maersk Air do not contribute to improving the production or distribution of goods or services, or to promoting technical and economic progress.

The sharing-out of the route network may be advantageous to the parties. It is unlikely that the parties would have concluded the agreement if it had not been in their mutual economic interest. For example, each party now has a guarantee that the other will not start to operate on its routes. However, the improvement of the parties' position by anti-competitive means does not satisfy the requirements of Article 81(3). Rather, in order for Article 81(1) to be declared inapplicable, the agreements should produce appreciable objective advantages in the public interest of such a character as to compensate for the disadvantages in the field of competition [1].

In the present case, there is nothing to suggest that the agreement produces any appreciable objective advantages. Moreover, even if these advantages existed, they would not compensate for the disadvantages resulting from the withdrawal of the main competitor from various markets, or from the overall non-competition clause between the two main airlines in Denmark.

(b) Given that the first condition is not satisfied, there is no 'resulting benefit' to pass on to consumers. On the contrary, the agreement was prejudicial for consumers. For example, in the Copenhagen-Stockholm and Billund-Frankfurt routes, consumers no longer have the choice of flying with SAS or with Maersk Air, as was the case before the agreement entered into force.

[1] Joined Cases 56 and 58/64, *Consten and Grundig* [1996] ECR 299, point 348.

(c) For the same reason, it is not necessary to determine the existence of restrictions which are not indispensable to the attainment of the beneficial objectives of the cooperation.

(d) Finally, the cooperation affords SAS and Maersk Air the possibility of eliminating competition in respect of a substantial part of the services in question. This is at least the case for the markets for the scheduled air transport of time-sensitive passengers between Copenhagen and Stockholm and of all passengers between Billund and Frankfurt:

— on the Copenhagen-Stockholm route, the agreement led to an increase in SAS's market share on the route from [...] % to over [...] %. It eliminated competition between SAS and Maersk Air and reduced Finnair's strength on the route. The theoretical possibility of another airline starting operations on this route is not realistic, given the large number of SAS frequencies and the fact that the route links the two main SAS hubs.

— As regards Billund-Frankfurt, SAS and Maersk Air were the only carriers operating on the route during 1997 and 1998. Maersk Air had a [...] % market share and SAS had, together with Lufthansa (with whom SAS was code-sharing), a [...] % market share. Following the agreement with Maersk Air, SAS withdrew from the route, which is now operated exclusively by Maersk Air. Competition was therefore eliminated between SAS and Maersk Air. Given that the route is relatively thin ([...] passengers in 1998), that Frankfurt is a congested airport and that a key function of the Billund-Frankfurt route is to feed/de-feed Frankfurt, a Star alliance hub, the possibility that a third party (an airline other than Lufthansa or SAS) will enter this route is extremely remote.

IX. **PENALTIES AND FINES**

A. *THE PENALTIES AND FINES PROVIDED FOR BY REGULATION (EEC) No 3975/87 AND THE ABSENCE OF IMMUNITY FROM FINES*

(78) Pursuant to Article 4(1) of Regulation (EEC) No 3975/87, where the Commission finds that there has been an infringement of Article 81(1) of the Treaty, it may, by decision, require the undertakings concerned to bring such infringement to an end.

(79) According to Article 12(2) of Regulation (EEC) No 3975/87, the Commission may impose fines on the undertakings that infringe Article 81(1) of the Treaty. The amounts of such fines range from EUR 1 000 to EUR 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of the undertakings participating in the infringement.

(80) According to Article 12(5) of Regulation (EEC) No 3975/87:

'… [F]ines … shall not be imposed in respect of acts taking place after notification to the Commission and before its decision in application of Article 81(3) of the Treaty, provided they fall within the limits of the activity described in the notification.

However, this provision shall not have effect where the Commission has informed the undertakings … concerned that, after preliminary examination, it is of the opinion that Article 81(1) of the Treaty applies and that application of Article 81(3) is not justified.'

(81) The Article 81(1) infringements which are the subject the present proceedings are, first, the overall market-sharing agreement (including the sharing-out of domestic routes) and, second, the specific market-sharing agreements regarding the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes.

(82) The parties did not notify the overall market-sharing agreement or any kind of cooperation on the Copenhagen-Stockholm route to the Commission.

(83) The parties notified the Commission that they were cooperating on the Copenhagen-Venice and Billund-Frankfurt routes as regards code-sharing and frequent-flyer programmes. However, the actual cooperation on these routes exceeded the limits of the notification, since the parties presented the SAS withdrawals as unilateral decisions and concealed from the Commission the fact that these withdrawals had been agreed with Maersk Air as part of a package.

(84) For the above reasons, the Commission concludes that the infringements committed by Maersk Air and SAS cannot benefit from immunity from fines pursuant to Article 12(5) of Regulation (EEC) No 3975/87.

B. *THE AMOUNT OF THE FINES*

(85) In fixing the amount of the fine, the Commission must have regard to the gravity and to the duration of the infringement, which are the two criteria expressly referred to in Article 12(2) of Regulation (EEC) No 3975/87. Any aggravating or attenuating circumstances are also reflected in the fine imposed.

B.1. THE BASIC AMOUNT

(86) The basic amount is determined according to the gravity and duration of the infringement.

Gravity

(87) In assessing the gravity of the infringement, the Commission takes account of its nature, the size of the relevant geographic market and the actual impact of the infringement on the market.

Nature of the infringement

(88) The present infringements consisted of market-sharing practices, which are by their nature very serious violations of Article 81 of the Treaty.

(89) The parties knew that their behaviour infringed Article 81 of the Treaty and took action to avoid the Commission becoming aware of the full extent of their agreements. SAS and Maersk Air also tried to avoid keeping a full written record of the points on which they had agreed:

> 'The parts of the documents that infringe Article 85(1), although they cannot be agreed upon and cannot be put on paper, we presume that because some people will not be present (in the future), these parts will have to be written anyway and be put in escrow in the offices of lawyers from both sides …'
>
> (Project managers' group meeting of 14 August 1998).
>
> '[A Maersk Air representative] stated that all material on price agreements, market-sharing agreements and the like had to be destroyed before going home today. Anything that might be needed had to be taken home. Also, any controversial material on PCs had to be deleted.'
>
> (Notes of internal Maersk Air meeting of 7 October 1998).
>
> '[A SAS representative] expressed concern about the further circulation of the status report in its current form. She wanted to see it amended, with certain sections deleted, as the lawyers had recommended … [1]
>
> [A SAS representative] suggested that we should refrain from distributing the status report to the working groups in its current form, but she also considered it important that these groups should be given a consistent and full idea of the planned agreement in its entirety and be ordered to maintain strict confidentiality and not to keep documents at the office.'
>
> (Record of the 26 June 1998 project managers' group. [...] SAS representatives and [...] Maersk Air representatives participated in this meeting).

[1] A few days before, at a meeting between […] SAS representatives and […] Mærsk Air representatives the point had been made by an outside lawyer that 'none of the points concerning market-sharing and the setting of prices could be included in a written agreement' (Record of the meeting between Mærsk Air and SAS of 23 June 1998).

The size of the relevant geographic market

(90) The withdrawals that took place in the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes are only the most visible consequences of the market-sharing. On all the other routes to and from Denmark (routes to/from the other Member States, to/from the EEA countries and to/from the rest of the world), the agreement prevented competition that could otherwise have taken place. SAS, the largest airline in the Nordic countries, ensured that Maersk Air, the main Danish airline capable of competing with it for flights to/from Denmark, would not enter any of the routes that SAS operated out of Copenhagen or even any route that SAS did not operate but might wish to enter. Conversely, Maersk Air ensured that SAS would not compete on its routes to/from Billund, Denmark's second airport.

(91) The affected geographic market therefore extends over the EEA and beyond.

The actual impact of the infringement

(92) The most visible results of the infringement were as follows: Maersk Air withdrew from the Copenhagen-Stockholm route on 27 March 1999 and terminated its cooperation with Finnair. Finnair first reduced its frequencies on the route and finally withdrew in May 2000. As compensation for Maersk Air's withdrawal from the Copenhagen-Stockholm route, SAS withdrew from the Copenhagen-Venice route and — as part of the package — SAS also withdrew from the Billund-Frankfurt route, where it was previously competing with Maersk Air.

(93) The Copenhagen-Stockholm route is, because of its volume in terms of passengers and number of frequencies, one of the main routes within the Community. On this route, SAS increased its market share from [...] % during the year that preceded the entry into force of the agreement to an estimated [...] % as from May 2000.

(94) At the negotiation stage, the fact that Maersk Air would be 'steering clear' of Stockholm and Oslo was valued by the parties, on the basis of the known passenger volume and the possibility of a DKK 100 price rise, as giving an annual additional revenue to SAS of some DKK [...] million (that is, an annual additional revenue of EUR [...] million). Such an estimate was made to allow the parties to agree on the value of Maersk Air's compensation.

(95) Given that the overall market-sharing between SAS and Maersk Air affects a large number of routes to and from Denmark, the Commission considers that the gains obtained by SAS as a result of the infringement exceed that estimate. While the Commission has not been able to estimate the gains obtained by Maersk Air as a result of the infringement, it should be noted that Maersk Air negotiated compensation for withdrawing from the Copenhagen-Stockholm route and not entering the Copenhagen-Oslo route in such a way that the compensation should be financially equivalent to the additional revenue obtained by SAS. It therefore appears reasonable to consider that Maersk Air also obtained a substantial additional benefit as a result of the infringement.

The arguments of the parties regarding the gravity of the infringement and the Commission's position on the arguments of the parties

(96) SAS argues that the infringements should be considered as serious but not very serious.

(a) First, SAS refers to a passage in the Commission's guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ESCS [1], according to which:

> [Very serious infringements] 'will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly (see Decisions 91/297/EEC, 91/298/EEC, 91/299/EEC, 91/300/EEC and 91/301/EEC — Soda Ash, 94/815/EC — Cement, 94/601/EC — Cartonboard, 92/163/EEC — Tetra Pak, and 94/215/ECSC — Steel beams).'

SAS infers from the references to the cases mentioned that the category of very serious infringements should only include widespread cartels usually involving more than two companies, the activities of which spread across the Community and beyond over a long period of time. In contrast, SAS submits that the Greek ferrie [2] case, where the Commission concluded that the infringement was serious, bears considerable resemblance to the cooperation between SAS and Maersk Air as regards both the volume of traffic (1 258 000 passengers in 1996) and the affected part of the common market (three routes between Italy and Greece).

[1] OJ C 9, 14.1.1998, p. 3.
[2] Commission Decision of 9 December 1998 (OJ L 109, 27.4.1999, p. 24).

(b) Second, SAS argues that the infringements only had limited negative effects on the markets. According to SAS:

— the SAS/Maersk Air cooperation allowed Maersk Air — with the specific agreement of SAS — to start operations on two new routes, namely Copenhagen-Istanbul and Copenhagen-Cairo, and reopen the Copenhagen-Athens ([1]) route. The opening or reopening of these routes by Maersk Air had benefits for the travelling public,

— the infringements only affected a limited part of the common market. The Commission is right, SAS writes, in focusing on three particular routes (Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt), even though some of the parties' statements on market-sharing have been phrased in broad terms. There would be no evidence to suggest that, in the absence of the market-sharing agreement, the parties would have acted any differently on any other route.

(97) Maersk Air also argues that the impact of the infringements has been limited. It points out that the relatively short distance between Billund and Copenhagen allows passengers from Jutland and Funen to choose between the two airports for international flights to/from Denmark. Maersk Air writes that SAS promoted its Copenhagen hub by offering free connecting transport by air or train for passengers located in Jutland or Funen for the flights to/from Copenhagen.

(98) The Commission considers that the impact of the infringements in the Greek ferries case, which related to price-fixing, was more limited than in the present case. First, in that case the parties did not actually implement all the offending agreements and they engaged in price competition through discounting. Second, the Greek Government had encouraged the carriers, during the period of the infringement, to keep the agreed fare increases within the inflation rates, which resulted in fares being kept at one of the lowest levels within the Community for maritime transport from one Member State to the other. Third, while the size in terms of passengers of the three routes for which infringements were found in the Greek ferries case (Ancona-Patras, Bari-Patras and Brindisi-Patras) is comparable to the size of the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes ([2]), an important difference is that the SAS/Maersk Air market-sharing affected many other routes. By ensuring that Maersk Air would not compete with SAS on the routes to/from Copenhagen and that SAS would not compete with Maersk Air on the routes to/from Billund, SAS and Maersk Air's horizontal market-sharing agreements restricted competition on a large number of routes to/from Denmark, including the routes between Denmark and the other Member States, between Denmark and the members of the EEA and between Denmark and the rest of the world. Given that SAS and Maersk Air are the two main airlines in Denmark, and that Copenhagen and Billund are the two main airports in the country, the repercussions of the market-sharing are therefore felt throughout the EEA and beyond, unlike in the Greek ferries case.

(99) As regards the argument that the cooperation would have allowed Maersk Air to start operations on the Copenhagen-Istanbul and Copenhagen-Cairo and Copenhagen-Athens route, there is no evidence that cooperating with SAS was necessary for Maersk Air to initiate operations between Copenhagen and Istanbul, Cairo and Athens. Maersk Air could have decided to operate these routes independently or in cooperation with a carrier other than SAS. Even if it were to be assumed, in favour of the parties, that these routes could only be opened because Maersk Air cooperated with SAS, the benefits for the passengers travelling on those routes could not make up for the elimination of competition on other markets.

(100) Regarding SAS' argument that there is no evidence to suggest that, in the absence of the overall market-sharing agreement, the parties would have acted any differently than they actually did in the routes other than the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes, the fact remains that Maersk Air was prevented from competing with SAS on the routes that SAS operated from Copenhagen and even on the routes that SAS was not operating but might wish to operate. Whether or not Maersk Air would have entered any such routes had it not been bound by the agreement with SAS is a hypothetical question that did not arise once Maersk Air was actually deprived of the freedom to decide whether or not to enter new routes from Copenhagen. The same reasoning applies as regards SAS' lack of freedom to launch routes from Billund.

([1]) SAS stopped operating on the Copenhagen-Athens route in the autumn of 1997 and Mærsk Air started operations on 28 March 1999.

([2]) The size of all the maritime routes between Italy and Greece in 1996 (which is larger than the three routes for which infringements were found) was, according to the Greek ferries decision, of 1 258 000 passengers, while the size of the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes was of 1 174 368 passengers in 1999.

(101) Similarly, the fact that the Copenhagen and Billund airports are 250 kilometres apart or that SAS offered free transport from Jutland or Funen to passengers flying from Copenhagen does not alter the Commission's assessment. The passengers flying out of Copenhagen could not, as a result of the infringement, count on Maersk Air to compete with SAS and the passengers flying to/from Jutland could not count on SAS to compete with Maersk Air. For the passengers to/from Jutland, travelling via Copenhagen to/from many of the European destinations operated by Maersk Air from Billund is not a convenient alternative, at least as far as time-sensitive customers are concerned.

Very serious infringement

(102) The Commission considers that the market sharing agreement between SAS and Maersk Air is a very serious infringement of Community competition law.

Same type of infringement

(103) Both companies committed the same type of infringement (market-sharing). It appears from the Commission's file that the intervention of both parties in the preparation of the agreements was equally important. Also, both parties took action to implement the agreement by entering into/withdrawing from the routes agreed. The agreement benefited both companies. An example of the balance that the parties tried to obtain with the agreement is the calculation of the SAS 'compensation' to Maersk Air for withdrawing from the Copenhagen-Stockholm route. After detailed negotiations on the exact level of compensation, the parties agreed that the compensation would consist in SAS ceasing operations between Copenhagen and Venice and Maersk Air starting operations on the route at the same moment.

Disparity of sizes

(104) Even if the nature of the infringement committed by each company is the same, the Commission will take account of the real impact of the offending conduct of each undertaking on competition, in particular having regard to the fact that there exists a considerable disparity between the sizes of the parties. Despite the in-built equilibrium in the agreement itself, the following factors will be taken into account:

— SAS is the major airline in Scandinavia, while Maersk Air is much smaller. The turnover of SAS in 2000 was EUR 4 917 million, while Maersk Air's turnover in the same year was 10.7 times smaller (EUR 458.6 million). The SAS turnover generated in relation with Denmark (EUR 757,6 million) is still 1,65 times bigger than Maersk Air's turnover,

— the agreement in effect extended the SAS market power: first, it incorporated the routes on which the parties code-shared to the SAS network (SAS put its code on Maersk Air's routes, but Maersk Air did not put its code on the SAS routes); second, the SAS frequent-flyer programme could be used on Maersk Air's routes, both to earn and to redeem points.

(105) Consequently, more weight will be given to the infringements committed by SAS than to the infringements committed by Maersk Air. This does not however mean that the relationship between the fines of the two companies should correspond exactly to the ratio between the two turnovers.

Starting point for the fines

(106) Taking into account the difference between the size of the parties and the need to set the fines at a level which ensures that they have a sufficiently deterrent effect, the appropriate starting point for the fines is set as follows:

SAS:	EUR 35 000 000
Maersk Air:	EUR 14 000 000

Duration

(107) In the statement of objections, the Commission signalled to the parties its intention to consider that the infringement started on 5 September 1998 — the date of the status report that recorded the parties' agreement — and was still continuing at the date of the statement of objections (31 January 2001), in so far as the parties were subject to an obligation not to re-enter the routes that they had abandoned and to a non-competition clause.

(108) As regards the date on which the infringement commenced, Maersk Air acknowledges in its response of 4 April 2001 to the statement of objections that the infringements started on 5 September 1998. However, SAS argues in its response that the infringements began on 8 October 1998, which is the date on which the notified cooperation agreement was signed. SAS also points out that the effects only started to be felt from 3 January 1999, when SAS withdrew from the Billund-Frankfurt route.

(109) The Commission does not share SAS' view. As can be seen from the various quotes of the 5 September 1998 status report reproduced as evidence above, the parties had clearly agreed as of that date which course of action to follow regarding the agreed withdrawals and entries. Also, as of 5 September 1998, the parties had lost their freedom to take unilateral decisions on the aspects covered by the market-sharing. The 8 October 1998 cooperation agreement notified by the parties is only the formal instrument of cooperation which precisely is not comprehensive because the actual cooperation was broader than that notified by the parties. The first agreed withdrawal took place on 3 January 1999, but the parties were no longer free to take unilateral decisions regarding their route network to/from Denmark from 5 September 1998. For these reasons, the Commission concludes that the infringements started on 5 September 1998.

(110) As regards the date of termination of the infringement, on 7 March 2001 the parties concluded a joint declaration according to which, from that date, the parties had regained their full freedom to compete and unilaterally take any commercial or strategic course of action they see fit. The joint declaration also stated that it did not alter the parties' position that the infringements were brought to an end at an earlier date, and that the parties would develop this position in their reply to the Commission's statement of objections.

(111) In their responses of 4 April 2001 to the statement of objections, the parties argue that the infringements ceased after the on-site inspections of 15 and 16 June 2000. More specifically:

— SAS writes that from the time of the Commission's investigation all meetings between the parties were either cancelled or conducted in a 'controlled environment' where the SAS internal and external lawyers advised on the permissible extent of contacts with Maersk Air,

— SAS also states that:

> 'When the full extent of SAS' part in the infringements became clear from the statement of objections received on 2 February 2001, President and CEO of SAS, [...], made it clear to his counterpart in Maersk Air [by letter of 15 February 2001] that any understanding outside the scope of the Cooperation Agreement was — and had always been null and void.'

— Maersk Air refers to a 21 August 2000 letter from [...], Maersk Air President, to the Commission services. This letter followed a meeting on 10 August 2000 between the representatives of Maersk Air and the Commission services. That letter stated as follows:

> 'As it was said during the meeting on 10 August 2000, Maersk Air A/S has immediately ceased all cooperation with SAS concerning market-sharing and price-fixing and with this letter I can confirm this position of Maersk Air A/S.'

Maersk Air also refers to a letter of 21 August 2000 to SAS, where [the Maersk Air President] wrote:

> 'I hereby let you know, for the sake of good order, that Maersk Air A/S has confirmed to the European Commission that Maersk Air A/S does not participate in any sort of cooperation with SAS that involves horizontal price-fixing or market-sharing.'

(112) The Commission does not consider Maersk Air's abovementioned letters of 21 August 2000 as a termination of the market-sharing agreements or as evidence of such a termination. The letter addressed to the Commission has no bearing on the existence of the agreements, nor does it show that Maersk Air has effectively declared termination vis-a-vis SAS. The letter to SAS does not clearly and unambiguously express the will to terminate the agreements; rather, it could be interpreted as an attempt to reassure SAS about the declarations that Maersk Air had made to the Commission. At the time, the parties were not yet aware of the position that the Commission would take in the statement of objections. The Commission therefore concludes that the infringements can only be deemed terminated at the earliest as from 15 February 2001, when SAS declared vis-a-vis Maersk Air that it did not consider itself as being bound by the market-sharing agreements.

(113) Consequently, the infringements lasted from 5 September 1998 until 15 February 2001, that is, for two years, five months and ten days.

(114) SAS and Maersk Air have committed an infringement of medium duration. In the Commission's practice, infringements of medium duration are, in general, infringements that last between one and five years. For infringements of medium duration, the Commission applies an increase of up to 50 % of the amount determined for the gravity of the infringement. In the present case, the starting point of the fine is increased by 25 %.

Conclusion on the basic amounts

(115) The Commission accordingly sets the basic amount of the fines at EUR 43 750 000 for SAS and EUR 17 500 000 for Maersk Air.

B.2. AGGRAVATING AND ATTENUATING CIRCUMSTANCES

Aggravating circumstances

(116) There are no aggravating circumstances.

Attenuating circumstances

(117) Maersk Air points out that it is a first time offender and claims that the Commission should consider this to constitute an attenuating circumstance.

(118) This argument cannot be accepted. First, Maersk Air is a fully-owned subsidiary of A. P. Møller, which is well aware of the consequences of infringing Community competition law. The documents obtained from the on-site inspections show that the A. P. Møller management was kept informed at all times of the progress of the negotiations with SAS and endorsed the agreements that Maersk Air reached with SAS. Second, not only did Maersk Air have the knowledge and infrastructure to recognise that its behaviour violated competition law, but, as is clear from the evidence in the Commission's file it was positively aware of the infringement and nevertheless decided to implement the market-sharing.

(119) The extent of the cooperation by the undertakings in the proceedings is examined below, in the context of the application of the Commission notice on the non-imposition or reduction of fines in cartel cases ('the leniency notice') [1]. Outside the scope of the leniency notice, there are no attenuating circumstances.

[1] OJ C 207, 18.7.1996, p. 4.

B.3. APPLICATION OF THE LENIENCY NOTICE

(120) Both SAS and Maersk Air argue that they cooperated with the Commission from the time of the on-site inspections on 15 and 16 June 2000. They invoke the application of sections B(d) ([1]) and D.2 ([2]) of the leniency notice.

(121) As regards the application of section B of the leniency notice, it is apparent that the conditions in points (a) to (e) of section B are cumulative and not alternative. In the present case, neither of the parties informed the Commission about the existence of the market-sharing agreements before the Commission undertook the investigations on 15 June 2001. Condition (a) of section B is therefore not fulfilled and the application of section B of the notice is not possible.

(122) The 'status reports' and the document of 16 July 1998 on the policy regarding international routes from Copenhagen constituted the key evidence that enabled the Commission to initiate the procedure leading to the present decision. This evidence was obtained in the course of the on-site inspections on 15 and 16 June 2000. For this reason, section C ([3]) of the leniency notice does not apply.

(123) As regards the application of section D.2, first indent, the Commission notes that:

— at the end of the on-site inspection, Maersk Air offered to the Commission services to hold a meeting with [a Maersk Air representative], who at that moment had already left Maersk Air. [That Maersk Air representative] had a key role in Maersk Air's negotiation with SAS during 1998. This meeting took place at the Maersk Air offices on 22 June 2000 and on that occasion Maersk Air handed over to the Commission representatives the 'private files' that [the Maersk Air representative] had kept in his Copenhagen home. These files helped the Commission establish the actual evolution of the negotiations and the precise scope of the agreement,

— by contrast, the information provided by SAS only served to confirm what the Commission already knew. Unlike the documents provided by Maersk Air, the 'additional files' transmitted by SAS were not provided spontaneously after the inspection, but pursuant to a request for information.

(124) As regards the application of the second indent of section D.2 of the leniency notice, neither SAS nor Maersk Air contested the facts contained in the statement of objections.

([1]) Section B of the leniency notice reads:
'B. NON–IMPOSITION OF A FINE OR A VERY SUBSTANTIAL REDUCTION IN ITS AMOUNT
An entreprise which:
(a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;
(b) is the first to adduce evidence of the cartel's existence;
(c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;
(d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete cooperation throughout the investigation;
(e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal acitivity,
will benefit from a reduction of at least 75 % of the fine or even from total exemption from the fine that would have been imposed if it had not cooperated.'

([2]) Section D of the leniency notice provides:
'D. SIGNIFICANT REDUCTION IN A FINE
1. Where the enterprise cooperates without having met all the conditions set out in sections B or C, it will benefit from a reduction of 10 % to 50% of the fine that would have been imposed if it had not cooperated.
2. Such cases may include the following:
— before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the infringement,
— after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.'

([3]) Section C of the leniency notice provides:
'C. SUBSTANTIAL REDUCTION IN A FINE
Enterprises which both satisfy the conditions set out in section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to the cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50 % to 75 % of the fine.'

(125) In view of the foregoing, the fine to be imposed on Maersk Air should be reduced by 25 %, and that imposed on SAS, by 10 %,

HAS ADOPTED THIS DECISION:

Article 1

Scandinavian Airlines System ('SAS') and Maersk Air A/S ('Maersk Air') have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement, by agreeing to:

(a) an overall market-sharing agreement, according to which SAS would not operate on Maersk Air's routes out of Jutland and Maersk Air would not be able to launch services on routes from Copenhagen which SAS operates or wishes to operate, and an agreement to respect the share-out of the domestic routes;

(b) specific market-sharing agreements regarding individual international routes, and in particular:

(i) the agreement pursuant to which Maersk Air would cease flying between Copenhagen and Stockholm as from 28 March 1999 and obtain compensation for its withdrawal;

(ii) in compensation for Maersk Air's withdrawal from the Copenhagen-Stockholm route, the agreement pursuant to which SAS would stop operating between Copenhagen and Venice at the end of March/beginning of April 1999 and Maersk Air would start operations on the route at the same moment;

(iii) the agreement according to which SAS would stop flying on the Billund-Frankfurt route in January 1999.

Article 2

For the infringements referred to in Article 1, a fine of EUR 39 375 000 shall be imposed on SAS, and a fine of EUR 13 125 000 shall be imposed on Maersk Air.

Article 3

The fine determined in Article 2 shall be paid in euro within three months of the date of notification of this Decision into the following bank account of the Commission of the European Communities:

Account No 642-0029000-95
IBAN BE76 6420 0290 0095
Banco Bilbao Vizcaya Argentaria (BBVA) SA
Avenue des Arts/Kunstlaan, 43
B-1040 Brussels
(SWIFT code: BBVABEBB)

After the expiry of the three-month period, interest shall be payable at the rate charged by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, namely 8,04 %.

Article 4

This Decision is addressed to:

SAS, Scandinavian Airlines System
Frösundaviks Allé, 1
S-195 87 Stockholm

and

Maersk Air A/S
Copenhagen Airport South
DK-2791 Dragør.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 18 July 2001.

For the Commission

Mario MONTI

Member of the Commission