JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

18 July 2005 *

In Case T-241/01,

Scandinavian Airlines System AB, established in Stockholm (Sweden), represented by M. Kofmann, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by P. Oliver and W. Wils, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Article 2 of Commission Decision 2001/716/EC of 18 July 2001 relating to a proceeding pursuant to Article 81 EC and Article 53 EEA (COMP.D.2 37.444 — SAS/Maersk Air and COMP.D.2 37.386 — Sun-Air versus SAS and Maersk Air) (OJ 2001 L 265, p. 15), in so far as it fixes the fine imposed on

* Language of the case: English.

the applicant at EUR 39 375 000, and, in the alternative, an application for the reduction of that fine,

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

composed of J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2004,

gives the following

Judgment

Legal context

1 According to Article 4(1) of Council Regulation 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 (OJ 1987 L 374, p. 1; 'the Regulation'), which applied at the time of the facts of the case, where the Commission finds there has

been an infringement of Article 81(1) of the Treaty, it may by decision require the undertakings concerned to bring it to an end.

2 Article 12(2) of the Regulation states that the Commission may, by decision, impose fines on undertakings or associations of undertakings 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, where either intentionally or negligently they have infringed Article 81(1) of the Treaty. In fixing the amount of the fine, regard must be had both to the seriousness and to the duration of the infringement.

3 In a notice published in the Official Journal (OJ 1998 C 9, p. 3), the Commission set out guidelines for the calculation of fines imposed pursuant to Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87; 'Regulation No 17') and Article 65(5) of the ECSC Treaty ('the Guidelines').

4 In its Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4; 'the leniency notice'), the Commission stated the conditions under which undertakings cooperating with it during its investigation might be spared a fine or have its amount reduced.

Background to the dispute

5 Scandinavian Airlines System AB ('SAS" or 'the applicant'), the largest airline in Scandinavia, is a consortium controlled by SAS Sverige AB, SAS Danmark A/S and

SAS Norge ASA, each of those undertakings being, in turn, owned as to 50% by the State and 50% by the private sector. SAS is part of the Star Alliance and serves 105 scheduled destinations (40 within Scandinavia, 56 in the rest of Europe and nine outside Europe). Its turnover, according to its annual report for 2000, was EUR 4 917 000 000.

6 Maersk Air A/S is a Danish airline owned by the A.P. Møller group, which is also active in other sectors such as shipping, oil and gas. The A.P Møller group also controls Maersk Air Ltd UK. Maersk Air A/S and Maersk Air Ltd together form the Maersk Air group, whose turnover in 2000 was EUR 458 600 000. Maersk Air A/S (hereinafter 'Maersk Air') operates four Danish domestic routes and 15 scheduled international routes to and from Copenhagen and Billund.

7 By letter of 8 March 1999, SAS and Maersk Air notified the Commission of a cooperation agreement, dated 8 October 1998, and five ancillary agreements in order to obtain negative clearance and/or an exemption under Article 3(2) and Article 5 of the Regulation.

8 The cooperation agreement, which entered into force on 28 March 1999, includes two main aspects, namely:

(a) code-sharing on a number of Maersk Air routes, four domestic routes and nine international routes, allowing SAS to market seats on the code-shared flights;

(b) participation in a frequent flyer programme, allowing Maersk Air passengers to earn points on SAS's frequent flyer programme (the 'EuroBonus' programme), and, conversely, allowing EuroBonus members to exchange points obtained by them for Maersk Air flights. The cooperation in respect of the frequent flyer programme covers all of Maersk Air's routes.

9 The five ancillary agreements provide the technical and financial details necessary to implement the two aspects of the main agreement.

10 On 23 November 1998, a small Danish airline, Sun-Air of Scandinavia, submitted a complaint to the Commission, which was registered on 7 January 1999, against SAS and Maersk Air.

11 In the course of its preliminary enquiry, the Commission found that the notice reflected only partially the agreements concluded between the two undertakings. According to the Commission, the coming into force of the cooperation agreement coincided with the withdrawal by Maersk Air from the Copenhagen-Stockholm route, on which it had been competing with SAS until that time. Furthermore, it also emerged that, at the same time, SAS ceased to operate between Copenhagen and Venice, just as Maersk Air began to operate on that route. Finally, SAS withdrew from the Billund-Frankfurt route, leaving Maersk Air the only carrier on that route. None of those entrances and withdrawals had been notified to the Commission.

12 By decision of 9 June 2000, the Commission ordered SAS, Maersk Air and the A.P. Møller group to submit to an investigation pursuant to Article 14(3) of Council Regulation No 17 and Article 11(3) of the Regulation.

13 The documents discovered during the inspection, which took place on 15 and 16 June 2000, confirmed that the agreement between SAS and Maersk Air was broader than the one which the parties had notified to the Commission. The documents showed that, pursuant to an agreement not notified to the Commission, first, SAS undertook not to operate on Maersk's routes out of Jutland while Maersk undertook not to launch services on routes from Copenhagen which SAS operated or wished to operate, and, secondly, Maersk Air had withdrawn from the Copenhagen-Stockholm route and SAS from the Copenhagen-Venice and Billund-Frankfurt routes, each company leaving the other as sole operator on those routes.

14 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.

15 By letter of 24 August 2000, in response to a Commission request for information of 1 August 2000, SAS sent the Commission a volume with the title 'private files'. By letter of 13 September 2000, SAS sent two additional files that had appeared after certain employees returned from their holidays.

16 By letter of 12 October 2000, SAS and Maersk Air submitted a supplementary notification so that the Commission could take account of changes in their cooperation, in particular concerning the two companies' traffic planning.

17 On 31 January 2001, the Commission initiated proceedings under Article 81 EC and Article 53 of the European Economic Area ('EEA') Agreement and sent a statement of objections to SAS and Maersk Air, in accordance with Articles 3(1) and 16(1) of the Regulation. 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 could not 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 had infringed Article 81 of the Treaty and Article 53 of the EEA Agreement and that that infringement of Community law could be regarded as very serious. The Commission also informed the parties that it intended to impose fines.

18 In their separate responses to the statement of objections, both dated 4 April 2001, the parties to the cartel acknowledged the facts and the existence of the infringements as described in the statement of objections and stated that they did not wish to request an oral hearing.

19 SAS and Maersk Air did, however, make observations limited to factors capable of affecting the calculation of the fine, such as the seriousness and the duration of the infringements.

20 At the end of the proceedings the Commission adopted Decision 2001/716/EC 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) (OJ 2001 L 265, p. 15; 'the contested decision').

21 The operative part of the contested decision reads:

'Article 1

... SAS and ... 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), 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 ...'

Procedure and forms of order sought

22 By application lodged at the Registry of the Court of First Instance on 2 October 2001, the applicant brought the present action.

23 On receiving the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the parties to reply to certain questions in writing and to supply various documents. The parties acceded to those requests within the time-limit set.

24 The parties presented oral argument and replied to questions of the Court of First Instance at the hearing on 24 June 2004.

25 The applicant claims that the Court should:

— partially annul the Commission's decision of 18 July 2001, in so far as the amount of the fine imposed in Article 2 is excessive;

— alternatively, reduce the fine by as much as it considers appropriate;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

27 In its rejoinder, the Commission argues that the applicant is challenging certain considerations concerning the scope and the nature of the infringement, whereas it stated in its application that it was not challenging the circumstances of the infringement and obtained a 10% reduction in the fine for not substantially contesting the facts appearing in the statement of objections. The Commission

considers that, by doing so, the applicant has acted in an improper manner warranting an increase in the amount of the fine, and points out that the Court has the power to take such a measure in accordance with its power to make any order that may be required by the justice of the case.

Law

28 As a preliminary observation, the applicant emphasises that it does not challenge the contested decision in so far as it found SAS in breach of the competition rules, but merely challenges certain factors capable of affecting the calculation of the fine.

29 The applicant makes three pleas in law in support of its application. The first plea alleges infringement of Article 12(2) of the Regulation and the Guidelines and concerns the assessment of the seriousness of the infringement. The second plea alleges infringement of Article 12(2) of the Regulation and concerns the determination of the duration of the infringement. In the third plea, the applicant submits that the Commission failed to take account, or incorrectly took account, of attenuating circumstances that should have led to a larger reduction in the basic amount of the fine.

The first plea, alleging misassessment of the seriousness of the infringement

Arguments of the parties

30 The applicant argues that the Commission infringed Article 12 of the Regulation and the Guidelines by categorising the infringements committed by the applicant as

'very serious', whereas they were only 'serious'. This plea consists of five parts, concerning the categorisation of infringements, their actual impact, their geographic scope, the profits derived from them, and the turnover figures to be taken into account.

— The first part, concerning the classification of infringements

31 First, the applicant submits that its infringements are less serious than those normally characterised as 'very serious' by the Commission. In Commission decisions, particularly those referred to in the Guidelines, and in the case-law of the Court of Justice and the Court of First Instance, infringements classified as' very serious' invariably involve the whole or at least a very substantial part of the common market as well as substantial actual damage to competition in that market. The applicant argues that, although the Guidelines state that market-sharing can constitute a very serious infringement, the only ones that have been categorised as such have been widespread cartels, conducted over a long period of time. It refers, in that regard, to more recent cases also involving market sharing, such as, for example,'Lysine','Seamless Steel Tubes' and 'District Heating Pipes'. However, in the present case, in spite of the relative importance of certain air routes, the non-notified aspects of the cooperation did not have such extensive or serious effects.

32 The applicant notes that the Court of Justice has held that when assessing the seriousness of an infringement regard must be had to a large number of factors, the nature of which will vary in relation to the type of infringement and the circumstances of each case (Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 120 and 129). The applicant, while acknowledging that the Commission has a certain amount of discretion in determining the seriousness of an infringement, considers that that discretion has been substantially restricted by the adoption of the

Guidelines. Although the Commission's methodology under its Guidelines does deal with factors other than the nature of the infringement, the assessment of the seriousness of the infringement cannot be based solely on the characterisation of the infringement irrespective of its impact. On the contrary, it submits, the fact that an 'obvious' or 'per se' infringement, such as market-sharing, clearly falls within the scope of Article 81(1) EC does not have any direct bearing on the seriousness of the infringement for the purposes of calculating the amount of the fine.

33 The applicant considers, secondly, that the present case should be compared to the Greek Ferries case (Commission Decision 1999/271/EC of 9 December 1998 relating to proceedings pursuant to Article [81] of the EC Treaty — IV/34.466) (OJ 1999 L 109, p. 24), which concerned a price-fixing agreement for roll-on and roll-off services on routes between Greece and Italy and where, whilst holding that that type of agreement constituted, by its nature, a very serious breach of Community law, the Commission nevertheless concluded, in the light of the limited actual impact of the infringement on the market, of the fact that the parties did not apply all the agreements in full but engaged in price competition through discounting, and of the fact that that infringement produced its effects only within a limited part of the common market, that the infringement in question was a 'serious' and not a 'very serious' breach of Community competition rules.

34 The applicant submits that, in the present case, the Commission did not provide evidence of the alleged effects of the agreement, or explain their impact when it stated that the market-sharing between the two undertakings affected many other routes. The applicant complains in particular that the Commission did not define more than three markets in the present case (i.e. the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes).

35 The seriousness of an infringement depends both on geography and on the number of people affected, and to rely solely on the first criterion results in the aviation industry being treated more harshly than, for example, the maritime industry. The applicant notes that the number of people flying on the three routes identified by the Commission, i.e. 1082000 passengers, makes the infringement in question

comparable to the facts of the 'Greek Ferries' case, where the number of passengers was 1258000. In both cases the numbers of passengers are relatively low in comparison to the totality on routes within, and to and from, the EEA. Similarly, the contested agreement in the present case affected only the three routes that the Commission specifically defined, as is testified in particular by the fact that the parties failed to agree a cooperative arrangement in relation to the Copenhagen-Birmingham route.

36 By contrast, comparison of the geographic impact of the infringements in the present case with the Volkswagen case (Commission Decision 98/273/EC of 28 January 1998, relating to proceedings pursuant to Article 85 of the EC Treaty, IV/35.733 — VW) (OJ 1998 L 124, p. 60), is meaningless in so far as the method of market definition differs for each of the two sectors, namely air transport for the first and vehicle distribution for the second. Furthermore, the fact that, in the Volkswagen case, the Commission classified the infringement as very serious even though Italy, Germany and Austria were the only countries affected, is irrelevant considering the disparity in size between those three countries and Denmark.

37 Thirdly, and finally, the applicant claims that the Commission, although it categorised the infringements committed by SAS and Maersk Air as 'very serious', set the basic fine at EUR 14 000 000 for Maersk Air. Since the Guidelines state that the basic amount for fines for very serious infringements begins at EUR 20 000 000, the applicant considers that the Commission's attitude is inconsistent and that the infringements committed by each of the parties to the agreement should be categorised as serious.

— The second part of the plea, concerning the actual impact of the infringements

38 The applicant submits that the infringements for which it is jointly responsible had little, if any, negative effects on the markets in question. The applicant states in that

regard that the changes made in the parties' traffic programmes were fully justified by sound economic and commercial considerations, with the result that unilateral decisions would have led to the same changes. It notes that SAS made considerable losses on the Copenhagen-Venice and Billund-Frankfurt routes just as Maersk Air made losses on the Stockholm-Copenhagen route.

39 The applicant concedes that the Copenhagen-Stockholm route was used as a 'bargaining object' during negotiations, but it notes that it would have been to its benefit had Maersk Air remained on the route with approximately four daily flights, since it is not able alone profitably to exploit the full potential of feeder traffic between Stockholm and its main hub in Copenhagen.

40 The applicant submits that there is nothing to suggest that fares have risen disproportionately on the routes covered by the parties' cooperation. Account must be taken of the effect on prices for a correct assessment of the seriousness of an infringement, or, at the very least, evidence should be adduced in relation to the effect on traffic volume. The applicant submits, in that regard, that a study that it commissioned by the Lexecon consultancy firm to show the actual impact of the agreement on routes out of Denmark other than the three routes referred to by the Commission shows that, on those routes, the effect of the agreement in weakening the threat of potential competition was small and had only a minimal impact on fares. A comparison between the Copenhagen-Stockholm route and the Copenhagen-Oslo and Stockholm-Oslo routes in relation to fares charged from January 1998 to March 2000, for certain types of ticket, shows that fares on the three routes, two of which are unaffected by Maersk Air, developed similarly.

41 The applicant submits that the travelling public benefits in a number of ways from its cooperation with Maersk Air. Since the inspection, SAS's cooperation with Maersk Air has been limited to the 'legitimate' areas of the parties' cooperation such

as code sharing, frequent flyer pro-gramme, ground handling and hosting services. The applicant is of the opinion that the travelling public benefits substantially from the cooperation, such benefits including, for example, the opening or re-opening of new routes, for example between Copenhagen and Athens, Venice, Istanbul and Cairo and between Billund and Dublin, as well as an increase in the frequency of flights and better connections on existing routes.

42 The applicant notes that none of the parties have taken or implemented any decision which is not in its own best interests. Thus, in the spring of 2000, when the parties could not come to any agreement on the Copenhagen-Birmingham route, they decided to enter into direct competition on the route that Maersk Air operated with British Airways.

43 Finally, the applicant submits that only a limited part of the common market was affected, even though the parties used general language to describe the market-sharing arrangement. First, there is no evidence to suggest that, in the absence of the contested agreement, the parties would have acted any differently on any route other than the three specified routes. Secondly, even on the three routes identified by the Commission, the changes made in the parties' traffic programmes were inevitable.

— The third part of the plea, concerning the geographic scope of the infringement

44 The applicant considers that the statement in paragraph 91 of the contested decision that 'the affected geographic market therefore extends over the EEA and beyond' is unclear and inconsistent. Such a statement would appear to define the geographic market as the geographic area within which the effects of the infringement had some

impact. The applicant notes that, in paragraph 28 of the contested decision, the Commission states that 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. The Commission's usual market definition in air transport cases lends itself to identifying not a spatial geographic market but rather linear point-to-point connections. The applicant submits that, save for the three contested markets (Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt), the Commission has failed to define any other market and merely referred to broad categories by mentioning a large but indeterminate number of routes to and from Copenhagen and Billund. The Commission has therefore failed to identify and delineate any more than three markets.

45 In any event, the Commission did not prove the existence of a market covering the whole of the EEA and beyond. The Commission did not provide reasons as to why all routes to and from Denmark are or could have been affected by the agreement.

46 Furthermore, the area described by the Commission encom-passes many other routes on which neither Maersk Air nor SAS are active and which do not depart or terminate in Denmark. In relation to those routes also, the Commission failed to provide reasons as to why they are or could be affected.

47 The applicant submits that the Commission failed to adduce evidence of actual impact on the indeterminate number of routes which it refers to only by categories. It submits that the Lexecon report found that the effects of the agreement were minimal only on non-overlap routes where SAS faced only potential competition from Maersk Air.

48 The applicant observes that, in the Greek Ferries case, the Commission held that the geographic scope of the infringements in relation to transport routes was limited to the routes actually affected by anticompetitive behaviour. In the present case, the incorrect assessment of the geographic scope of the agreement caused the Commission to assess the seriousness of the alleged infringements incorrectly.

49 Even assuming that the Court of First Instance is of the view that the term 'affected geographic market' refers to the geographic area within which the effects of the infringement had an impact, the reasoning is inadequate in so far as the decision does not state what level of effect exists across the area described as the 'EEA and beyond'.

50 The applicant submits that the Commission further erred in its assessment of the geographic impact of the infringement.

51 The applicant considers that the infringement did not have such a wide-ranging effect as the Commission contends. The Commission should have taken account, for example, of SAS's and Maersk Air's attempt to coordinate their time-schedules on the Copenhagen-Birmingham route. That example shows that in spite of the market-sharing agreement being phrased in broad terms, its effects were limited to those routes where the parties were actually in competition.

— The fourth part of the plea, concerning profits derived from the infringement

52 The applicant notes that, according to the Guidelines, the basic amount of a fine may be increased in order to exceed the amount of gains improperly made as a result of the infringement. In the present case, the Commission applied those provisions

and calculated the amount of SAS's fine on the basis of an estimate by the parties at the negotiation stage that Maersk Air's withdrawal from the Copenhagen-Stockholm route would lead to an additional annual revenue of DKK [...] [1] for SAS. Contrary to the Commission's submission in its defence, it is clear from the contested decision that the Commission did in fact estimate the gains derived by SAS from the infringement on the basis of the amount of DKK [...].

53 The applicant denies that the infringement allowed it to derive an additional profit of DKK [...].

54 The applicant submits, in that regard, that, first, the figure of DKK [...] stems from a random comment made by a Maersk Air representative during the negotiations and was at no stage accepted by SAS.

55 The statement is also contradicted by the fact that fares on the Copenhagen-Stockholm route have not evolved any differently from fares on similar routes.

56 The applicant then observes that the Commission's assessment, in so far as it focuses only on the Copenhagen-Stockholm route, ignores the character of air transport as a network industry. The need to take account of the overall network is particularly important in relation to the Copenhagen-Stockholm route, where 60% of the traffic is transfer traffic.

1 — Confidential information removed.

57 The applicant also submits that continued operations by Maersk Air on the Copenhagen-Stockholm route would have been in its interest because of SAS's bottlenecks on that route, as it maintained during its 1998 negotiations with Maersk Air. It adds, that, within the relatively short period of time since Maersk Air's withdrawal, SAS has not been able fully to adjust its network to the new situation and that, as a result of its shortage of capacity, SAS is losing traffic to competing networks.

58 Finally, the applicant states that the figure of DKK [...] originated from a docu-ment which SAS could not comment on at the time of its publication, and the fact that SAS did not dissent from the view of the Maersk Air representative does not mean that SAS agreed with it. Documents drafted by SAS in relation to those negotiations do not refer to additional revenue resulting from the cooperation agreement, but in fact suggest that it would be beneficial if Maersk Air remained on the Copenhagen-Stockholm route to alleviate bottlenecks at peak travel times.

59 Furthermore, the applicant notes that it transpires from paragraph 53 of the decision that the figure of DKK [...] is based on an assumed price rise per passenger on the Copenhagen-Stockholm and Copenhagen-Oslo routes, whereas the latter route never formed part of the market-sharing agreement. Applying the Commission's logic to only the Copenhagen-Stockholm route, based on approximately 100 000 000 passengers, the correct figure is thus DKK [...].

— The fifth part of the plea, concerning the impact on turnover

60 The applicant considers that, should the Court of First Instance endorse the Commission's choice in using the method of calculation based on the turnover involved, even though the Guidelines make no reference to turnover for the calculation of fines, the Commission should at least compare like figures.

61 The applicant submits, in that regard, that the Commission erred in so far as it compared SAS's overall group turnover of EUR 4 917 000 000 with that of Maersk Air, which is 10.7 times smaller, without taking account of the fact that Maersk Air forms part of the A.P. Møller group, whose turnover is approximately twice that of the SAS group.

62 The Commission contends that the applicant's arguments are unfounded, and that the plea should be dismissed.

Findings of the Court

63 In its first plea, to the effect that the Commission erroneously classified the infringements as 'very serious' whereas they were only 'serious', the applicant formulates a series of complaints and arguments under five sub-headings, which, though distinct, partially overlap and are essentially designed to challenge the Commission's assessment of the seriousness of the infringements inasmuch as it over-concentrated on the nature of the infringements while neglecting or mis-assessing factors concerning the size of the geographic market in question and the actual impact of the infringements on the market. It considers that the facts of this case are similar to those in 'Greek Ferries' and that the Commission erroneously took account of the profits made from the infringement and the overall turnover figure in the calculation of the fine.

— Preliminary observations

64 It should be noted at the outset that Article 12(2) of the Regulation, like Article 15 (2) of Regulation No 17, merely provides that, in determining the amount of the fine,

account is to be taken of the seriousness and the duration of the infringement. According to settled case-law, that provision confers upon the Commission a wide discretion in the fixing of fines (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127) which is, amongst other things, a function of its general policy in competition matters (*Musique Diffusion française and Others* v *Commission*, cited in paragraph 32 above, paragraphs 105 and 109). It is in that context that, in 1998, in order to ensure the transparency and objectivity of its decisions on fines, the Commission adopted the Guidelines which are designed, whilst complying with higher-ranking law, to specify the criteria which the Commission intends to apply when exercising its discretion; a self-limitation of that power results (see, to that effect, Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 89), in that the Commission is required to comply with guidelines that it has itself laid down (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57).

65 In this case, as stated in recitals 78 to 125 of the contested decision, the Commission has imposed fines on two undertakings which infringed Article 81(1) EC and Article 53 of the EEA Agreement. Those recitals, and the documents before the court, show that the fines were imposed under Article 12(2) of the Regulation, and that, even though the contested decision does not expressly refer to the Guidelines, and the Guidelines themselves refer expressly only to fines imposed pursuant to Article 15 (2) of Regulation No 17, the Commission determined the amount of the fines by applying the method defined by the Guidelines.

66 It first needs to be examined whether, as the applicant suggests, the Guidelines excessively reduced the Commission's discretion when fixing fines.

67 According to the method defined by the Guidelines, determination of the amount of fines follows a system based on the fixing of a basic amount, to which increases are

applied to take account of aggravating circumstances and reductions applied to take account of extenuating ones. The basic amount is determined by reference to the seriousness of the infringement, to which an additional amount may be added by reference to its duration.

68 In assessing the seriousness of the infringement, the Guidelines state that account must be taken of its nature, its actual impact on the market, where that can be measured, and the size of the relevant geographic market (point 1A, first paragraph, of the Guidelines). In that context, infringements are classified into three categories, namely 'minor', for which fines are likely to be between EUR 1 000 and EUR 1 000 000, 'serious', for which the amount is likely to be between EUR 1 million and EUR 20 million, and 'very serious', for which the likely amount exceeds EUR 20 million (point 1A, second paragraph, first to third indents). Within each of those categories, the proposed scale of fines makes it possible to apply differential treatment to undertakings according to the nature of the infringements committed (point 1A, third paragraph). It is also necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators — in particular consumers — and to set the fine at a level which ensures that it has a sufficiently deterrent effect (point 1A, fourth paragraph).

69 Within each of the three categories of infringement thus defined, it may further be necessary, according to the Guidelines, to apply weightings in certain cases so as to take account of the specific weight, and thus the real impact, of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type, and accordingly to adapt the basic-amount starting point according to the specific character of each undertaking (point 1A, sixth paragraph).

70 It follows that, in so far as the Guidelines provide that assessment of the seriousness of the infringement must take account of its nature, its actual impact on the market, where that can be measured, and the size of the relevant geographic market, they fall within both the legislative framework laid down by Article 12(2) of the Regulation and the scope of the discretion which, according to the case-law, the Commission has when fixing fines.

71 It should also be noted that, contrary to what the applicant seems to be arguing, the Guidelines do not provide that all market-sharing cartels are automatically classified as 'very serious' infringements.

72 In the first place, the first paragraph of point 1 A of the Guidelines expressly provides that assessment of the seriousness of the infringement must take into account not only its nature but also its impact on the market where that is measurable and the extent of the geographic market concerned.

73 Secondly, the third indent of the second paragraph of point 1 A, which defines the concept of 'very serious infringements', does not imply a rigid and predetermined classification, but merely indicates that 'These 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 clearcut abuses of a dominant position by undertakings holding a virtual monopoly'.

74 Thirdly, point 1 A further provides, in its fourth to sixth paragraphs, that account is to be taken of a series of other factors (actual economic capacity of offenders to cause significant damage, deterrent effect of the fine, specific weight and thus real impact of the offending conduct of each undertaking) in order to determine the amount of the fine.

75 The Guidelines cannot therefore be regarded as excessively and unlawfully limiting the Commission's discretion in fixing fines, but must rather be viewed as an instrument allowing undertakings to have a more precise idea of the competition policy which the Commission intends to follow in order to ensure the transparency and objectivity of its decisions on fines (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 157). It should also be noted that the legality of the methodology prescribed in the Guidelines for calculating fines has already been confirmed many times by the Community judicature (see, in particular, Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913 ('Graphite electrodes'); and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597 ('the *Lysine* judgment')).

76 In any event, the applicant's argument that the Commission satisfied itself with a purely formalist approach, taking into account only the criterion of the nature of the infringement, rests on an erroneous reading of the contested decision.

77 Examination of the seriousness of the infringement begins in recital 87 of the contested decision, according to which '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'. There then follow three 'sections' of the contested decision, respectively examining the 'nature of the infringement' (recitals 88 and 89), the 'size of the relevant geographic market' (recitals 90 and 91) and the 'actual impact of the infringement' (recitals 92 to 95). Finally, in a fourth section, the Commission goes on to examine various arguments of the parties to the cartel concerning the seriousness of the infringement (recitals 96 to 101).

78 The applicant's complaint that the Commission made a purely formal examination of the infringements, limited to their nature, must therefore be rejected.

79 It next has to be examined whether the Commission's assessment of the seriousness of the infringements, having regard to the three factors of their nature, the extent of the geographic market concerned and their actual impact on the market, is vitiated by obvious error.

— The nature of the infringement

80 Concerning the nature of the infringement, it should be noted that, in the words of Article 1 of the contested decision, the parties infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by agreeing to an overall market-sharing agreement whereby 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 operated or wished to operate, and an agreement to respect the share-out of the domestic routes, and by also making specific market-sharing agreements regarding individual international routes, and in particular the agreement whereby Maersk Air would cease flying between Copenhagen and Stockholm in exchange for compensation, the counterpart agreement whereby SAS would withdraw from the Copenhagen-Venice route which Maersk Air would take over, and the agreement whereby SAS would stop flying on the Billund-Frankfurt route.

81 Those facts are undisputed, the parties having admitted them during the administrative procedure and the applicant expressly stating in its application that it does not dispute the infringements found in the contested decision.

82 In the first part of this plea, seeking to demonstrate that the infringements established should have been classified as 'serious' rather than 'very serious', the applicant accuses the Commission, essentially, of adopting a formalist approach and considering only the nature of the infringements, whereas the Commission's decision-making practice ('Lysine', 'Seamless Steel Tubes' and 'District Heating Pipes') and the case-law show that, amongst market-sharing agreements, the only ones to be classified as 'very serious' were those which invariably affected the whole or, at least, a very significant part of the common market and actually caused considerable harm to competition. The Guidelines themselves, whilst mentioning market-sharing agreements amongst 'very serious' infringements, referred only to cartels of wide extent and long duration. The applicant refers in that respect to the Commission's decisions in the 'Cement', 'Cardboard' and 'Girders' cases.

83 For the purpose of fixing the amount of the fine, the seriousness of the infringement is to be assessed by taking into account such matters as the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the Community and the situation of the market when the infringement was committed (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 176). A well-established line of case-law simply indicates, moreover, that 'the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition' (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 246, and the *Lysine* judgment, paragraph 117). Similarly, in Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraphs 258 and 259, the Court of First Instance held that the seriousness of the infringement could be established by reference to the nature and the object of the abusive conduct and stated that 'it is clear from settled case-law (Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 636, and Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 199) that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects'.

84 Therefore, even if the size of the geographic market concerned and the impact on the market when measurable must also be taken into account, the nature of the infringements constitutes an essential criterion for assessing the seriousness of an infringement.

85 Concerning more particularly cartels which, like this one, consist of market-sharing, it should be noted at the outset that, according to the Guidelines, 'very serious' infringements essentially consist of horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, and that they also appear amongst the examples of agreements, decisions or concerted practices expressly declared incompatible with the common market in Article 81(1)(c) EC. Apart from the serious distortion of competition which they entail, such agreements, by obliging the parties to respect distinct markets, often delimited by national frontiers, cause the isolation of those markets, thereby counteracting the EC Treaty's main objective of integrating the Community market. Also, infringements of this type, especially where horizontal cartels are concerned, are classified by the case-law as 'particularly serious' or 'obvious infringements' (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136). According to consistent case-law, in assessing the seriousness of an infringement for the purpose of fixing the amount of the fine, the Commission must take into consideration not only the particular circumstances of the case but also the context in which the infringement occurs and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community (*Musique Diffusion Française*, cited in paragraph 32 above, at paragraph 106).

86 As for the applicant's complaint that the infringements in question should have been classified as 'serious' on the ground that only infringements covering the whole of the common market and of a long duration may be classified as 'very serious', this must be rejected.

87 First, the complaint is erroneous in law. The duration of an infringement is not a criterion for assessing its seriousness, but constitutes the second factor, alongside the seriousness of the infringement, prescribed both by Article 12(2) of the Regulation and by the Guidelines, for determining the amount of the fine. Concerning the geographic extent, the fact that, as simple examples of infringements classified as 'very serious', the Guidelines have referred only to infringements effectively concerning most Member States cannot be interpreted as meaning that only infringements of such a geographic extent are capable of receiving that classification. Moreover, even if most of the decisions or the case-law concerning infringements held to be 'very serious' did relate to very extensive geographic restrictions, neither the Treaty, nor the Regulation, nor the Guidelines nor the case-law support the conclusion that only the latter may be considered as such. On the contrary, as has been pointed out above, the case-law recognises the Commission as having a wide discretion in determining the seriousness of infringements and fixing the fine by reference to numerous factors which do not fall within a binding or exhaustive list of the criteria to be taken into account. Moreover, according to consistent case-law, its decision-making practice does not in itself serve as a legal framework for fines in competition matters (see, in particular, Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 188).

88 Certain infringements have in any event been classified as 'very serious' even though they were not 'very extensive', in the sense contended for by the applicant. Thus, the decision adopted in the *Volkswagen* case, against which the application for annulment was dismissed by the Court of First Instance, (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, confirmed on appeal by the judgment of the Court of Justice in Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189), classified the infringement at issue as 'very serious' even though Italy, Germany and Austria were the only countries concerned. Similarly, in Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491, the Court of First Instance upheld the Commission's assessment as 'very serious' of an infringement affecting the Netherlands market for the sale of new Opel motor cars.

89 Moreover, the territory of a single Member State, or even a part of it, may be regarded as constituting a substantial part of the common market within the meaning of Article 82 EC (see, in particular, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 371 to 375; Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 15; Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraphs 74 to 117).

90 The complaint is also factually inaccurate, in that the infringements found by the contested decision do not, as the applicant suggests, concern only Denmark. According to recital 91 of the contested decision, the geographic market affected extends beyond the EEA. It should be remembered that the contested decision found that the parties to the agreement had, in addition to specific market-sharing agreements concerning certain international routes, concluded an overall market-sharing agreement whereby SAS would not operate on routes run by Maersk Air from Jutland and Maersk Air would not be able to commence services on routes from Copenhagen which SAS was using or wished to use. Therefore, subject to further examination as to whether the assessment of the geographic size of the market in question was well-founded, even if the agreement concerns only routes to and from Denmark, the geographic market affected extends to the whole of the EEA and even beyond it.

91 The complaint that, having regard to their nature, the infringements could not be classified as 'very serious' must therefore be rejected.

— The size of the geographic market in question

92 Concerning, secondly, the criterion in relation to the size of the geographic market in question, the applicant essentially argues that the Commission wrongly assessed the geographic impact of the infringements and that it did not even define the markets concerned, other than the three routes specifically identified.

93 It should be noted, as a preliminary observation, that this complaint forms part of the plea alleging error in the assessment of the seriousness of the infringement, and that it does not constitute a plea whereby the applicant denies the existence of the infringement itself. As the applicant has expressly acknowledged, this action is not designed to dispute the existence of the infringements, which — according to Article 1 of the contested decision, annulment of which is not sought by the applicant — consist of, first, the conclusion of agreements concerning three specific routes (Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt), and, second, the conclusion of an overall market-sharing agreement to the effect that SAS would not fly on the routes operated from Jutland by Maersk Air and Maersk Air would not be able to commence services on routes from Copenhagen which SAS operated or wished to operate, together with an agreement to respect the share-out of the domestic routes.

94 It is in that context that the Court will assess the present complaint, which must be understood as concerning only the determination of the geographic extent of the overall agreement for the purposes of assessing the seriousness of the infringement.

95 It should be noted that, in recital 90 of the contested decision, under the heading 'The size of the relevant geographic market', the Commission stated that the withdrawals from the three routes to and from Denmark (Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt) were only the most visible consequences of the market-sharing, and that 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 overall market-sharing 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 and from Billund, Denmark's second airport.

96 Similarly, the Commission stated in recital 98 of the contested decision that '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'. As indicated in the first recital of the contested decision, SAS, a member of the Star Alliance, serves 105 scheduled destinations, of which 40 are within Scandinavia, 56 are in the rest of Europe and nine are outside Europe.

97 It follows that, even if not all air transport of the EEA was affected by the offending agreements, the applicant's complaint is based on an erroneous reading of the contested decision, the Commission having simply concluded, correctly, in recital 91 of that decision, that the infringements had had repercussions in the whole of the EEA and beyond.

98 None of the arguments put forward by the applicants is capable of overturning that assessment.

99 First, as the Commission rightly argues, the expression "affected geographic market" must be regarded as synonymous with the term "relevant geographic market" referred to in point 1.A of the Guidelines and recitals 90 and 91 of the contested decision. The applicant's argument, though unclear, seems to consist in accusing the Commission of understanding by 'affected geographic market' the geographic area in which the effects of the infringements had a certain impact. That argument is obviously unfounded, as point 1.A of the Guidelines states precisely that assessment of the seriousness of the infringement must take account of the geographic extent of

the market concerned. The Commission is therefore not obliged, to that end, to define precisely which are the markets in question, but simply to assess the greater or lesser extent of the market or markets concerned. Moreover, even in order to find an infringement, the Commission is not required to define precisely the markets in question where, as in this case, the agreements are clearly designed to restrict competition.

100 Similarly, the applicant's argument that, by applying the 'point of origin/point of destination' method to define the markets in question, the Commission omitted to identify the markets other than the three markets referred to in specific agreements, must clearly be rejected.

101 First, as already stated, the Commission is not required by point 1.A of the Guidelines to define precisely the markets in question.

102 Secondly, the definition of those markets is apparent to a sufficient legal standard from the contested decision. Since the overall agreement is designed to suppress the respective potential competition of the two parties to the agreement on all routes to and from Denmark, it is clear that the 'other markets' in question are constituted by all pairs of 'origin/destination' points in relation to Denmark. Generally, therefore, all routes which the parties operate, or, in the words of the overall market-sharing agreement, wish to operate, to or from Copenhagen or Jutland are affected. The Commission was therefore right to conclude in recital 43 of the contested decision, after exposing the object of that overall market-sharing agreement, consisting of a

total suppression of competition between its parties, that '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'.

103 The Court further observes, for the sake of completeness, that, according to recital 27 of the contested decision, the parties to the agreement themselves stated in their notification of 8 March 1999 that 'the relevant market [was] the provision of scheduled air transport of passengers in the EEA market' and 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 constitute[d] a unified whole'.

104 There is no escaping the conclusion that, as is apparent from the above considerations, the contested decision, contrary to what the applicant argues, fully satisfies the requirements that there be a statement of reasons, in accordance with Article 253 EC.

105 The applicant's arguments concerning the size of the geographic market in question must therefore be dismissed.

— Market impact

106 The applicant essentially argues that the infringements had little or no actual impact on the market.

107 In that respect, the Court must first reject the general argument, not further elaborated upon, that the agreements had no effect since all the amendments made by either of the parties to its traffic programming were justified on economic and commercial grounds. That is merely an unsupported allegation and therefore not capable of calling into question the findings made in the contested decision with a view to establishing the effects resulting from the infringements whose existence is undisputed.

108 The Court will then examine the various arguments concerning the three specific agreements on the one hand and the overall market-sharing agreement on the other.

109 Concerning the three routes that the parties to the agreement respectively abandoned in each other's favour (Copenhagen-Venice and Billund-Frankfurt for SAS and Stockholm-Copenhagen for Maersk Air), the applicant's argument that each of the parties made losses on those routes before the agreements, even if the fact were proved, is irrelevant. In the first place, in spite of those losses, the parties nevertheless considered it necessary, or at least preferable, to conclude agreements whereby they respectively undertook to abandon those three routes. Whether they would have withdrawn from those routes if they had not concluded those agreements is purely hypothetical, since the parties to the agreement had foregone the freedom to choose whether they would withdraw or not. Moreover, the mere fact that an airline makes losses on a line at a given time does not necessarily imply that it has an interest in abandoning it, if only by reason of the importance which that route may represent for the whole of the network which it serves. It is, moreover, unlikely that all airlines are profitable on all their routes at any given moment. In any event, the applicant has not established that it was on the basis of purely economic considerations, resulting from analyses carried out at the time, that the parties to the agreement decided to make the withdrawals in question. On the contrary, recital 66 of the contested decision, which has not been challenged by the applicant, shows that Maersk Air agreed with SAS that it would withdraw from the Copenhagen-Stockholm route without making any in-depth economic analysis of that route's operation beyond the winter season 1998/1999.

110 Concerning first the agreement concerning the Copenhagen-Stockholm route, it should be noted that the Commission found in recitals 92 to 94 of the contested decision that Maersk Air abandoned the Copenhagen-Stockholm route on 27 March 1999, stating in recital 93 that, because of its volume in terms of the numbers of passengers and flights, the Copenhagen-Stockholm route was one of the main routes within the Community, and that, on that 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. Similarly, recital 46 of the contested decision shows that Maersk Air stopped code-sharing with Finnair, which also operated on the route and withdrew from it in May 2000 in consequence, and also stopped code-sharing with Alitalia and Swissair (which did not operate). Those facts are not disputed by the applicant. It is therefore clear that the agreement had a very noticeable effect on the market, both for travellers and for the applicant and rival companies.

111 The applicant nevertheless argues in that respect that it had an interest in Maersk Air continuing to fly that route with four daily flights since SAS on its own would not have been in a position profitably to operate all the potential feeder traffic between Stockholm and its main hub of Copenhagen.

112 That argument must clearly be rejected.

113 First, as has just been indicated, the applicant benefited from the withdrawal of Maersk Air because, amongst other things, its market share significantly increased as a result.

114 Secondly, that strong growth shows that, despite the alleged saturation of its capacities, the applicant was capable of absorbing increased demand.

115 Thirdly, the Commission found, in recital 67 of the contested decision, that, in the opinion of the parties to the cartel themselves, SAS's revenue increased markedly following the withdrawal of Maersk Air and, more precisely, in recital 94 of the contested decision, that '[a]t 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'. Moreover, the Commission stated in its defence that those forecasts have proved accurate, SAS having moved from a loss of SEK 27 million in 1998 to a profit of SEK 156 million in 2000, without those figures being challenged by the applicant.

116 Fourth, if the applicant did have an interest in Maersk Air continuing to operate on that route, the fact remains that it has been unable to explain why it nevertheless considered it necessary to conclude an agreement for the withdrawal of Maersk Air. That applies all the more because, firstly, as the documents before the Court and in particular recitals 49 to 51 of the contested decision show, the Copenhagen-Stockholm route was at the heart of the market-sharing negotiations, the withdrawal agreements on the two other routes being designed precisely to arrive at equivalent compensation, and, secondly, the applicant argues that neither of the parties to the agreement took or implemented any decision which was not in its own interests. In any event, the fact, assuming it to be a fact, that the applicant was more interested in Maersk Air continuing to operate on that route only confirms that the agreement had an actual impact on the market, it being immaterial whether its consequences on the applicant's position were favourable or unfavourable. Thus, following the latter's argument, the agreement would, by reason of the saturation of its capacity on the route, have to be regarded as having the effect of depriving some passengers of the possibility of access to its 'hub' of Stockholm.

117 Regarding the specific agreements concerning the Copenhagen-Venice and Billund-Frankfurt routes, the Commission found in recital 92 of the contested decision that SAS had abandoned those two routes to compensate for Maersk Air's withdrawal from the Copenhagen-Stockholm route. The Court finds that those facts are

undisputed, and the result is that those agreements had the effect of removing all real competition in those two markets. Moreover, the applicant has not put forward any argument to establish that the agreements nevertheless had no discernible effect on the market. On the contrary, the applicant's statement that, since the inspection, the parties to the agreement limited their cooperation to its lawful aspects and that passengers derive a benefit consisting, in particular, of the opening or re-opening of the route between Copenhagen and Venice, only confirms the existence of an impact on the market arising from the offending agreements.

118 The applicant's arguments seeking to establish that the market-sharing agreements concerning the three specific routes had little impact on the market must therefore be rejected.

119 Concerning the overall market-sharing agreement, it should be noted that the Commission found, in recitals 41 to 43, 62, 69, 72 and 90 of the contested decision, that, since Maersk Air had agreed with SAS that it would not start any new routes from Copenhagen without SAS's consent, all routes to and from Copenhagen were affected by that agreement, and that, conversely, since SAS has agreed not to fly on the routes which Maersk Air was already operating from Jutland, the agreement also affected all those routes. It also found that the parties had agreed to comply with a sharing-out of internal routes and that there was a separate market for air transport services between Copenhagen and Bornholm. In recital 72, the Commission stated that both the three specific agreements and the overall market-sharing agreement had a clearly anti-competitive object and that they also had the effect of significantly restricting competition. The effect was not the same everywhere, however, since the former had affected actual competition, whereas the overall agreement had restricted potential competition between the parties to the agreement in so far as each of them had agreed not to operate routes from the airport reserved for the other. The Commission added, in that respect, that that restriction operated in a

context where SAS was the main carrier to and from Denmark with Maersk Air as its main Danish competitor, where most air traffic to and from Denmark originated from or was bound for one of the two airports covered by the agreement, and where Copenhagen was one of SAS's three airport hubs, whereas Maersk Air principally operated its routes to and from Copenhagen and Billund airports.

120 Those factors are undeniably sufficient for a finding that the overall agreement had an impact on the market. In the first place, the applicant has admitted that the parties concluded that agreement and intended to implement it; secondly, the parties to the cartel actually implemented and complied with that overall market-sharing agreement, or, at the very least, the applicant has not denied that, in accordance with what was contained in that agreement, each party kept away from routes reserved for the other. The Commission has further pointed out in that respect, in recital 42 of the contested decision, that, after the agreement took effect, SAS withdrew from Billund and Maersk Air was the only company to start new routes from that airport. The fact, mentioned in recital 23 of the contested decision, that the Commission found clear proof of a market-sharing agreement on the Copenhagen-Geneva route, without however finding a specific infringement since the regulation applied only to air transport between EEA airports, only goes to confirm that the impact of the agreements was not limited to the three routes referred to by the applicant.

121 In those circumstances, the applicant's complaint that the Commission made an error of assessment by exaggerating the seriousness of the infringement, inasmuch as it stated without proof that markets other than the three specific routes had been affected by the agreement whereas in reality only those three routes were concerned, cannot be accepted, since it effectively calls into question the very existence of the overall market-sharing agreement.

122 Moreover, since, according to the Guidelines, the Commission does not, for the purposes of assessing the seriousness of the infringement, have to take its actual market impact into account unless it is measurable, and the overall agreement was designed to restrict potential competition, the actual effect of which is *ex hypothesi* difficult to measure, this Court finds that the Commission was not required precisely to demonstrate the actual impact of the cartel on the market and to quantify it, but could confine itself to estimates of the probability of such an effect.

123 The Court also rejects the applicant's argument that there is nothing to show that, in the absence of an overall market-sharing agreement, the parties would have acted differently on routes other than Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt. The Commission was right to find the following, in recital 100 of the contested decision:

'... 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's lack of freedom to launch routes from Billund.'

124 Similarly, the argument that the agreement allowed Maersk Air to launch the Copenhagen-Cairo and Copenhagen-Athens routes is irrelevant, since the Commission has rightly pointed out as follows in recital 99 of the contested decision:

'... 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'.

125 Furthermore, the argument based on the pursuit of the code-sharing agreement between Maersk Air and British Airways on the Copenhagen-Birmingham route does not in any way support the applicant's view that the market-sharing agreement affected only the three specific markets. As mentioned in recital 19 of the contested decision, the documents obtained during the inspection show that it had been decided not to terminate all of Maersk Air's code-sharing agreements immediately and to keep some of them in being so as not to draw attention and to avoid 'problems with the Commission'. As the applicant itself has stated, Maersk Air and SAS first tried to come to an agreement on the operation of that route, and it was only after 29 October 2000, that is to say after the inspection undertaken by the Commission on 15 and 16 June 2000, that the parties to the cartel decided to compete with each other.

126 In order to demonstrate that the overall market-sharing agreement had no effect on the market, the applicant relies, finally, on a study carried out by the Lexecon company, which is alleged to show that the actual impact of the agreement on the fares of routes from Denmark was minimal. Apart from the fact that that study, commissioned by the applicant, was supplied only at the reply stage without the applicant explaining why that evidence was submitted late, as required by Article 48 (1) of the Rules of Procedure of the Court of First Instance, it is sufficient to note that the infringement which was found consists in the sharing of markets, and thus does not directly concern the fares charged by parties to the agreement, and that the parties adopted a line of conduct in accordance with that market-sharing.

127 Moreover, the study deals only with the impact of the agreement on the prices charged by SAS, whereas the non-competition clause was reciprocal and it had also

been agreed that SAS would not fly on routes operated by Maersk Air to and from Billund. Clearly, in the absence of an agreement, SAS would have been able to exercise a significant competitive constraint on Maersk Air. Neither the study nor the applicant have put forward anything to demonstrate that the agreement had no impact in that regard.

128 Even if the study does tend to show that SAS fares on routes from Denmark, affected by the overall market-sharing agreement, remained stable in relation to those charged by SAS on routes from Sweden and Norway, which were not covered by that agreement, it compares only the prices charged on 20 chosen routes amongst the 105 destinations served by SAS and does not establish that competitive conditions on the affected market and the unaffected market were comparable. Moreover, the study shows that fares evolved differently in the two regions, those charged on routes from Denmark rising in relation to those on routes from Sweden and Norway from 1996 to 1999, and then falling until 2000.

129 The applicant's claims seeking to demonstrate that the Commission wrongly assessed the market impact of the infringements must therefore be rejected.

130 In any event, it is well established in the case-law that the Commission is not required to demonstrate the actual effects of an agreement when it has a clearly anti-competitive purpose. For example, in *Michelin*, cited in paragraph 83 above (paragraphs 258 and 259), in reply to the applicant's argument that the basic amount should have been significantly less by reason of the actual effects of the infringement, the Court of First Instance observed that, in the contested decision, the Commission had not examined the specific effects of the abusive practices and nor was it required to do so. Though the Commission had speculated on the effects of the abusive conduct, the seriousness of the infringement was established by

reference to the nature and the object of that conduct. The Court went on to point out that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects. Similarly, in its judgment in *Thyssen Stahl*, cited in paragraph 83 above, the Court of First Instance held the following in paragraphs 635 and 636:

'... it is not necessary, in order to find that there has been an infringement of Article 65(1) [ECSC], for it to be established that the conduct in question actually had an anti-competitive effect. The same applies with regard to the imposition of a fine under Article 65(5) [ECSC]. It follows that the effect which an agreement or concerted practice may have had on normal competition is not a conclusive criterion in assessing the proper amount of the fine. As the Commission has correctly pointed out, factors relating to the intentional aspect, and thus to the object of a course of conduct, may be more significant than those relating to its effects ..., particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing'.

131 In this case, it is indisputable that the offending agreements, by providing for a sharing of the market, clearly had an anti-competitive object.

— The comparison with the 'Greek Ferries' case

132 In relation to the argument based on comparison with the 'Greek Ferries' case, in which the Commission classified the infringement as 'serious' and not 'very serious', it should be noted, first of all, that, in accordance with consistent case-law, the Commission's previous decision-making practice does not in itself serve as a legal framework for fines in competition matters, since the latter is defined in Regulation No 17, or in equivalent sectoral regulations such as, in this case, the Regulation, and in the Guidelines (*LR AF 1998*, cited in paragraph 75 above, at paragraphs 234 and 337, and *Michelin*, cited in paragraph 83 above, at paragraph 254). Therefore, the

fact that in the past the Commission regarded infringements of a certain type as 'serious' cannot prevent it from regarding them as 'very serious' in a subsequent case if that is necessary in order to ensure the implementation of Community competition policy (*Musique Diffusion Française*, cited in paragraph 32 above, at paragraphs 105 to 108; *Lysine*, paragraph 56).

133 Therefore, comparison with the 'Greek Ferries' case, in which the Commission classified the infringement as 'serious', is not sufficient to establish that the Commission could not classify the infringement at issue in the present case as 'very serious'.

134 In any event, comparison of the two cases is not sufficient to establish that the infringements in question should have been classified as 'serious'.

135 Apart from the fact that the decision in 'Greek Ferries' concerned a pricing agreement on three ferry routes between Patras (Greece) and three Italian ports, and not, as in this case, specific agreements on certain routes backed up by an overall market-sharing agreement, it should be noted that, as the Commission rightly pointed out in recital 98 of the contested decision, the infringements found in the 'Greek Ferries' case, which concerned the fixing of prices, were more limited than in this case.

136 First, in that case, the parties to the agreement had not implemented all the unlawful agreements and had competed on price by offering discounts.

137 Secondly, the Greek authorities had encouraged the ferry companies, during the period of the infringement, to contain the agreed price increases within the rate of inflation, so that fares remained amongst the lowest in the Community for intra-community sea transport. The applicant has not in any way demonstrated that the same applies in this case.

138 Thirdly, even if, in passenger terms, the three routes in respect of which infringements were found in the 'Greek Ferries' case (Ancona-Patras, Bari-Patras and Brindisi-Patras) were comparable in size with the Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt routes, it should be remembered that, in this case, the market-sharing between SAS and Maersk Air also affects several other routes. By arranging that Maersk Air would not compete with SAS on routes to and from Copenhagen and that SAS would not compete with Maersk Air to and from Billund, the horizontal market-sharing agreements between SAS and Maersk Air restricted competition on a large number of routes to and from Denmark, including on routes between Denmark and other Member States, between Denmark and EEA Member States and between Denmark and the rest of the world. Since SAS and Maersk Air are the two main airlines of Denmark and Copenhagen and Billund are the two largest airports of that country, the repercussions of that sharing were felt throughout the EEA and beyond, unlike what happened in the 'Greek Ferries' case.

139 It should further be added that in the 'Greek Ferries' decision, the Commission took the view that the agreement on prices was, by its nature, a very serious infringement and it was only by reason of particular circumstances that it concluded that this was a 'serious' infringement. As is clear from recital 148 of the 'Greek Ferries' decision, the three factors which led the Commission to attenuate the seriousness of that infringement are not present in this case. The applicant does not deny the absence of the first two of those factors (namely that, in spite of the agreement, the parties competed on price and that, because of pressure from the national authorities, the fares remained amongst the lowest in the Community). If the applicant relies on the

third factor, it does so wrongly, as has been held above, since the infringement committed in this case is geographically wider than that penalised in the 'Greek Ferries' decision.

— Conclusion on the classification of the infringements

140 It follows that the 'Greek Ferries' case not only discloses no valid basis for reclassifying the infringements in this case, but, on the contrary, rather goes to confirm that the classification as 'very serious' is well founded, since, first, the specific attenuating circumstances in 'Greek Ferries' are not present here, and, secondly, the infringements in question are clearly much broader in their geographic scope.

141 In those circumstances, the Commission was right, having regard to the nature of the infringement, the size of the geographic market in question and the impact of the infringement on the market, to conclude that SAS and Maersk Air had committed a very serious infringement.

142 None of the other arguments raised by the applicant is capable of calling that analysis into question.

143 Concerning, first, the argument that the Commission's fixing the basic amount of the fine on Maersk Air at EUR 14 million implies that the infringement must be classified as 'serious' and not 'very serious', given that the Guidelines fix the minimum fine at EUR 20 million for infringements classified as 'very serious', suffice it to say that it is the seriousness of the infringement that determines the amount of

the fine and not vice-versa. As has been held above, the Commission was right to conclude, in recital 102 of the contested decision, that the market-sharing agreement between SAS and Maersk Air was a very serious infringement.

144 Concerning the argument that the applicant did not make unlawful gains by virtue of the infringements, and that the Commission could not therefore apply the provision in the Guidelines whereby the basic amount may be increased where there is a 'need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement', it should be noted at the outset that that complaint arises from an incorrect reading both of the Guidelines and of the contested decision. It is under the heading of aggravating circumstances, and not for the purposes of assessing the seriousness of the infringement, that the fifth indent of point 2 of the Guidelines provides for the possibility of increasing the penalty in order to exceed the amount of gains improperly made as a result of the infringement. In that respect, as is expressly stated in recital 116 of the contested decision, the Commission took the view that there were no aggravating circumstances in this case and it did not therefore increase the fine imposed on the applicant to reflect gains improperly made by it. The complaint must therefore be rejected.

145 For the sake of completeness, however, the Court will examine the argument, not as seeking to demonstrate that the infringement should not have been classified as 'very serious', but as a separate plea that the applicant's fine was fixed at an excessive level because it was based on the erroneous supposition that the withdrawal of Maersk Air from the Copenhagen-Stockholm route secured it additional annual revenue of DKK [...].

146 It should be noted in that respect that, according to the case-law (*CMA CGM*, cited in paragraph 75 above, at paragraph 340, and *Deutsche Bahn*, cited in paragraph 64 above, at paragraph 217), the fact that an undertaking has derived no profit from the infringement cannot prevent it from being fined, as otherwise the fine would lose its deterrent effect (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 46 and 47). It follows that the Commission is not required, for the

purpose of fixing the amount of fines, to establish that the infringement secured an improper advantage for the undertakings concerned, or to take into consideration, where it applies, the fact that no profit was derived from the infringement in question (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, 'the *Cement* judgment', paragraph 4881).

147 Point 5(b) of the Guidelines, containing a series of general comments, does, it is true, state that 'depending on the circumstances, account should be taken, once the ... calculations have been made, of certain objective factors such as a specific economic context [or] any economic benefit derived by the offenders ... and the fines should be adjusted accordingly'. It has, however, already been held that such indications do not mean that the Commission has henceforth assumed the burden of establishing, in all circumstances, for the purposes of determining the amount of the fine, the financial advantage linked to the infringement found. They merely show its willingness to take that factor further into account and to use it as a basis for calculating the amount of fines, in so far as it has been in a position to assess it, if only approximately (*Cement*, paragraph 4885).

148 It therefore needs to be examined, first, whether the contested decision actually took account of the profits derived by the parties to the cartel by virtue of the infringements in order to determine the seriousness of the infringement.

149 It should be noted in that respect that, under the heading 'The actual impact of the infringement', appearing in the section dealing with the seriousness of the infringement, the Commission first held, in recitals 92 and 93, that 'The most visible results of the infringement were as follows: Maersk Air withdrew from the Copenhagen-Stockholm route ... SAS withdrew from the Copenhagen-Venice and Billund-Frankfurt [routes] On [the Copenhagen-Stockholm] route, SAS increased its market share from [...] ... to ...[...]'. Those effects are undisputed and already show that SAS undeniably profited from the infringement by increasing its market share.

The Commission continues by indicating, in recital 94 of the contested decision, that, at the negotiation stage, the parties estimated — on the basis of known passenger volume and the possibility of a DKK 100 price rise — that Maersk Air's staying away from Stockholm and Oslo would cause SAS's annual revenue to rise by about DKK [...] million (EUR [...] million)' and in recital 95 that, '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'. It follows that the Commission may be regarded as having taken account, to some extent, of the profits made by the parties to the agreement as a result of the infringements, it being understood that that factor cannot be regarded as the starting point for the determination of the fine but, at most, as a factor taken into account in the determination of the seriousness of the infringement and, thus, having possibly played a certain part in the calculation of the fine.

150 The applicant denies that the infringement caused its annual revenue to rise by about DKK [...].

151 It should be noted in that regard, first, that recital 94 of the contested decision merely indicates that the parties made an estimate at the negotiating stage. This was not an estimate by the Commission but one made by the parties themselves when negotiating agreements.

152 Secondly, as is shown in recital 53 of the contested decision, that estimate appears in the record of the meeting of the project managers' group (SAS/Maersk Air) on 25 August 1998. Contrary to what the applicant argues, therefore, one is dealing here not with a mere random comment by a representative of Maersk Air but with the record of a meeting in which SAS participated.

153 Thirdly, although the applicant states that that estimate was contained in a document drawn up by Maersk Air and that it has not at any time been acknowledged by SAS, it is clear from the answers to the written questions of the Court of First Instance that that document was attached to the statement of objections and that the parties recognised the facts and the infringements described in the statement.

154 Fourthly, the applicant claims that the information is contradicted by the fact that fares on the Copenhagen-Stockholm route have not evolved differently from fares charged on comparable routes which were not affected by the agreement. That allegation has already been rejected in the observations concerning the actual impact of the infringements, on the ground, inter alia, that the Copenhagen-Oslo and Stockholm-Oslo routes cannot be regarded as unaffected by the agreement, bearing in mind, first, the overall market-sharing agreement and, secondly, the fact that, according to the record of the meeting of 25 August 1998, referred to in recital 53 of the contested decision, Maersk Air agreed to keep away from Oslo.

155 Fifthly, the applicant argues in its reply that the estimate of DKK [...] should be reduced to DKK [...] on the ground that the Copenhagen-Oslo route had never been subject to market-sharing. As the Commission has rightly argued, that argument cannot be accepted since it amounts to calling into question the existence or the scope of the overall market-sharing agreement and since the applicant has not challenged either the facts or the infringements. Nor has the applicant established to a sufficient legal standard that the route was not subject to market-sharing.

156 Sixthly, the complaint must in any case be rejected because the applicant merely challenges the existence of profits derived from the infringements but without providing any evidence to that effect. On the contrary, as indicated above, the Commission has argued, without being contradicted by the applicant, that the forecasts of the parties proved to be accurate since SAS went from a loss of DKK 27 million in 1998 to a profit of DKK 36 million the following year, and on to a profit of DKK 156 million in 2000.

157 It follows from the whole of the above that the plea claiming that the infringements should have been classified as 'serious' and not 'very serious' must be rejected.

— Whether turnover should have been taken into account

158 In this first plea, the applicant also accuses the Commission of calculating the fine on the basis of turnover even though the Guidelines make no reference to it, and of making an error by comparing the consolidated turnover of the SAS group with that of Maersk Air without taking account of the fact that Maersk Air formed part of the A.P. Møller group.

159 Although it finds this complaint irrelevant in the context of the first plea, which concerns the determination of the seriousness of the infringements, the Court will examine it below as a separate plea.

160 The Guidelines introduced a new approach for the calculation of fines. Whereas previously the Commission's practice consisted in calculating the fine in proportion to the turnover of the undertakings concerned, the Guidelines are based more on the flat-rate principle, the starting-point being determined henceforth in absolute terms by reference to the inherent seriousness of the infringement, increased by reference to the duration, and, finally, adjusted by reference to aggravating or extenuating circumstances. That method has been expressly confirmed by the case-law (see, in particular, *Graphite Electrodes*, paragraphs 189 to 193). In the method laid down by the Guidelines, the turnover appears only as a secondary criterion for adjusting the fine within the amounts laid down by the Guidelines for the various categories of infringements ('minor', 'serious' and 'very serious').

161 Contrary to what the applicant claims, the Commission, as is shown by recitals 87 to 103 of the contested decision, did not use a calculation method based on the turnover concerned, but took as its starting-point the classification of the infringement — in this case held to be 'very serious' — and then, in accordance with the Guidelines, took account, in recitals 104 to 106 of the contested decision, of the actual impact of the offending conduct of each of the two undertakings, taking into account the fact that there was a great difference in size between them.

162 Thus, while expressly taking the view that the parties had committed an infringement of the same type, and despite the intrinsic equilibrium of the agreement in that, in principle, it envisaged profits for both parties of the same order of size, the Commission took account of the following factors in recital 104 of the contested decision:

'— 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.'

163 The Commission therefore took the view, in recital 105 of the contested decision, that 'more weight will be given to the infringements committed by SAS than to the infringements committed by Maersk Air', but that that 'does not however mean that the relationship between the fines of the two companies should correspond exactly to the ratio between the two turnovers'. Given the difference in size between the parties to the agreement and the need to fix the fines at a sufficiently deterrent level, the Commission, in recital 106 of the contested decision, fixed the starting-point of the fines at EUR 35 million for SAS and EUR 14 million for Maersk Air.

164 It follows from those passages of the contested decision that, contrary to what the applicant maintains, the Commission did not calculate the fine by reference to the total turnover, rather than by reference to the turnover achieved in the market concerned, namely in relation to Denmark, but took into consideration the figures relating to the two types of turnover in order to adjust, to some extent, the starting-point of the fine imposed on each of the two parties to the cartel, which had committed the same type of infringement.

165 According to the case-law, the Commission has a wide discretion in fixing fines, and may, in particular, have recourse to one or other type of turnover by reference to the individual circumstances of the case. Thus, the Court of First Instance, pointing out that the only express reference to turnover contained in Article 15(2) of Regulation No 17 concerns the upper limit that the amount of a fine may not exceed and that that limit is to be understood as relating to total turnover (*Musique Diffusion française*, cited in paragraph 32 above, at paragraph 119), has held that '[p]rovided it remains within that limit, the Commission may choose which turnover to take in terms of territory and products in order to determine the fine' (*Cement*, paragraph 5023) without being obliged to use the precise figure for total turnover or turnover achieved on the geographic or product market in question, and that, whilst the Guidelines do not require fines to be calculated by reference to a given turnover figure, neither do they prevent such a figure from being taken into account, provided the choice made by the Commission is not vitiated by an obvious error of assessment (*Graphite electrodes*, paragraph 195).

166 It follows that, for the purposes of determining the amount of the fine, the Commission is free to take into account the turnover figure of its choice, provided it does not appear unreasonable by reference to the circumstances of the case. Similarly, according to the case-law, the Commission is not required, when determining the amount of fines, to ensure, where fines are imposed on various undertakings involved in the same infringement, that the final amounts of the fines reflect all differentiations between the undertakings concerned as regards their total turnover (*CMA CGM*, cited in paragraph 75 above, at paragraph 385, and case-law cited therein).

167 Since the applicant has not demonstrated that the Commission made an obvious error of assessment, or even explained in what way the choice made by the Commission is supposed to have been unreasonable, its complaint must be dismissed.

168 For the sake of completeness, it should be noted that, the starting-point for the determination of the fines having been fixed at EUR 35 million for SAS and EUR 14 million for Maersk Air, it respectively represents 4.62% and 3.05% of their turnover achieved in relation to Denmark and 0.7% and 3.05% of their total turnover. If one looks at the turnover achieved in relation to Denmark, the applicant has thus been penalised slightly more than Maersk Air (4.62% as against 3.05%), whereas, if one takes the total turnover figure, the applicant has been penalised much less severely than Maersk Air (0.7% compared with 3.05%). It is clear from the contested decision, first, that the Commission rather based its decision, as it was entitled to do, on both types of turnover, and, secondly, that, the parties to the agreement having committed the same infringement and drawn comparable benefits from it, and the Guidelines being based on the flat-rate principle whereby the fine is determined by reference to the seriousness of the infringement more than by reference to the turnover of the undertakings concerned, the starting-point used in this case does not appear to be vitiated by an obvious error of assessment or to be in breach of the principle of equal treatment.

169 The applicant appears to be challenging the fact that the Commission took into account the total turnover rather than that achieved in relation to Denmark. It should be noted in that respect that, according to consistent case-law, where the Commission calculates the fine on an undertaking it may take account, amongst other things, of its size and its economic strength (*Musique Diffusion française*, cited in paragraph 32 above, at paragraph 120; Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraphs 89 and 90). In addition, concerning measurement of the financial capacity of members of a cartel, the case-law has recognised the relevance of the total turnover (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 85 and 86). Apart from the fact that the Commission did not base its decision on turnover only, the argument must therefore be rejected.

170 Finally, in so far as the applicant's complaint, though not clearly formulated, appears rather to be challenging the fact that the Commission did not take account of the fact that Maersk Air belongs to the A.P. Møller group, it is sufficient to note, as the Commission has rightly pointed out, that, first, the other members of the A.P. Møller group were active in sectors clearly distinct from air transport, such as maritime transport and energy, and, secondly, the Commission took account of the fact that Maersk Air belonged to that group in rejecting, in recital 118 of the contested decision, the existence of an extenuating circumstance based on the fact that this was its first infringement. In any event, even if the Commission had erred in Maersk Air's favour by forgetting to take account of its belonging to the A.P. Møller group, that fact cannot constitute a valid reason for reducing the fine imposed on the applicant, since no one may rely on an unlawfulness committed in favour of another party.

171 It follows from the above that the complaints and arguments under the first plea in law must be rejected.

The second plea in law, alleging misassessment of the duration of the infringement

Arguments of the parties

172 The applicant argues that the Commission's calculation of the duration of the infringements, to the effect that they lasted from 5 September 1998 until 15 February 2001, is incorrect.

173 Regarding the commencement date of the infringements, the applicant submits that even though the status report of 5 September 1998 concerning a possible alliance between SAS and Maersk Air records agreement on a wide range of elements which were later implemented, it cannot be construed as an agreement within the meaning of Article 81 EC. The market-sharing agreed between SAS and Maersk Air was closely linked to the cooperation agreement of 8 October 1998 and did not exist independently. The applicant submits that the status report of 5 September 1998 is not an agreement or concerted practice in so far as it only recorded possible future actions the implementation of which depended on the conclusion of the final agreement. Therefore, the earliest possible time at which the infringements may be deemed to have begun is the date of the parties' agreement, i.e. 8 October 1998.

174 The applicant submits in its reply, moreover, that, whatever the duration of the infringement, the Commission is under an obligation to assess the duration of the anti-competitive effect of the agreement, as opposed to the duration of the infringement, when assessing the level of the fine. In the present case, irrespective of the findings in relation to the illicit agreement, it could not have had anti-competitive effects before 8 October 1998.

175 As for the date of termination of the infringement, the applicant states that, following the Commission's on-site inspection of 15 June 2000, SAS immediately ceased all conduct vis-à-vis Maersk Air that constituted a breach of Article 81(1) EC. It submits, in that regard, that all meetings with Maersk Air were cancelled or conducted in a controlled environment, with SAS's internal and external lawyers advising on the permissible extent of contacts with Maersk Air.

176 In any event, the letters sent by Maersk Air on 21 August 2000 to the Commission and to SAS clearly set out Maersk Air's commitment to cease all price-fixing or market-sharing cooperation.

177 The applicant submits that infringements of the competition rules in the form of market-sharing are terminated by the mere removal of the restrictions agreed between the parties, and that the parties are under no obligation to take positive measures in the form of re-entering loss-making markets.

178 Having regard to the unilateral withdrawal of one of the parties to the agreement, Maersk Air, Article 81(1) EC could therefore no longer be applicable from 21 August 2000, even if SAS wished, at that point, to continue to operate in accordance with the agreement.

179 The applicant is of the opinion that the Commission should not have refused to accept Maersk Air's unilateral declaration of 21 August 2000 as proof of its withdrawal on the ground that, by that date, the Commission had not yet issued its statement of objections. It was, moreover, illogical for the Commission to attach importance to SAS's letter to Maersk Air of 15 February 2001 whilst at the same time ignoring Maersk Air's similar letter to SAS of 21 August 2000. Such negligence amounted to failure by the Commission to fulfil its obligation to take proper account of the information supplied to it.

180 The applicant considers that the Commission therefore erred in applying a 25% increase in the level of the fine instead of the 17% increase that would have been applicable if the dates of 8 October 1998 and 15 June 2000 had been used.

181 The Commission argues that the second plea is unfounded.

Findings of the Court

182 The applicant challenges the Commission's conclusions concerning the dates on which the infringement began and ended.

183 Concerning the date on which the infringement began, the Court finds that the Commission was right to use the date of 5 September 1998. The status report of 5 September 1998, reproduced in recital 50 of the contested decision states:

'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.'

184 It is clear from that document that, on 5 September 1998, the parties had already concluded an agreement, even if it would not be implemented until later, in particular so as not to attract the suspicion of the Commission, and that the parties to the agreement lost their autonomy as from that moment.

185 Moreover, the applicant's argument that that code-sharing was closely linked to the cooperation agreement of 8 October 1998 must be rejected, as the applicant has not produced any proof to that effect.

186 Similarly, the argument that the Commission should have concentrated on the duration of the effects of the infringement rather than the duration of the infringement itself is clearly unfounded, since the mere fact of making an agreement whose aim is to restrict competition in breach of Article 81(1) EC in itself constitutes a failure to comply with that provision, irrespective of whether that agreement was actually implemented (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 15).

187 Finally, it is clear from recital 108 of the contested decision that Maersk Air recognised in its reply to the statement of objections that the infringements had begun on 5 September 1998.

188 Therefore, the complaint that the Commission erred in its determination of the starting date of the infringement must clearly be rejected.

189 For the sake of completeness, the Court would add that the infringement appears to have begun even earlier in that, for example, the parties agreed on 5 September 1998 to an amendment of certain parts of their verbal agreement. Similarly, a Maersk Air document dated 8 January 1998, mentioned in recital 22 of the contested decision, refers to negotiations carried out throughout 1998 and the common fundamental objective of the parties to the agreement to determine which routes were to be operated by each and states that SAS requires Maersk Air to 'limit development of routes out of Copenhagen to what is mutually agreed'.

190 Concerning the date on which the infringement ended, the applicant argues, first, that the Commission should have used the date of the inspections, namely 15 June 2000, because it ceased all prohibited conduct from that moment.

191 That argument must be rejected.

192 First, the applicant offers no evidence in that regard but merely states that, as from that moment, all meetings scheduled with Maersk Air were cancelled or took place in the presence of its legal advisers.

193 Secondly, even if established, the fact that there were no more 'prohibited meetings' does nothing to demonstrate that the market-sharing agreements which were concluded and implemented had come to an end.

194 Thirdly, the presence of the applicant's lawyers cannot be regarded as constituting an assurance that those meetings were entirely lawful. Recital 89 of the contested decision in particular shows that the lawyers of the parties to the cartel knowingly assisted in setting up the prohibited agreements. For example, the minutes of the project managers' group meeting of 14 August 1998 mentions the fact that '[t]he parts of the documents that infringe Article [81(1) EC] although they cannot be agreed upon and cannot be put on paper ... will have to be written anyway and be put in escrow in the offices of lawyers from both sides'. According to the record of another meeting, an SAS representative was concerned 'about the further circulation of the status report in its current form' and 'wanted to see it amended, with certain sections deleted, as the lawyers had recommended'.

195 The applicant claims, secondly, that Maersk Air's letters to SAS and the Commission of 21 August 2000 clearly express Maersk Air's undertaking to cease all cooperation.

196 However, those letters cannot be regarded as bringing the agreements to an end or proving that they had ended.

197 In the first place, in its letter of 21 August 2000 to the Commission, Maersk Air indicates only that '[a]s it was said during the meeting on 10 August 2000, Maersk Air ... has immediately ceased all cooperation with SAS concerning market-sharing

and price-fixing' and that 'with this letter I confirm this position of Maersk Air'. As the Commission has rightly pointed out in recital 112 of the contested decision, that letter has no impact on the existence of the agreements, nor does it demonstrate that Maersk Air had effectively renounced those agreements vis-à-vis SAS.

198 Moreover, in its letter to SAS of 21 August 2000, Maersk Air wrote:

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

199 That letter to SAS does not clearly and unambiguously indicate the will to terminate the agreements. It might even, as the Commission points out in recital 112 of the contested decision, 'be interpreted as an attempt to reassure SAS about the declarations that Maersk Air had made to the Commission', by reason of the fact that '[a]t the time, the parties were not yet aware of the position that the Commission would take in the statement of objections'.

200 The Commission was therefore right to conclude that the infringements cannot be regarded as having ended before 15 February 2001 at the earliest, when the applicant informed Maersk Air that it did not regard itself as bound by the market-sharing agreements. That that conclusion is well founded is demonstrated, moreover, by SAS's reply to the statement of objections on 4 April 2001, in which it writes that

'[w]hen the full extent of SAS's part in the infringements became clear from the statement of objections received on 2 February 2001, the 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'.

201 It follows from the above that the second plea must clearly be rejected.

The third plea, alleging misassessment of attenuating circumstances

The first part, concerning SAS's cooperation with the Commission

— Arguments of the parties

202 The applicant submits that the Commission was wrong to grant SAS a reduction of only 10% of its fine for cooperating, while granting Maersk Air a reduction of 25%, whereas there was no real difference in the parties' willingness to cooperate and any such difference is purely coincidental. It submits that, during the on-site inspection, SAS provided full cooperation and put itself at the Commission's disposal in respect

of any questions which arose. It adds that, unlike what happened during the inspection at Maersk Air's premises, the key individual at SAS was present and took an active part in assisting the Commission, so that there was no reason for SAS explicitly to invite the Commission to come back at a later stage.

203 The applicant considers that SAS provided information that was of assistance to the Commission. It is of the opinion that it should have benefited from a larger reduction in its fine, having regard to the following factors:

— from the outset of the inspection, SAS made clear its intention of cooperating with the inspectors in every possible way;

— in response to the request for information of 1 August 2000, and later in the process, SAS provided 'additional files' including self-incriminating documents, even those covered by a duty of confidentiality, providing decisive evidence of the infringements;

— the parties jointly submitted a supplementary notification concerning changes made since the initial notification and proposed changes to take effect later;

— on 27 October 2000, SAS submitted to the Commission a position paper intended to aid the Commission's understanding of certain aspects of the parties' cooperation;

— upon receipt of the statement of objections, SAS's board of directors sought to uncover the reasons why and how the infringements of the competition rules could have happened and to reduce the risk that such infringements might be committed again;

— by letter of 15 February 2001, SAS made it clear to Maersk Air that any understanding outside the scope of the cooperation agreement was, and had always been, null and void;

— on 7 March 2001, following dialogue with the Commission on the issue of the duration of the infringements, the parties made a joint declaration confirming that all infringements had ceased;

— during a meeting with the Commission on 23 March 2001, SAS confirmed that it did not contest the facts, that it acknowledged having infringed Article 81 EC and that it waived its right to develop its arguments during an oral hearing.

204 The applicant considers that the Commission did not give adequate reasons for the disparity in the fine reductions granted to the two parties.

205 The Commission maintains that the applicant's arguments are unfounded.

— Findings of the Court

206 Recital 125 of the contested decision states that the Commission found it appropriate to reduce the fine imposed on Maersk Air by 25% and that imposed on SAS by 10% pursuant to section D.2 of the leniency notice. However, no reduction was granted to the parties pursuant to section B of that notice (which allows a reduction in the amount of the fine of at least 75%), since neither of the parties had denounced the secret cartel to the Commission before the latter carried out its inspection on 15 June 2000, or on the basis of section C of that notice (which allows a reduction in the amount of the fine of between 50 and 75%), since the Commission was already in possession of the key evidence which allowed it to initiate proceedings. Those aspects of the contested decision are not disputed by the applicant.

207 Section D of the leniency notice provides:

'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 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.'

208 The Commission considered that neither SAS nor Maersk Air had disputed the facts described in the statement of objections, and therefore gave them the benefit of a reduction under the second indent of section D.2 of the leniency notice.

209 However, the Commission applied the first indent of section D.2 of that notice only for the benefit of Maersk Air, observing in recital 123 of the contested decision 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. That 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 provided not spontaneously after the inspection, but pursuant to a request for information.'

210 It follows that the difference between the reduction granted to the applicant (10%) and that granted to Maersk Air (25%) arises from the additional 15% reduction which the Commission granted to Maersk Air only. It is that absence of reduction for cooperation that forms the subject-matter of this part of the third plea.

211 In support of its claim, the applicant argues that there was no difference in the willingness of the parties to the cartel to cooperate and that it fully cooperated with the Commission.

212 That circumstance, supposing it to be established, is, however, irrelevant. The mere willingness of an undertaking to cooperate is of no significance. Section D.2, first indent, of the leniency notice provides for a reduction only in favour of an undertaking which 'provides the Commission with information, documents or other evidence which contribute to establishing the infringement' and not in favour of an undertaking which is merely willing to cooperate, or limits itself to cooperating, with the Commission.

213 Similarly, according to consistent case-law, a reduction in the fine on account of cooperation during the administrative procedure is justified only if the conduct of the undertaking enabled the Commission to establish the existence of an infringement with less difficulty, and, where appropriate, bring it to an end (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36, and *Lysine*, paragraph 300). Moreover, when assessing the cooperation supplied by undertakings, the Commission cannot overlook the equal treatment principle (*Krupp Thyssen*, cited in paragraph 83 above, at paragraph 237; *Lysine*, paragraph 308).

214 It is clear from the first indent of recital 123 of the contested decision that, in accordance with what the leniency notice provides, it was because Maersk Air gave the Commission files ('the private files') which helped it to reconstruct the development of the negotiations and the exact extent of the agreement that the Commission granted it an additional reduction.

215 The applicant's argument that the difference in cooperation found between it and Maersk Air is purely coincidental and arises from the presence at its premises, unlike what happened at the premises of Maersk Air, of a responsible person during the inspection, relieving the Commission of a fresh visit, thus arises from a misreading of the contested decision. Contrary to what the applicant suggests, it was not because Maersk Air invited the Commission to come back later in order to be given explanations that the Commission granted Maersk Air an additional reduction, but because Maersk Air supplied the Commission with files enabling it to establish the precise extent of the agreements.

216 By contrast, the Commission refused that reduction to the applicant for two reasons:

— first, the information supplied by SAS merely served to confirm what the Commission already knew;

— second, SAS supplied the additional documents not spontaneously but only after a request for information.

217 The Court finds that the applicant has not put forward any concrete evidence to challenge the two grounds for refusing to grant an additional reduction in the amount of the fine.

218 First, it has not denied that it supplied those documents only after a request for information. According to the case-law, cooperation in the investigation which does not go beyond that which undertakings are already obliged to provide under Article 11(4) and (5) of Regulation No 17 or equivalent provisions contained in sectoral regulations does not warrant a reduction in the fine (Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 283; *CMA CGM*, cited in paragraph 75 above, at paragraph 303).

219 Nor has the applicant indicated a single document which it has supplied to the Commission enabling the latter to confirm the existence of the infringement, or a single document which has served as the basis of the contested decision or simply been used to that end.

220 Moreover, none of the measures relied on by the applicant is capable of justifying a reduction in the fine for cooperation, or even, more generally, by reason of attenuating circumstances.

221 The first part of the third plea must therefore be dismissed.

The second part, concerning SAS's actions after the contested decision

— Arguments of the parties

222 The applicant submits that it is open to the Community judicature, under its unlimited jurisdiction, to take account of matters arising subsequent to the Commission decision, and, in particular, of the conduct of a fined party adopted after its decision (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico and Commercial Solvents* v *Commission* [1974] ECR 223; Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraph 64). It considers that its actions following the Commission's decision, culminating in the dismissal of its Senior Vice-President and the resignation of its entire Board of Directors, warrant a more substantial reduction in the fine imposed. Moreover, the implementation of a compliance programme has been considered an attenuating circumstance (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549).

223 The applicant considers that the actions taken by SAS subsequent to the adoption of the decision were exceptional. The resignation of the entire Board of Directors and the dismissal of the Senior Vice-President were extreme steps for a company to take, and constitute an effective deterrent to other companies infringing the competition rules. Furthermore, the introduction of a compliance programme clearly shows that SAS intends to eliminate future breaches of Community rules.

224 The Commission considers that the circumstances relied on by the applicant do not warrant a reduction in the fine imposed on it and that the case-law quoted is irrelevant in this case.

— Findings of the Court

225 The Court observes at the outset that measures taken by an undertaking after the decision taken in its regard cannot in any event affect the legality of that decision, which has to be assessed in relation to the factual and legal elements existing at the date when the measure was adopted.

226 Therefore, at the very most, the applicant's claim can be examined only in the context of the unlimited jurisdiction of the Court of First Instance, pursuant to Article 229 EC.

227 In the first place, the two judgments relied on by the applicant cannot be read as authority for the principle that the fine imposed on an undertaking might be reduced in consideration of conduct adopted by that undertaking after the adoption of the decision imposing that fine upon it. In *Istituto Chemioterapico Italiano*, cited in paragraph 222 above, the Court of Justice reduced the amount of the fine on account of delay by the Commission in adopting the decision, since if it had acted earlier the infringement would have been of lesser duration and the fine would have been lower, and the harmful effects of the conduct complained of were limited by the fact that the applicant had complied with the directions in the decision. In *CB*, cited in paragraph 222 above, the Court of First Instance merely referred to *Istituto Chemioterapico Italiano*, but did not reduce the amount of the fine in consideration of conduct subsequent to the decision, and had not even had such a request referred to it.

228 Therefore, contrary to what the applicant maintains, the case-law does not show that a fine may be reduced in consideration of conduct adopted subsequently to the

issuing of the decision imposing a fine. Such a reduction, even if it were possible, could in any event be operated by the Community judicature only with great care and in altogether exceptional circumstances, particularly because such a practice could be perceived as an incentive to commit infringements while speculating on a possible reduction in the fine by reason of alteration of the undertaking's conduct after the decision.

229 None of the circumstances put forward by the applicant in this case appears capable of justifying a reduction in the amount of the fine.

230 The arguments in the second part of the applicant's third plea must therefore be dismissed, and with them, therefore, the third plea as a whole.

The Commission's application for the fine imposed on the applicant to be increased

231 The Commission argues that, in its reply, the applicant has challenged certain considerations regarding the scope and nature of the infringement, whereas it had obtained a 10% reduction in the amount of the fine for not disputing the facts stated in the statement of objections, and the Commission therefore asks the Court of First Instance to penalise such improper conduct by increasing the fine in accordance with its unlimited jurisdiction.

232 The second paragraph of point E.4 of the leniency notice provides that 'Should an enterprise which has benefited from a reduction in a fine for not substantially

contesting the facts then contest them for the first time in proceedings for annulment before the Court of First Instance, the Commission will normally ask that court to increase the fine imposed on that enterprise'. In addition, under Article 14 of the Regulation, 'The Court of [First Instance] shall have unlimited jurisdiction within the meaning of Article [229 EC] to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed'. In its judgment in *Graphite Electrodes* (paragraphs 417 and 418), for example, the Court of First Instance took account of the fact that the applicant had challenged before it certain facts that it had admitted during the administrative procedure and accordingly diminished the reduction enjoyed by the applicant by virtue of its cooperation.

233 It therefore needs to examined whether, as the Commission maintains, the circumstances of this case warrant the withdrawal of the 10% reduction granted to the applicant for its cooperation.

234 In this case, the Court finds that the applicant is not directly challenging, in its action, the facts of which it was accused in the statement of objections and on which the finding of a breach of Article 81 EC is based, since its claims are directed not towards annulment of the contested decision in so far as it found the applicant had committed an infringement, but only towards reduction in the amount of the fine imposed upon it.

235 However, the Commission maintains that the applicant is challenging some of its considerations regarding the scope and nature of the infringement, and considers that the applicant is thereby adopting an improper line of conduct which should be penalised by an increase in the amount of the fine imposed.

236 It therefore needs to be examined whether, as the Commission maintains, the applicant is substantially contesting the facts on which the Commission based its objections and which the applicant admitted in the pre-litigation phase of the procedure.

237 The Commission points out in that regard that the applicant argues, in its reply, that 'the agreement between the parties in this case was only partially implemented, indeed it only affected the three routes which the Commission specifically defined (i.e. Copenhagen-Stockholm, Copenhagen-Venice and Billund-Frankfurt'; that 'the parties' intentions were much more limited than the Commission has concluded, [being] limited to three routes' and that 'the Copenhagen-Oslo route never formed part of the parties' market sharing arrangement' whereas 'the [contested] decision stated clearly (paragraphs 62-64 and Article 1) that the parties ... concluded an overall market-sharing agreement the object of which was to affect all air transport into and out of Denmark, notably limiting also potential competition between SAS and Maersk Air]'.

238 In order to assess whether the applicant has gone back upon the acquiescence which earned it a reduction in the amount of its fine, it is necessary to compare the applicant's arguments before the Court of First Instance not with the findings contained in the contested decision but with what the applicant acknowledged during the administrative procedure.

239 The statement of objections states that the parties to the cartel concluded market-sharing agreements on three specific routes and an overall market-sharing agreement. Paragraph 74 of the statement of objections states:

'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) EC, the agreements have,

in addition, the effect of 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'.

240 It may therefore be inferred that, in the statement of objections, the Commission had in some way come to the view that the overall agreement had not only been concluded but had been implemented and had had an effect on the market.

241 The applicant's arguments in its written pleadings before the Court of First Instance could, in some way, be interpreted as seeking to deny not only the effects of the overall agreement but also its implementation or even its conclusion. It is clear, however, from the written answers to the Court's questions and from the oral arguments at the hearing that the applicant has confirmed that it was not denying either that it concluded an overall market-sharing agreement or that the parties intended to implement it, but that it was only questioning whether the overall agreement had had an impact on the market. The Court finds that, whilst acknowledging the facts and infringements described in the statement of objections, the applicant had already argued, in its reply to that statement, that the infringements had not had an effect on the market.

242 The applicant's arguments in this action cannot therefore be regarded as a withdrawal of its acquiescence capable of justifying withdrawal of the 10% reduction in its fine which was granted by the Commission.

243 The Commission's application in that regard must therefore be dismissed.

244 It follows from the whole of the above that the pleas and arguments of the applicant seeking a reduction in the amount of the fine imposed upon it must be dismissed.

245 In those circumstances, having regard to the seriousness and duration of the infringements as correctly found in the contested decision, and to the fact that the parties were fully aware of the clearly anti-competitive nature of their conduct and arranged matters by avoiding leaving written traces so that the Commission should be unaware of the exact scope of their agreements, while notifying it of the other aspects of their cooperation, the size of the applicant and its market position, the Court of First Instance, in the exercise of its unlimited jurisdiction, considers that the amount of the fine imposed on the applicant is appropriate.

246 The application must therefore be dismissed.

Costs

247 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful on all counts, it must be ordered to pay both its own costs and those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby

1. **Dismisses the application;**

2. **Orders the applicant to pay its own costs and those incurred by the Commission.**

Azizi Jaeger Dehousse

Delivered in open court in Luxembourg on 18 July 2005.

H. Jung M. Jaeger

Registrar President

Table of contents