

Case M.7333 – ALITALIA/ ETIHAD [Excerpt]

The Transaction consists in the acquisition of joint control by Alitalia and Etihad over New Alitalia, a newly incorporated company which will receive [...] Alitalia's operating business as a going concern.

Etihad's voting rights at New Alitalia's shareholders meeting will be capped at 49.9% of the total votes cast at each meeting and all votes in excess will be discarded. As a result, Alitalia will always hold the absolute majority at New Alitalia's shareholders meeting.

The Parties' activities primarily overlap in the area of air transport of passengers. Alitalia's domestic and international air passenger services are carried out through mainly offering scheduled flights through its home hub Rome – Fiumicino, its secondary hub at Milan–Linate and other airports in Italy by Alitalia, Alitalia Cityliner and Air One. Etihad's air passenger services are carried out primarily through offering scheduled flights from its home hub in Abu Dhabi (the United Arab Emirates), which includes short and medium-haul services within Middle East as well as long-haul services to North America, Europe, Africa, Australia and Asia.

In addition, according to the Air Services Agreement in place between Italy and the United Arab Emirates, Alitalia is one of the designated carriers entitled to operate flights on the routes between Italy (Rome and/or Milan) and airports in the United Arab Emirates. Reciprocally, under the terms of the same agreement, Etihad can provide scheduled air transport services between airports in the United Arab Emirates and Rome and/or Milan airports. However, Etihad is not entitled to provide air transport services within Italy or between EU airports.

In recent years Etihad acquired minority shareholdings or otherwise financed in a number of carriers - airberlin Air Serbia, Darwin Airlines - with the aim of building a connecting network and to encourage, where possible, the carriers it has invested in to cooperate on codeshares and joint purchasing. As a result of the Transaction, New Alitalia would be linked indirectly, through Etihad, with the various carriers of which Etihad is a shareholder. In order to fully take into account the possible effects of Etihad's shareholdings in New Alitalia, Air Serbia, and in the EEP as well as Etihad's influence over Darwin Airline,

the Commission assessed all overlaps between Alitalia and airberlin, Air Serbia, Darwin Airlines, and Jet Airways in its O&D analysis. On the basis of that analysis the Commission has excluded serious doubts on all routes where the activities of Alitalia (including its Transatlantic JV partners) and Etihad, Air Serbia, Darwin Airline, and/or the EEP (Emirates) overlap, with the exception of the Rome–Belgrade route where the Commission identified serious doubts.

Pursuant to the terms of the CCA, New Alitalia will be using Abu Dhabi airport as hub for scheduled flights to [...]. However, New Alitalia will continue to cooperate with its existing partners and to operate to destinations within the Exclusive Territory that are not served by Etihad, Air Serbia, Darwin Airline, and the EEP. Furthermore, subject to Etihad's consent, New Alitalia will be entitled to enter into new codeshare agreements relating to the Exclusive Territory with third parties.

Alitalia has entered into codeshare agreements with Etihad as well as with Air Serbia, Darwin Airline and Jet Airways. Those agreements pre-date the Transaction and, as such, are unrelated to the Transaction. Furthermore, Alitalia has recently entered into a codeshare agreement with airberlin. Discussions between the two carriers regarding such agreement started at the latest in the first quarter of 2013 and were concluded in August 2014 following Alitalia's release from a restriction under its SkyTeam agreement, which made it possible to finalise the code share agreement.

Both Alitalia and Etihad operate FFPs (Frequent Flyer programme). Alitalia Loyalty is a company dedicated to the operation and development of Alitalia's FFP, the MilleMiglia Programme. On 31 December 2013, MilleMiglia had 1.1 million active members and a total of 4.45 million registered members. Etihad has been operating the Etihad Guest FFP since 2006. Etihad Guest now has more than 2.5 million members. In 2012, Etihad acquired 70% of airberlin's loyalty programme, Topbonus and in 2014 Etihad acquired 50.1% of Jet Privilege, Jet Airways' loyalty programme.

Case n° IV/M058 - BAXTER/NESTLE/SALVIA

On 4 January 1991, Baxter International Inc., a U.S. pharmaceutical company, and Nestlé S.A., a Swiss company mainly active in the field of food products, notified the proposed creation of a joint venture in Germany called CLINTEC SALVIA GmbH & Co OHG ("Clintec Salvia") which will be equally owned by Baxter Deutschland GmbH and Nestlé Deutschland AG and which will take over the clinical nutrition assets of Baxter Deutschland GmbH and of Salvia-Werk GmbH. This latter company was recently acquired by a subsidiary of Baxter called Dialyse Technik GmbH. Until the end of 1990, Salvia-Werk GmbH belonged to Boehringer Mannheim. Salvia-Werk GmbH is a pharmaceutical company with three business activities: dialysis, clinical nutrition and respiratory business. The dialysis business will remain under the sole control of Baxter. The respiratory business will be retransferred to Boehringer Mannheim. The clinical nutrition assets will be transferred to Clintec Salvia. The transfer to Clintec Salvia is made in the context of a broader agreement between Baxter and Nestlé concluded in 1989 by which these two parties decided to jointly develop, manufacture and market clinical nutrition products on an exclusive worldwide basis. The clinical nutrition market is composed of at least two submarkets, the enteral nutrition market i.e. food products taken orally or by tube, and the parenteral nutrition market i.e. pharmaceutical preparations delivered directly into the blood. Until 1989, Nestlé was only active in the enteral nutrition field, while Baxter manufactured only parenteral nutrition products but also sold some enteral nutrition products bought from third parties.

The broader agreement of 1989 was notified to the Commission under Regulation N° 17 on 19 September 1989. That agreement concerns inter alia the creation of a joint venture between Nestlé and Baxter called N.B. International Technologies to which each parent has granted an exclusive licence in respect of all its non-U.S. technology and trademarks in the field of clinical nutrition. The licence agreements are for an initial period to 2010, but can be terminated before that date by consent between the contracting parties. The broader agreement further created a joint venture between Nestlé and Baxter called Clinical International Operations Ltd., which coordinates the activities of local joint ventures called Clintec. These joint ventures all operate under sublicences of N.B. International Technologies. At

present, within the EEC three such local joint ventures are in operation, in the U.K., in Italy and in the Benelux. Though their bylaws include the development, manufacture and sale of clinical nutrition products, these joint ventures are mainly marketing joint ventures because the development and manufacture of the products concerned continues to be carried out to a large extent by Nestlé and Baxter on a sub-contract basis.

In Germany, where Baxter and Nestlé had only very limited activities ([deleted] in the parenteral market), the parties decided to penetrate that market through the acquisition of the clinical nutrition business of Salvia-Werk GmbH. This acquisition took place in several stages:

- first, the acquisition from Boehringer Mannheim of 98,75% of Salvia-Werk GmbH by Dialyse Technik GmbH (Baxter) and of 1,25% by Nestlé Deutschland AG: this acquisition included two business activities not to be transferred to Clintec Salvia and did not meet the thresholds of the EEC Merger Regulation. The parties notified this first transaction to the Bundeskartellamt which cleared the transaction on 21.12.1990;
- second, the creation of Clintec Salvia GmbH & Co OHG by two subsidiaries of Baxter, i.e. Dialyse Technik GmbH (without capital participation) and Salvia-Werk GmbH: this intra-group transaction was carried out in preparation for the transfer of the clinical nutrition assets of Salvia-Werk GmbH and Baxter Deutschland GmbH to Clintec Salvia and the sale of part of Baxter's interests in Clintec Salvia to Nestlé Deutschland AG;
- third, the transfer of the clinical nutrition assets of Salvia-Werk GmbH and Baxter Deutschland GmbH to Clintec Salvia;
- fourth, the sale of 50% of Baxter's interests in Clintec Salvia to Nestlé by a sale of the capital contribution held by Salvia-Werk GmbH in Clintec Salvia to Nestlé Deutschland AG: this last transaction transforms Clintec Salvia into a joint venture between Nestlé Deutschland AG and Baxter Deutschland GmbH.

The parties' agreement of 1989 to jointly develop, manufacture and market clinical nutrition products is a cooperative agreement which has not created a durable change in the structure of their undertakings and has not created a single economic entity between the parties in the field of clinical nutrition:

- neither Nestlé nor Baxter has transferred its respective patents and know-how in the field of enteral and parenteral nutrition products to the joint ventures set up in 1989; they have granted an exclusive licence to these joint ventures for the manufacture and marketing of the products concerned; though this licence is granted for a long term period, the parties have not granted an irrevocable licence for the duration of the life of the patents involved but limited the licence rights to a fixed period which can be terminated by mutual agreement at any time;
- Baxter and Nestlé continue, as sub-contractors, to manufacture most of the parenteral and enteral nutrition products sold by the 1989 joint ventures: the function of these joint ventures is mainly that of a common distribution agency; ;
- Baxter and Nestlé also continue to carry out, on a sub-contract basis, most of the research and development in the field of clinical nutrition: the 1989 joint ventures are therefore largely dependent on their parents;
- the 1989 joint ventures distribute their products under registered trademarks of Baxter and Nestlé; these trademarks are licensed to the joint ventures on an exclusive basis similar to the technology licences.

Case No IV/M.560 - EDS / LUFTHANSA

EDS, which is a wholly owned indirect subsidiary of General Motors Corporation, provides IT services, ie systems management, systems integration, systems development and consulting services. LH (Lufthansa) is an air transport company, registered in Germany. Lufthansa Systems is currently responsible for LH's internal IT service and production capacities.

The operation involves the acquisition by EDS from LH of 25% of the shares of Lufthansa Systems, a newly created subsidiary of LH. The joint venture will operate as a systems house providing IT services, which are specifically tailored to the needs of the air transport sector. EDS will acquire 25% of the shares in Lufthansa Systems. The Shareholders Agreement provides that both parents are represented on the supervisory board (LH 3, EDS 1) and that in important decisions (including the annual budget and annual business plan) unanimity is required.

Lufthansa Systems will perform on a lasting basis all the functions of an autonomous economic entity and create a structural change in the market. The joint venture will have adequate resources to carry out its business. The initial share capital amounts to DM 25 million. It has a full functioning IT division, contributed by LH. The current number of employees is 1,112; this figure is expected to rise with the increase of third party business. Lufthansa Systems will have the power to grant sublicences, to the extent that LH grants it software licences.

Lufthansa Systems will provide services for LH, LH subsidiaries and third parties. The joint venture will rely almost entirely on sales to LH for an initial start up period. Although initially Lufthansa business will account for a large proportion of the joint venture's work this will decrease and the parties intend that the joint venture will be geared to play an active role on the market. The substantial financial contribution made by EDS for its shareholding in the joint venture (1 million DM) provides further evidence of this fact and serves to confirm that the joint venture cannot be considered a normal outsourcing operation. In addition competitors have confirmed that there is a substantial and growing market for IT in

the air transport industry, and as can be seen below (para 21) although some airline companies operate their IT services in house, many others offer such services to third parties. Lufthansa Systems is likely to be a significant player in this field in the future. Furthermore the joint venture is expected to extend its services to the travel industry in general. Therefore even if LH remains the main customer of Lufthansa Systems in the medium term, the joint venture's dependence on its parent will only be temporary. In addition, the services provided to LH will be priced on an arm's length basis. Prices will be renegotiated every year and shall be determined primarily by a comparison with market conditions for comparable services.

LH will no longer be active in the joint venture's market, having transferred all its external and substantially all of its internal IT service and production capacities to the joint venture. Therefore there is no scope for co-ordination of competitive behaviour as between the parents. This is equally true for the segment of computer reservation systems, where LH holds a minority stake in Amadeus. EDS has not been active in this segment. A joint venture between Amadeus, EDS and Continental Airlines for the marketing of Amadeus in North and Central America, which has been created most recently, relates to a different product market than the one involved in the present operation.