

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 January 1996

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the
EEA Agreement

(IV/35.545 — LH/SAS)

(Only the German and Swedish texts are authentic)

(Text with EEA relevance)

(96/180/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European Community,

I. THE FACTS

A. The notification

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector⁽¹⁾, as last amended by Regulation (EEC) No 2410/92⁽²⁾, and in particular Article 5 thereof,

Having regard to the notice pursuant to Article 5 (2) of Regulation (EEC) No 3975/87⁽³⁾,

Having regard to the notice pursuant to Article 16 (3) of Regulation (EEC) No 3975/87⁽⁴⁾,

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

- (1) On 11 May 1995 Deutsche Lufthansa AG (Lufthansa) and Scandinavian Airlines System (SAS) notified a general cooperation agreement concluded by them on that date and providing for the establishment of an integrated air transport system between the two airlines.
- (2) The parties requested the Commission to find that their agreement does not infringe Article 85 (1) of the EC Treaty or, in the alternative, that the conditions are met for granting exemption under Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement.
- (3) The Commission published a summary of the application in the *Official Journal of the European Communities* on 7 June 1995 pursuant to Article 5 (2) of Regulation (EEC) No 3975/87.
- (4) On 26 July 1995 the Commission sent Lufthansa and SAS a letter notifying them that there were serious doubts within the meaning of Article 5 (3) of Regulation (EEC) No 3975/87.
- (5) On 5 August 1995 the Commission published a notice in the *Official Journal of the European Communities* pursuant to Article 16 (3) of Regulation (EEC) No 3975/87 inviting interested third

⁽¹⁾ OJ No L 374, 31. 12. 1987, p. 1.

⁽²⁾ OJ No L 240, 24. 8. 1992, p. 18.

⁽³⁾ OJ No C 141, 7. 6. 1995, p. 9.

⁽⁴⁾ OJ No C 201, 5. 8. 1995, p. 2.

parties to submit their observations on the Commission's intention of authorizing the agreement subject to certain conditions.

B. The undertakings

- (6) Lufthansa is the holding company of the Lufthansa group, which provides air transport for passengers and goods and is engaged in activities relating to air transport.
- (7) Lufthansa is controlled as follows:
- 59,35 % by the private sector,
 - 35,68 % by Germany,
 - 4,97 % by various public enterprises.
- (8) Lufthansa's main shareholdings are as follows:
- | | |
|------------------------|--------|
| — Condor Flugdienst: | 100 % |
| — Lufthansa Cargo: | 100 % |
| — Lufthansa City Line: | 100 % |
| — Euro Berlin: | 49 % |
| — Sun Express: | 40 % |
| — Lauda Air: | 39,7 % |
| — Business Air: | 38,4 % |
| — Cargolux: | 24,5 % |
| — Luxair: | 13,0 % |
- (9) In 1993 Lufthansa had a turnover in air transport of ECU 8 billion, of which ECU [...] billion ⁽¹⁾ was achieved within the Community. It made a loss of ECU 57 million in 1993, compared with a pre-tax profit of ECU 158 million in 1994.
- (10) In terms of passenger-kilometres in Europe ⁽²⁾ in 1994, Lufthansa ranks second with 10,8 billion passenger-kilometres, after British Airways with 13,7 billion.
- In terms of world traffic, Lufthansa is also the second-largest European airline with 56,5 billion passenger-kilometres as against 86,2 billion for British Airways.
- (11) In terms of the main world regions, Lufthansa ranks as follows among the European airlines:
- traffic between Europe and North Africa:
[...] position,
 - traffic between Europe and Central America:
[...] position,
 - traffic between Europe and South America:
[...] position,

- traffic between Europe and North Africa:
[...] position,
- traffic between Europe and South Africa:
[...] position,
- traffic between Europe and the Middle East:
[...] position,
- traffic between Europe and the Far East:
[...] position.

- (12) In Europe, Lufthansa operates 20 routes with more than 100 000 passengers, the main ones being Frankfurt-London ([...] passengers) and Frankfurt-Paris ([...] passengers).

- (13) In terms of scheduled cargo transport, however, Lufthansa is the leading European airline, both for intra-European traffic and for worldwide traffic.

At European level, Lufthansa carries 156 million tonne-kilometres and is well ahead of British Airways, which is in second place with 93 million tonne-kilometres. However, it should be stressed that cargo transport within Europe accounts for only 2,9 % of Lufthansa's total world cargo transport business.

- (14) In terms of fleet size as at the end of 1994, British Airways was in first place in Europe with 253 aircraft in service and 53 on order. Lufthansa was in second place with 220 aircraft in service and 16 on order.

- (15) (SAS) is controlled by the three national airlines of Denmark, Norway and Sweden:

- Det Danske Luftfartselskab: 28,57 %,
- Det Norske Luftfartselskap: 28,57 %,
- AB Aerotransport: 42,85 %.

Each national airline is owned 50 % by the State and 50 % by private investors.

- (16) SAS's main shareholdings are:

- Spanair: 49 %,
- Grønlandsfly: 37,5 %,
- Airlines of Britain Holdings: 40 %,

Airlines of Britain Holdings is the holding company of British Midland, Manx Airlines and Loganair.

- (17) In 1994, SAS had a turnover in air transport of ECU 2,8 billion worldwide, of which ECU [...] billion within the Community.

In 1993, SAS made a loss of ECU 54 million. In 1994, it made a pre-tax profit of ECU 165 million.

- (18) SAS is the eighth-largest European airline in terms of cargo transported within the Community and also at world level.

⁽¹⁾ In accordance with Article 17 of Regulation (EEC) No 3975/87 which deals with the non-disclosure of business secrets, certain figures have been omitted from the published version of this Decision.

⁽²⁾ All airlines belonging to the Association of European Airlines.

- (19) SAS has a substantial domestic network, but a relatively limited network outside Europe. As already indicated, it is in third position amongst the European Airlines in terms of passenger-kilometres within Europe, but only seventh in terms of passenger-kilometres at world level.

In terms of the major world regions, SAS is in:

- [...] position as regards traffic between Europe and North America,
- [...] position as regards traffic between Europe and the Middle East,
- [...] position as regards traffic between Europe and the Far East.

SAS has virtually no involvement in traffic between Europe and Central and South America and between Europe and Africa.

- (20) In Europe, SAS operates 154 routes, including 61 in Scandinavia, i.e. 40 % of the total. Of these 154 routes, 52 have traffic in excess of 100 000 passengers, including 36 Scandinavian routes. The main two routes are domestic routes:

- Bergen-Oslo: [...] passengers,
- Stockholm-Gothenburg: [...] passengers.

SAS uses two main hubs: Copenhagen and Stockholm.

- (21) In terms of fleet size as at the end of 1994, SAS ranked third ahead of Air France, with 155 aircraft in operation and 11 on order.

C. The agreement

- (22) The parties intend to create an enduring alliance by establishing an integrated air transport system based on a comprehensive set of long-term commercial, marketing and operational relationships and involving integration of their worldwide networks and other operations. The main features of the alliance are as follows:

- (23) *The setting-up of a joint venture for traffic between Germany and Scandinavia.*

The parties will set up a regional joint venture, owned jointly and equally by the parties, as their exclusive vehicle for offering scheduled air trans-

port services between Germany and Scandinavia. The management of the joint venture will decide on such matters as capacity, frequencies and fares. Each party will provide at least [...] % of the transportation requirements of the joint venture, which will not be an independent company. The parties will share the profits and losses of the joint venture.

Each party will retain its own commercial brand identity.

(24) *Worldwide cooperation*

Lufthansa and SAS intend to establish worldwide an integrated transport system involving joint network planning, a joint pricing policy and joint budgeting. This will include reciprocal access to frequent-flyer credits, code-sharing, harmonization of service levels, and integration of data-processing.

Maintenance and ground-handling operations will be provided by SAS in Scandinavia and by Lufthansa in Germany. Elsewhere, the parties will choose the most economic means available for their integrated system.

(25) *A single marketing strategy*

SAS and Lufthansa will work together in marketing and sales using their combined strengths and resources.

In Scandinavia, SAS will be responsible for marketing and sales, taking account of Lufthansa's marketing operations.

In Germany, Lufthansa will be responsible for marketing and sales, taking account of SAS's marketing operations.

Elsewhere, the parties will set up jointly-owned entities, or joint representations, which will be responsible for marketing and sales.

However, each party will remain free to operate any direct service it wishes between its domestic market and foreign destinations where this is economically possible.

- (26) In the case of transport within Scandinavia and Germany, each airline will carry out its activities independently.

(27) *Organization of the hub system*

The parties propose to base their hub system on five airports:

- Copenhagen: for internal traffic within Scandinavia, traffic to and from the Baltic Sea area and traffic between Europe and North-East Asia,
- Stockholm: for Swedish domestic traffic, traffic to and from Sweden, and traffic to and from the Baltic Sea area,
- Oslo: for Norwegian domestic traffic and traffic to and from Norway,
- Frankfurt: for German domestic traffic, traffic to and from Germany, intra-European traffic and traffic between Europe and other continents,
- Munich: for traffic to and from Germany, intra-European traffic and traffic between Europe and other continents.

- (28) The two airlines' cargo transport activities will be integrated as far as possible so as to improve their efficiency and customer service.

D. Comments from third parties

- (29) In response to the notices published in the *Official Journal of the European Communities* pursuant to Article 5 (2) and Article 16 (3) of Regulation (EEC) No 3975/87, the Commission received comments from third parties stressing the following points in particular:

- the agreement between Lufthansa and SAS will entail very substantial restrictions of competition on routes between Scandinavia and Germany,
- if the agreement is exempted, conditions must be imposed that would allow other airlines to have access to the abovementioned routes,
- in this respect, the shortage of slots at certain airports is an important aspect to be taken into consideration. The parties operate a large number of frequencies, and there must therefore be a freeze or indeed a reduction in the number of frequencies and a freeze in capacities,
- a further request made to the Commission was that certain cooperation agreements between the parties and other airlines, notably between

Lufthansa and Lauda Air, should be terminated because of the effects which the agreement could have on peripheral markets.

II. LEGAL ASSESSMENT**A. Relevant market**

- (30) The Commission considers that the relevant markets in this instance are, first, the market for the scheduled air transport of passengers and, secondly, the market for the scheduled air transport of goods for each of the routes linking Scandinavia and Germany, including any hubs that might be situated at the far end of such routes.
- (31) The Commission takes the view that, in this instance, chartered air transport does not constitute a genuine alternative to scheduled air transport since the clientele consists essentially of business travellers. Such travellers need to travel to the main European cities to attend working meetings at agreed times and cannot therefore accept the inconvenience of charter flights, unlike passengers travelling in their leisure time.
- (32) Theoretically, high-speed trains offer an alternative to air transport. Over medium distances, high-speed trains offer fast and regular services which mean that they are substitutable for air transport⁽¹⁾.
- (33) Similarly, in the case of cargo transport within Europe, road and rail may, in certain circumstances, be substitutable for air transport. The air transport of goods may also be preceded or followed by land transport, which accordingly constitutes transport that is separate from air transport⁽²⁾.

However, the fact of the matter is that these alternative modes of transport are not available to any significant extent in this instance.

- (34) Pursuant to the case-law of the Court of Justice and the Court of First Instance, an overall national or European market cannot be defined for transport, but alternative transport must be assessed for each route, or for substitutable routes.

⁽¹⁾ See the study on train/aircraft complementarities in Europe published by the Institut du Transport Aérien, Paris, December 1991.

⁽²⁾ See the Judgment of the Court of Justice of 5 October 1995 in Case C-96/94, *Centro Servizi Spediporto srl v. Spediziona Marittima del Golfo srl*, not yet reported.

- (35) This approach does not exclude the taking into account of the existence of networks controlled by the airlines⁽¹⁾, nor the fact that competition may exist between the hubs of large airlines.
- (36) In this instance, most of the cooperation between the two airlines relates to the routes as a whole between Scandinavia and Germany. Substitutability between such routes is limited, notably because the traffic mainly involves businessmen, as the parties have stated. Because of the short distances between Scandinavia and Germany, indirect flights are not real alternatives for passengers wishing to travel quickly to their place of work.
- (37) The Commission is not unaware of the fact that a proportion, sometimes substantial, of the passengers travelling between Scandinavia and Germany are transfer passengers travelling to a hub airport before continuing their journey to another European or intercontinental destination. The transport operation between Scandinavia and Germany is in such cases merely part of a journey which is geographically much more extensive.
- (38) In this instance, however, the agreement relates essentially to the routes between Scandinavia and Germany regardless of whether the passengers are transfer passengers or passengers travelling solely between Scandinavia and Germany.

B. Concept of agreement

- (39) The cooperation agreement concluded between the parties includes the setting-up of a joint venture owned jointly and equally by the parties and managed jointly by them. However, the joint venture is intended to cover only transport services between Scandinavia and Germany, and this represents only part of the cooperation between the parties.
- (40) The joint venture will not have the necessary resources to carry on its economic activity on a lasting basis. It will remain permanently fully dependent on Lufthansa and SAS, which will provide the transport services under their own

name. In this respect point 2.5 of the cooperation agreement provides that the parties will remain independent airlines and that each party will retain its own commercial identity. Moreover, the parties will remain autonomous and expressly reserve the right to take autonomous decisions.

The joint venture will thus operate on the market in a manner similar to that of a joint sales agency and will not operate on the market in a manner similar to an autonomous undertaking.

- (41) It should also be noted that the two parent companies are not permanently withdrawing from the relevant service market. They will still have the means to operate directly on the routes between Scandinavia and Germany.
- (42) Legally, the Commission therefore considers that the object and effect of the joint venture set up by the two airlines is to coordinate the competitive conduct of undertakings which remain independent. The joint venture is therefore a cooperative joint venture.
- (43) The joint venture forms part of a much wider cooperation agreement which falls within the scope of Article 85 of the EC Treaty.

C. Restrictions of competition

C.1 *Restrictions of competition in passenger transport on routes between Scandinavia and Germany*

- (44) The parties have stressed that a not inconsiderable proportion of the traffic between Scandinavia and Germany is transfer traffic. The percentages of transfer passengers on the main routes are as follows:

	Transfers %	Total number of passengers carried
Düsseldorf — Copenhagen	[...]	[...]
Düsseldorf — Stockholm	[...]	[...]
Frankfurt — Copenhagen	[...]	[...]
Frankfurt — Gothenborg	[...]	[...]
Frankfurt — Oslo	[...]	[...]
Frankfurt — Stockholm	[...]	[...]
Hamburg — Stockholm	[...]	[...]
Munich — Copenhagen	[...]	[...]

⁽¹⁾ See in particular the Judgment of the Court of Justice of 11 April 1989 in Case 66/86, *Ahmed Saeed Flugreisen*, [1989] ECR 803 and the Judgment of the Court of First Instance of 19 May 1994 in Case T-2/93, *Air France v. Commission*, [1994] ECR II-323.

- (45) The transfer passengers use a Lufthansa or SAS hub before departing on another flight, including flights to other parts of the world.

For some transfer passengers at least, the German and Scandinavian hub airports are in competition with other European hubs operated by other airlines, such as London, Amsterdam or Brussels airports. Such competition applies mainly to inter-continental flights.

- (46) However, the Commission considers that competition must be assessed not only in terms of the routes that feed the hubs, particularly on the routes between Scandinavia and Germany.

- (47) About 25 routes link Scandinavia and Germany, the main routes being the following:

Routes between Germany and Scandinavia

SAS/Lufthansa (LH) daily frequencies

	Summer 1995			Winter 1995/96		
	SAS	LH	Total	SAS	LH	Total
Düsseldorf — Copenhagen	3	2	5	3	2	5
Düsseldorf — Stockholm	2	2	4	2	2	4
Frankfurt — Copenhagen	3	4	7	3	4	7
Frankfurt — Gothenburg	1	1	2	1	1	2
Frankfurt — Oslo	2	2	4	2	3	5
Frankfurt — Stockholm	2	3	5	2	3	5
Hamburg — Stockholm	1	2	3	1	2	3
Munich — Copenhagen	2	1	3	3	1	4
Copenhagen — Munich	2	1	3	2	1	3

On these eight routes, Lufthansa and SAS are the only airlines operating, except for one frequency per day between Frankfurt and Copenhagen operated by Singapore Airlines.

In terms of the number of passengers carried, these eight routes account for 66 % of all traffic between Scandinavia and Germany.

- (49) Furthermore, at least one of the two airlines is operating on 12 routes between Scandinavia and Germany. The new entity being set up will thus operate on 20 of the 25 routes between Scandinavia and Germany.

(Passengers)

Frankfurt — Copenhagen	291 266
Frankfurt — Stockholm	192 361
Düsseldorf — Copenhagen	150 955
Munich — Copenhagen	112 344
Hamburg — Copenhagen	97 470
Frankfurt — Oslo	87 750
Berlin — Copenhagen	84 360
Düsseldorf — Stockholm	71 140
Hamburg — Stockholm	65 755
Hanover — Copenhagen	50 381
Hamburg — Oslo	50 235
Frankfurt — Gothenburg	47 658

- (48) When the agreement was signed, Lufthansa and SAS were both operating eight routes on which they had the following daily frequencies:

- (50) On all these routes, Lufthansa and SAS propose to coordinate their activity through the joint venture, as regards capacities, frequencies, fares and marketing policy.

In so doing, the parent companies will appreciably restrict actual and potential competition with one another on all such routes.

- (51) The agreement between Lufthansa and SAS will also substantially restrict competition *vis-à-vis* third parties by setting up entry barriers on the relevant routes.

- (52) The cooperation between Lufthansa and SAS is likely to increase the two airlines' economic power substantially. In economic terms, this increase in power will result in particular from the coordination of resources, the availability of the largest European fleet, the scope for interlining, the coordination of networks and the coordination of frequencies.

Number of frequencies from Düsseldorf to 30 major cities in Europe

SAS	LH	KLM	AF	BA	Other airlines
13	105	35	13	20	52

- (53) The pooling of frequent-flyer programmes is also an aspect that must be taken into account in assessing the economic power of the undertakings. Most of the customers are businessmen, and they will clearly prefer airlines that have a joint frequent-flyer programme, allowing them to earn points whatever the airline used. A common system is thus likely to constitute a not inconsiderable entry barrier to other airlines that do not have comparable programmes⁽¹⁾.

Accordingly, under their cooperation agreement, Lufthansa and SAS will provide more than 50 % of the frequencies from these airports.

- (54) This economic power is enhanced by the fact that the two airlines control a substantial proportion of the slots at the main German and Scandinavian airports, where available capacities are saturated at peak periods.

The two airlines control about:

- [...] % of slots at Frankfurt,
- [...] % of slots at Oslo,
- [...] % of slots at Stockholm,
- [...] % of slots at Düsseldorf.

- (55) The economic power of Lufthansa and SAS also stems from the large number of frequencies which they operate from the main airports in question.

The situation is as follows at three major airports⁽²⁾:

Number of frequencies from Copenhagen to 30 major cities in Europe

SAS	LH	KLM	AF	BA	Other airlines
138	20	49	22	21	26

Number of frequencies from Frankfurt to 30 major cities in Europe

SAS	LH	KLM	AF	BA	Other airlines
17	137	24	10	24	53

- (56) In general, Lufthansa and SAS will thus, as a result of their cooperation agreement, have an economic strength which will act as a substantial barrier to entry on all the routes between Scandinavia and Germany.

C.2 Restrictions of competition in passenger transport on other routes

- (57) On routes other than those linking Scandinavia and Germany, Lufthansa and SAS will also develop their cooperation in joint network planning, pricing policy, harmonization of service levels, code-sharing and reciprocal access to frequent-flyer programmes.
- (58) This part of the cooperation agreement will thus also have the object and effect of restricting competition between the parties.

The effects of these restrictions of competition on the market are not, however, comparable to the effects which the cooperation agreement will have on the routes between Scandinavia and Germany.

On other European routes, Lufthansa and SAS are in direct competition with other major airlines.

- (59) On these routes, having regard in particular to the limited market shares held by Lufthansa and SAS, the cooperation agreement between them is not likely as such to create any significant entry barrier.

C.3 Restrictions of competition in intra-European cargo transport

- (60) The parties propose to integrate their cargo transport activities as far as possible.

- (61) The cooperation agreement between Lufthansa and SAS will also have the object and effect of restricting competition appreciably between the parties in cargo transport in Europe.

⁽¹⁾ See the study entitled *Concurrence et Coopération dans le transport aérien en Europe*; David Encaoua and Anne Perrot, 1991.

⁽²⁾ Source: ABC, February 1993.

- (62) Consequently, in view of the aspects referred to in recitals (44) to (61), the cooperation agreement concluded between Lufthansa and SAS has as its object and effect the restriction of competition, in breach of the provisions of Article 85 (1) of the Treaty.

D. Effect on trade between Member States

- (63) The cooperation agreement between Lufthansa and SAS covers international passenger and cargo transport between Member States. The agreement therefore affects trade between Member States.

E. Article 85 (3)

(a) Contribution to economic progress

- (64) The agreement's contribution to economic progress may be assessed at various levels.

a.1 The establishment of a European network

The airlines consider that their agreement will enable them to establish a more extensive European network which will be comparable to the networks of other major airlines and which will involve in particular the routes between Scandinavia and Germany. Such a network will make it possible to provide consumers with a better-quality service, notably in terms of the number of direct and indirect flights, and a larger number of potential connections between different routes.

- (65) The differences in configuration between the Lufthansa and SAS networks have already been outlined in recitals (10), (11), (12), (19) and (20).

The differences compared with the other large European airlines can be seen from the table below:

Number of scheduled services operated at the end of 1994

	Domestic market	Rest of Europe	Outside Europe	Total	National/total (%)	Europe/total (%)	Outside Europe/total (%)
BA	20	58	87	165	12	35	52
AF	8	58	104	170	5	34	61
LH	17	78	95	190	8	36	50
KLM	4	58	86	148	3	39	58
SAS	39	54	9	102	38	53	9

Source: AEA.

- (66) While the structure of the networks of British Airways and Air France is fairly similar, Lufthansa differs in that it has a higher proportion of intra-European routes and a correspondingly weaker presence on extra-European routes.

SAS, for its part, is in a very strong position at national and European level but is virtually absent at the extra-European level. What is more, the proportion of 'European' routes served by SAS includes, in fact, a large number of 'intra-Scandinavian' routes. Although, in terms of the number of passengers carried in Europe, SAS ranks

third, its operations are confined mainly to Scandinavia.

- (67) The networks' characteristics can also be seen from a comparison of the average length of each airline's flights:

	LH	SAS	All AEA airlines
Average length of flights on the world network (km)	1 036	686	1 084
Average length of flights on the European network (km)	686	621	—

Similarly, the difference in the networks' configuration can be seen from the ratio between total income and tonne-kms offered for sale.

	LH	SAS	All AEA airlines
Total income (in millions of dollars)	4,17	7,1	4,59
Tonne-kms offered for sale (in thousands of dollars)			

Whereas Lufthansa's figure is near to the European average, SAS's network is clearly much more regionally biased.

- (68) In the light of these factors, the Commission is of the opinion that the complementarity of the two networks of Lufthansa and SAS is established and that the pooling of those networks will make it possible to improve the services rendered to consumers, particularly on intra-European routes and especially on those to and from Scandinavia.

a.2 The reduction of costs

- (69) The Commission is of the opinion that the reduction of European airlines' costs is an important factor to be taken into account. Comparisons between US and European airlines reveal that the costs borne by European airlines are up to 48 % higher than those borne by US airlines ⁽¹⁾.
- (70) According to the parties, the agreement would make it possible, through cost reductions and better synergy, to save some DM [...] million a year over a period of [...] years.

These savings would be made primarily in the following four areas:

- traffic management, making it possible to improve services and hence attract more passengers,
- an integrated marketing system, which should make it possible to reduce costs in particular by eliminating duplication in the marketing field in certain countries,
- better organization of ground-handling services,
- the establishment of an integrated system of data exchange and of integrated reservation and

distribution systems, from which substantial savings are expected.

- (71) In the air transport field, experts consider that the return on changes in scale are generally constant; in other words, an X % increase in network size increases costs by the same proportion. By contrast, the return on increases in density is progressive, i.e. a 1 % increase in traffic with an unchanged network increases costs by only 0,82 %. Similarly, a 1 % increase in the average distance between two touch-downs generally reduces costs.

Lastly, a 1 % increase in the load factor reduces costs by 0,26 % ⁽²⁾.

- (72) An increase in the airlines' size is, therefore, not necessarily going to reduce their costs. Such a reduction calls for a deliberate cost-cutting plan covering several years. In the present case, the two airlines have apparently drawn up such a plan. The close cooperation between the two airlines can also reasonably be expected to lead to an appreciable increase in traffic throughout the network and thus help to reduce costs.

In addition, the establishment of a world-wide network common to the two airlines is likely to rationalize services and increase the average distance between touch-downs, thereby helping to further reduce costs.

- (73) In the light of the factors referred to in recitals (64) to (72), the Commission is of the opinion that the agreement is likely to contribute to economic progress within the meaning of Article 85 (3) of the Treaty.

(b) Benefit to consumers

- (74) Air transport users will benefit directly from the creation of a network common to the two airlines in that they will have access to a range of higher-quality services that are geographically more extensive at both European and world level.
- (75) The reduction in their costs will also enable the airlines to lower their fares which will be of benefit to users. The Commission must, however, impose conditions and obligations to ensure that these benefits to consumers last for as long as this Decision is in force.

⁽¹⁾ See the report of the *Comité des Sages* entitled: 'Expanding Horizons. Civil Aviation in Europe, an action programme for the future', 1993.

⁽²⁾ See the study entitled 'Concurrence et Coopération dans le transport aérien en Europe', David Encaoua and Anne Perrot, 1991.

(c) *Indispensable nature of the restrictions*

(76) The establishment of a large European network covering Scandinavia and Germany is scarcely conceivable without an extensive cooperation agreement between the two airlines.

(77) A question mark hangs over Lufthansa's ability to operate independently on all the Scandinavian routes with a view to carrying passengers to its hubs in Germany. For this to be possible, it would have to have a sufficient number of aircraft suited to the services in question, including regional services in Scandinavia.

(78) A comparison of the two airlines' fleets shows that, on 31 December 1993, SAS had 80 aircraft, out of a total of 160, with no more than 100 seats, whereas on that date Lufthansa had no such aircraft.

Lufthansa would therefore be unable to serve direct a large number of Scandinavian routes for want of a suitable fleet.

(79) While it is possible to reduce costs without concluding a cooperation agreement, the agreement in question is likely, thanks to the pooling of substantial material, human and financial resources, to make for a larger reduction.

(80) The Commission is therefore of the opinion that the restrictions of competition are necessary as the market now stands.

(81) It must nevertheless impose conditions to ensure that the restrictions of competition remain within the bounds of what is necessary and to safeguard the presence on the market of competing airlines.

(d) *No elimination of competition*

(82) The question of whether or not competition is eliminated must be assessed in the light of the following factors and of any conditions which the Commission may impose. Other airlines already operate services on some routes between Scandinavia and Germany and can extend their operations also to new routes in competition with Lufthansa and SAS. What is more, following the liberalization of European air transport, regulatory barriers to market entry have been removed.

(83) Consequently, the agreement between Lufthansa and SAS does not eliminate all potential and/or actual competition in the relevant markets.

(84) It must be borne in mind, however, that, by virtue of their cooperation agreement, Lufthansa and SAS

will be the only airlines present on certain routes, and that the contestability of the relevant markets is not fully assured unless conditions are imposed.

(85) The Commission accordingly considers that a number of conditions must be imposed in order to safeguard market access for new entrants and to resolve in particular the problem of entry barriers being erected.

F. *Conditions of exemption*

(86) Pursuant to Article 6 of Regulation (EEC) No 3975/87, any decision applying the exemption in Article 85 (3) must indicate the period for which it is to be valid, and conditions and obligations may be attached to such decision.

(87) According to Article 6 of Regulation (EEC) No 3975/87, such period of validity is normally not less than six years. Account must nevertheless be taken of the fact that the cooperation agreement in question is a major undertaking for the two airlines involving restructuring measures which will bear fruit only in the long term.

(88) Consequently, the Commission considers that in the present case a period of ten years is justified, i.e. until 31 December 2005. This Decision should take effect from the date on which the notification was made, i.e. 11 May 1995.

(89) The grant of exemption must, however, be subject to certain conditions and obligations to avoid a situation where the restrictions of competition exceed that which is indispensable and where competition is eliminated in the relevant passenger transport market.

(90) The Commission considers that the conditions do not have to be applicable to all routes, but only to those routes between Scandinavia and Germany where the two airlines operated competing services before the agreement was concluded and where the capacity exceeds 30 000 seats per year. This number of 30 000 seats was considered by the Council in Article 6 of Regulation (EEC) No 2408/92⁽¹⁾ as a threshold beyond which competition must necessarily be assured.

⁽¹⁾ OJ No L 240, 24. 8. 1992, p. 8.

The following routes satisfy these two criteria:

- Düsseldorf-Copenhagen,
- Düsseldorf-Stockholm,
- Frankfurt-Copenhagen,
- Frankfurt-Gothenburg,
- Frankfurt-Oslo,
- Frankfurt-Stockholm,
- Munich-Copenhagen,
- Hamburg-Stockholm.

(91) The purpose of the conditions is to ensure that competition is not eliminated and that opportunities for market entry are available to new entrants. In determining the period of applicability of the conditions, the following factors should be taken into account:

- Lufthansa and SAS are respectively the second and third largest passenger-carrying airlines in Europe in terms of passenger-kilometres,
- their cooperation involves 25 routes between Scandinavia and Germany, including 12 that have traffic of more than 45 000 passengers a year,
- the cooperation is designed to establish a dense service network that will make two major networks complementary,
- the main routes link airports some of which are saturated at certain times of the day.

This means that entry barriers on these routes will be considerable and may well continue for a long period.

The Commission therefore considers that a period of seven years during which the conditions would be applicable is necessary to ensure that other airlines establish a lasting foothold on the routes in question.

(92) In view of the economic strength of the two airlines and their joint presence on these routes, the Commission considers that they must freeze the number of daily frequencies they operate on a route when a new entrant decides to serve that route. This condition is designed to prevent the airlines already present from increasing substantially their number of frequencies with a view to squeezing the new entrant from the market. This freezing of the number of frequencies shall remain in force until such time as the new entrant actually operates services on the route or routes in question, but cannot exceed the period of validity of this Decision.

(93) Lufthansa and SAS nevertheless be allowed to exercise the necessary degree of flexibility in operating their services; in the event of a new competitor starting up on a route, they should be able to

increase the number of daily frequencies by one frequency on the relevant route.

(94) In the event of new entrants operating more frequencies than Lufthansa and SAS, the latter must be afforded the opportunity of matching the number of frequencies of their competitors, without, however, exceeding that number.

(95) The possibility for a new entrant to conclude an interlining agreement with Lufthansa and SAS is also an important factor when it comes to its being able to penetrate the relevant market effectively.

(96) It has been emphasized that the pooling by Lufthansa and SAS of their frequent-flyer credit systems is likely to constitute a not inconsiderable barrier to market entry. Any other airline which provides or wishes to provide services on the routes in question and which does not have a frequent-flyer programme applicable at international level must therefore be afforded the opportunity of participating in the programme operated by Lufthansa and SAS.

(97) Lufthansa and SAS have entered into cooperation agreements with other European airlines which are actual or potential competitors. It must be determined, in the light of the alliance between Lufthansa and SAS, whether these agreements can be allowed to remain in force.

(98) SAS is party to the European Quality Alliance (EQA), which was originally concluded between Swissair, Austrian Airlines and SAS. The EQA consists of bilateral agreements between SAS and Swissair, between SAS and Austrian Airlines and between Swissair and Austrian Airlines. The agreements, which entered into force in 1990, map out a strategy for coordinating the airlines' traffic systems with a view to developing long-range services from Scandinavian, Swiss and Austrian airports.

(99) The EQA introduces coordination of transport systems from the respective hub airports as follows:

- under the SAS-Swissair agreement: Zurich and Geneva will act as hub airports for traffic between Scandinavia, on the one hand, and Africa, the Middle East, India, Pakistan, South America and southern Europe, on the other. Similarly, Copenhagen, Oslo and Stockholm will serve as hub airports between Switzerland, on the one hand, and Asia, North America and northern Europe, on the other;
- under the SAS-Austrian Airlines agreement: Vienna will act as hub airport between Scandinavia, on the one hand, and Africa, the Middle East and eastern and southern Europe, on the other. Similarly, Copenhagen and Stockholm will serve as hub airports between Austria, on the one hand, and Asia, North America and northern Europe, on the other.

In both cases, the operation by one party of services via the hub airports of the other party is subject to the latter's agreement.

- Salzburg-Frankfurt,
- Salzburg-Berlin.

(100) The three airlines have concluded supplementary agreements on interlining facilities and participation by Swissair and Austrian Airlines in SAS's frequent-flyer programme.

(101) Following its agreement with Sabena, Swissair has undertaken to terminate its cooperation agreement with SAS within the EQA by 1 January 1996.

(102) The Commission considers that, within the framework of this Decision, SAS should also be asked to terminate its agreements with Swissair and Austrian Airlines, because as a result of the cooperation agreements concluded in 1995, two new entities have been created in Europe, namely:

- an entity consisting of Lufthansa and SAS, and
- an entity consisting of Sabena and Swissair.

The Commission considers that the agreements establishing these entities may under certain conditions be exempted from the ban on restrictive agreements. Since there must be effective competition between the two entities, however, the agreements between SAS and Swissair and between SAS and Austrian Airlines must be terminated.

(103) For its part, Lufthansa has concluded cooperation agreements with Transwede and Finnair for the operation of routes between Scandinavia and Germany. Inasmuch as these two carriers are competitors on the routes between Scandinavia and Germany, these agreements must also be terminated.

(104) Lufthansa has also concluded a cooperation agreement with Lauda Air, in which it has a 39,7 % shareholding.

Lauda Air mainly operates the following routes:

- Vienna-London,
- Vienna-Paris,
- Vienna-Manchester,
- Vienna-Barcelona,
- Vienna-Madrid,
- Vienna-Frankfurt,
- Vienna-Munich,
- Vienna-Düsseldorf,
- Salzburg-Paris,
- Salzburg-London,

(105) Apart from Vienna-London, all these routes give rise to cooperation with Lufthansa in the form of code-sharing agreements. However, none of these routes is in the markets defined in recital 30. Consequently, the agreement between Lufthansa and Lauda Air is not capable of having a significant effect on routes between Scandinavia and Germany. Moreover, the existence of the agreement between Lufthansa and Lauda Air has no direct effect on relations between the two entities referred to in recital 102.

(106) Consequently, without prejudging the lawfulness of the agreements between Lufthansa and Lauda Air, the Commission is of the opinion that the safeguarding of competition on routes between Scandinavia and Germany does not require the imposition of a condition obliging Lufthansa to put an end to all cooperation with Lauda Air.

(107) Access to routes between Scandinavia and Germany by new entrants is conditional on the availability of slots at Scandinavian and German airports. Frankfurt, Düsseldorf, Stockholm and Oslo airports are, however, saturated at certain hours of the day, and obtaining slots there by the normal allocation procedures is virtually impossible.

(108) Lufthansa and SAS must therefore give up, as the need arises, a sufficient number of slots at each of the abovementioned airports to enable other airlines to operate competing services on the routes referred to in recital (90).

(109) This will be called for only where the new entrant has been unable to obtain slots by the normal allocation procedure in force at each airport. Precise conditions must also be laid down to ensure that the slots given up by the Lufthansa and SAS are in fact used only to ensure continued competition on the routes between Scandinavia and Germany.

(110) Steps must also be taken to ensure that this condition is not circumvented by the slots in question being given up to a carrier which has links with Lufthansa or SAS.

(111) Where Lufthansa or SAS give up a slot, a contract will be signed between them and the airline taking over the slot. The contract may stipulate only provisions that are contained in this Decision.

(112) In view of the length of the exemption and the conditions attached to this Decision, the parties must send the Commission at regular intervals information enabling it to ascertain whether the

conditions are being complied with. Information on fares must also be sent to enable the Commission to assess the agreement's impact on their level and establish whether the agreement is still of benefit to consumers.

- (113) For the purposes of this Decision, Scandinavia should be taken to mean Denmark, Norway and Sweden.
- (114) This Decision is without prejudice to the applicability of Article 86 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA, the provisions of Article 85 (1) of the Treaty and of Article 53 (1) of the EEA Agreement are declared inapplicable for the period from 11 May 1995 to 31 December 2005 to the cooperation agreement concluded on 11 May 1995 between Deutsche Lufthansa AG and Scandinavian Airlines System.

Article 2

1. The exemption referred to in Article 1 shall be subject to the conditions and obligations set out in Articles 3, 4 and 5.
2. The conditions and obligations referred to in paragraph 1 are applicable on the following routes:
 - Düsseldorf-Copenhagen,
 - Düsseldorf-Stockholm,
 - Frankfurt-Copenhagen,
 - Frankfurt-Gothenburg,
 - Frankfurt-Oslo,
 - Frankfurt-Stockholm,
 - Hamburg-Stockholm,
 - Munich-Copenhagen.
3. For the purposes of this Decision, 'Lufthansa/SAS entity' means:
 - the airlines Lufthansa and SAS and any airline in which SAS or Lufthansa holds more than 10 % of the shares,
 - any airline with which Lufthansa and SAS have concluded a structural agreement, and
 - any airline with which Lufthansa and SAS have concluded a code-sharing agreement applicable on routes between Scandinavia and Germany.

Article 3

Until 31 October 2002 the following conditions shall be applicable to the carriage of passengers:

1. (a) where an airline established in the EEA and not belonging to the Lufthansa/SAS entity informs the latter at least three months before the beginning of the following transport season of its intention to operate services on one or more of the routes referred to in Article 2 (2), Lufthansa and SAS shall freeze their aggregate number of daily frequencies on the routes in question at the level attained:

- on 31 October 1995 for forthcoming summer seasons,
- on 1 November 1995 for forthcoming winter seasons.

This freezing of the number of frequencies shall remain in force until such time as the new entrant actually operates services on the route or routes in question, but cannot exceed the period of validity of this Decision.

- (b) notwithstanding point (a), Lufthansa and SAS may, where a new entrant appears on one of the routes referred to in Article 2 (2), increase by one frequency the total number of daily frequencies on the route in question.
- (c) Lufthansa and SAS may also, on each of the eight routes referred to in Article 2 (2), increase their aggregate number of daily frequencies so that it is equal to but not more than the aggregate number of frequencies operated by other airlines on each of these routes;
2. an airline established in a Member State of the EEA and operating services on one or more of the routes referred to in Article 2 (2) may ask to sign an interlining agreement with Lufthansa and SAS on the route or routes in question. Lufthansa and SAS shall sign an agreement in accordance with the conditions that are normal in the industry. Such agreements shall apply for seven years from the date of their signature, without, however, remaining in force beyond 31 December 2005;
3. SAS and Lufthansa shall afford any airline established in a Member State of the EEA operating services on one or more of the routes referred to in Article 2 (2) and not participating in a frequent-flyer programme applicable in more than one Member State the opportunity of participating in the SAS or Lufthansa programme or in the corresponding joint programme once it has been established for the sale of services on the abovementioned routes. Such participation shall take place under non-discriminatory financial conditions;

4. SAS shall terminate its cooperation agreement with Swissair within the European Quality Alliance by 31 January 1996;
5. SAS shall terminate its cooperation agreement with Austrian Airlines within the European Quality Alliance by 1 January 1997;
6. Lufthansa shall terminate its cooperation agreement with Transwede within the Marketing Alliance in Scandinavia by 1 January 1997;
7. Lufthansa shall terminate its cooperation agreement with Finnair in respect of routes between Scandinavia and Germany by 1 January 1997;
8. where an airline established in a Member State of the European Economic Area and not belonging to the Lufthansa/SAS entity wishes to commence or increase services on one or more of the routes referred to in Article 2 (2) but cannot obtain the necessary slots by the normal allocation procedure, Lufthansa and SAS shall place slots at the applicant's disposal at Frankfurt, Düsseldorf, Stockholm and Oslo airports under the following conditions:
 - (a) the number of slots per day made available at each of the airports may not be more than eight;
 - (b) Lufthansa and SAS shall make the slots available to the applicant within a period of 60 minutes before or after the time requested, it being understood that slots requested at peak times must also be granted within this time interval;
 - (c) Lufthansa and SAS shall not be required to make available to the same applicant more than four slots at each airport per two-hour period;
 - (d) Lufthansa and SAS shall not be required to give up more than six slots at each airport at peak times;
 - (e) for the purposes of this Decision, peak times shall be between 7 a.m. and 9 a.m., and between 5 p.m. and 7 p.m., local time;
 - (f) slots be made available by Lufthansa and SAS on condition that the new entrant has taken the steps necessary to obtain the slots in question in accordance with the normal allocation procedure and has not obtained the slots within a period of 60 minutes before or after the time requested or during a peak period if the request concerns that period;
 - (g) slots given up by Lufthansa and SAS may be used only to provide services on the routes referred to in Article 2 (2) during the period of validity of this Decision. A slot made available in accordance with this procedure for relinquishing slots may be exchanged by the new entrant for a slot used by him on another route or for a slot used by another airline, provided both that such slot is closer to the time initially requested and that the obligations and conditions attached to the original slot apply to the new slot;
 - (h) a new entrant who holds slots given up by Lufthansa and SAS shall inform the latter immediately and return the slots to them by the end of the IATA season in course in the following circumstances:
 - (i) if the new entrant no longer uses the slot or slots in question to operate services on the routes referred to in Article 2 (2), or
 - (ii) if the new entrant does not make at least 80 % use of the slot or slots in question, save where such under-utilization is justified on one of the grounds referred to in Article 10 (5) of Council Regulation (EEC) No 95/93⁽¹⁾, or
 - (iii) if this Decision providing for an exemption is annulled or if Lufthansa and SAS terminate their agreement, or
 - (iv) if the holder of the slots infringes any important provision of an agreement with Lufthansa and/or SAS on making slots available, or
 - (v) if the holder of the slots ceases to enjoy the status of airline established in a Member State of the European Economic Area;
 - (i) Lufthansa and SAS shall transfer slots to any new entrant in accordance with the procedure for relinquishing slots, following signature of an agreement containing the conditions set out in points (g) and (h). Such agreements shall be notified within one week of their signature to the Commission and to the authority responsible for allocating slots at the airport concerned;
 - (j) Lufthansa and SAS shall make the slots available to the new entrant on condition that a request is made to one of them within a maximum period of one month from the end of the meeting devoted to allocating slots for an IATA season;
9. for the 1995/96 winter season, the request may be made within a maximum period of one month from the date of publication of this Decision in the *Official Journal of the European Communities*. In all cases, Lufthansa and SAS shall send a reply to the applicant within a maximum period of two weeks from the date of the request.

⁽¹⁾ OJ No L 14, 22. 1. 1993, p. 1.

Article 4

Until 31 October 2002 the following obligations shall be applicable to the carriage of passengers:

At the end of each summer season, Lufthansa and SAS shall furnish the following information to the Commission for the preceding two seasons:

- the number of daily frequencies operated by Lufthansa and SAS on the routes referred to in Article 2 (2),
- a list of any interlining agreements concluded by Lufthansa and SAS in accordance with Article 3 (2),
- a list of any agreements relating to frequent-flyer programmes concluded by Lufthansa and SAS in accordance with Article 3 (3), and
- a list of slots made available to other airlines in accordance with Article 3 (8).

Article 5

Until 31 December 2005 the following obligations shall be applicable to the carriage of passengers:

At the end of each summer season, Lufthansa and SAS shall furnish the following information to the Commission for the preceding two seasons:

- the average price of a business-class return ticket on each of the routes referred to in Article 2 (2) and any difference compared with the prices resulting from

consultations on tariffs between airlines held in accordance with Commission Regulation (EEC) No 1617/93 ⁽¹⁾;

- the total monthly capacity supplied by Lufthansa and SAS on each of the routes referred to in Article 2 (2), and
- the stage reached in the implementation of the cost-reduction plan envisaged by the parties.

Article 6

This Decision is addressed to:

Deutsche Lufthansa AG,
Von-Gablenz-Straße, 2-6
D-50769, Cologne;
Scandinavian Airlines System,
Frösundaviks Allé, 1,
Solna,
S-195 87, Stockholm.

Done at Brussels, 16 January 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁾ OJ No L 155, 26. 6. 1993, p. 18.