

Marketing on trial
-practices and principles in the case of SAS' EuroBonus program-

Abstract

This paper follows the unfolding legal controversy between Scandinavian Airlines System (SAS) and the Swedish Competition Authority (SCA) regarding the formers' frequent flyer program (FFP), entitled EuroBonus. The controversy arises in late 1999 as SCA finds SAS' application of EuroBonus in Sweden to be at odds with the Swedish Competition Act (SFS 1993:20), article 19 on abuse of a dominant position. The dispute is settled in early 2001 as the Swedish Market court rules largely in favor of SCA. SAS is prohibited from applying its EuroBonus program on those domestic routes where there is competition. Although the case hosts an array of intriguing topics, e.g. defining the relevant market and determining dominance, this text revolves around the issue of abuse. Assuming that SAS is a dominant actor in the defined market, the key concern is then whether its frequent flyer program, EuroBonus, simply embodies everyday market practice in air travel or if it constitutes abuse of a dominant position. This means that two interpretations of the EuroBonus-program clash against each other as the parties present their arguments: on the one hand, an everyday market behavior practiced by SAS; on the other, a deviation from the ideal-type market conduct promoted by SCA.

The paper seeks to contribute to our understanding of the interrelation between ideas and principles concerning markets and marketing on the one hand, and market(ing) practice on the other. This topic is increasingly attended to also outside of marketing (see, e.g., Callon 1998). It is one particular such tradition that has inspired our method for mapping the controversy between practices and principles, the sociology of science and techniques (confer Law (1986, 1994), Latour (1987, 1996)). Most importantly, we switch from an ostensive definition of the world to a performative ditto. From this perspective, the controversy concerning the EuroBonus program can be seen as a series of attempted translations (confer Latour (1987)) through which the parties seek to manifest their respective views before the court. These translations

together form a framing process (confer Callon 1998, Goffman 1986) through which the parties seek to add reality to their particular reading of the situation. The ruling arrived at by the Market court (MD 2001:4) stabilizes the controversy, at least for some time, since emergent FFP practices and potential controversies associated with these are likely to perform the market in other ways yet.

The text is divided into four main parts. Initially, the perspective adhered to, a performative view of market action, is presented together with its implication for how we choose to delineate the controversy. We then briefly look at the relevant legislation, and then at a few general accounts of the particular marketing practice under study, i.e. the enforcement of customer loyalty. In the next part, the case is presented. There, the two parties are invited to present their respective positions, and the Market court its motives for the final ruling. We conclude by discussing how this ruling still is but a temporary stabilization of FFP practice.

A performative view of markets and marketing

How can the interrelation between market(ing) principles and market(ing) practice be studied? In this paper, we use an approach developed within the sociology of science and techniques for studying how scientific facts are established (see, e.g., Law 1986, 1994; Latour 1987, 1996). To date, the perspective has had a limited impact on research in the field of marketing (but see Kjellberg 2001; Kjellberg and Andersson 2003).

A central aspect of this approach is a shift from an *ostensive* to a *performative* definition of the world (Latour 1986). Underlying the performative definition is an ontological assumption of variability, that is, the world is not assumed to be characterised by stable principles, but rather by changing practices. A methodological consequence of this is that we allow the involved actors to define each other as well as the relevant aspects of their world, and that we follow the efforts of these actors to realise their version. This is possible since we study a controversy which involves questions regarding the constitution of (market-ing) reality. To understand how this situation unfolds, we would be ill-advised to apply an elaborate theoretical framework that establishes à priori what the world under study is or is not like (Latour 1987).

Constructing the narrative

In line with this position, we have constructed our narrative using the official documents exchanged, most often petitions – ‘pronouncements’ – filed with the Market

court. Since SAS files an appeal that urges the Market court to invalidate the original decision taken by SCA (which is where our story takes off) the first part of the account actually takes place outside the courtroom. It involves an exchange of views that could be called the ‘preparatory controversy’ which ultimately is settled in court during the main proceedings.

The resulting narrative is not intended to be descriptive, but has been ‘designed to isolate the features that are crucial for a particular problem’ (Friedman 1953, p 36), largely like one of Weber’s ideal types. In our case, the problem of interest is the interrelation of market(ing) practice and market(ing) principles, particularly the evaluation of EuroBonus according to the principles of Swedish antitrust legislation. Hence, the narrative is not exhaustive; we limit ourselves to the issue of abuse, and apply our own judgments as to the relevance of various aspects for this particular issue. As discussed above, however, in determining the relevance of any specific aspect, we have strived to ‘follow the actors’. That is, we have sought to apply their frames of reference and to reflect their views.

Devising a possible explanatory scheme

Through an abductive process (Alvesson and Sköldberg 1994), we subsequently propose a vocabulary for interpreting our case. That is, we seek to combine insights from following how this particular controversy unfolds with concepts and ideas that have been suggested in studies of other kinds of controversies. We make no claims as to the possibility of generalising the specific conclusions from our particular case. However, the concepts that we use are sufficiently general to be applicable when analysing other types of market(ing) controversies, including ones that take place outside the realm of a legal dispute.

The Swedish Competition Act and abuse of dominant position

The Swedish Competition Act (SFS 1993:20) resulted from a translation of the European antitrust legislation. Just as its main source of inspiration, the Swedish text revolves around two major restraints on competition, collaboration between companies (article 6) and abuse of a dominant market position (article 19). According to the latter, companies and/or associations of companies are not allowed to abuse, horizontally or vertically, a dominant position on the relevant market (where dominance refers to their

market shares). Unlawful conduct is sanctioned, e.g. through a conditional fine should the company not immediately discontinue a particular abusive market behavior.

[Article 19]

Any abuse by one or more undertakings of a dominant position on the market shall be prohibited. Such abuse may, in particular, consist in

1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
2. limiting production, markets or technological development to the prejudice of consumers;
3. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage have no connection with the subject of such contracts.

Figure 1; Article 19 of the Swedish Competition Act (SFS 1993:20)¹

Article 19 stipulates as unlawful gains from abusive behaviour, once it can be established that a company (or an association of companies) occupies a dominant market position. That is to say, dominance is a necessary but not sufficient criterion for the article to be applicable. It is not abusive to be dominant per se. But the way in which such a position of market power might in fact be used ‘horizontally’ and/or ‘vertically’ *to the unlawful disadvantage of others*, is (Konkurrensverket 2003). As furthermore learned from Figure 1, four cases of possible abuse can be identified. *On the one hand* there can be ‘exploitative abuse’ according to which an own market position is drawn upon to directly further one’s own interests; *customers are hurt* (the first two examples). *On the other hand* abuse can be ‘exclusionary’, meaning that *competitors* are directly hurt by a company that holds a dominant market position (the last two examples). So both short-term direct (exclusionary) and long-term indirect (exploitative) potential harm to customers and competitors are covered by the article. As figure 1 shows, the law does not specifically define abuse. Rather, the presence of abuse should be determined with reference to the particular context in each individual case (Carlsson et al 1995, p 334, Bernitz 1996, p 58, Korah 1997, pp 3-4, Wetter et al 1999, pp 419-420).

Loyalty programs as a facet of relationship marketing

The gradual development of individual exchange transactions into exchange relations is by no means a novel aspect of the economy. Replacing the transaction with the relation

¹Konkurrensverket 2003

as the focal point of attention involves interweaving the past, present, and future and affects, among other things, power-dependence constellations (confer Emerson 1962). In normative business language this is what *relationship marketing* or *loyalty management* (confer Peppers and Rodgers 1997) is about; the supplier seeks to have more consumers spend more. Most of what is written on such relationships in modern times owes a genuine debt to the framework erected some hundred years ago by social science pioneers on the continent, be it Simmel, Mauss, Weber or Durkheim. Consider for a second how Simmel (1955 (1908), p 64) chose to describe the attainment of commercial success (the ‘winning over’ of the customer).

But just as often, this winning over also means in its effect such a psychological connection, the founding of a relationship – from the momentary relation established by a purchase in a store to a marriage.

Although an empirical reality since long (confer Johanson 1966, Hammarkvist et al 1982, Norman 1992), the academic interest in exchange relationships was inspired by work within economic sociology from the early 1970s and onwards (confer Scott 1991). In this tradition, the explanatory power of the relationship was brought to the fore, demonstrating the merits of relation-centered analysis over a conventional transaction-based ditto. For instance, Baker (1984) showed that when the number of securities traders increase, market efficiency goes down (as they form sub-cliques). Further, Granovetter (1985) showed that economic action cannot be explained by efficiency criteria alone (but most notably by the social context). In both cases, the relationship makes the difference. For the past decade, relationship-centered marketing has been the *sine qua non* of normative writings on services and business-to-business. However, it was for a long time absent in the mainstream (confer Sheth and Parvatiyar 1995 on the similarities with the very foundations of capitalism). Consider as a case in point the differences between the first edition of Kotler’s *Marketing Management* (1967) and a more contemporary version (Kotler 2000). Whereas relationships are absent in the former, they are at least discussed in the latter (although one may question their compatibility with the fundamental assumptions of the marketing-mix perspective, confer Johanson and Mattsson (1994)).

Contemporary work in the area often start from the observation that it is more profitable to keep a customer than to get a new one (confer Söderlund 1997). This holds particularly in a transparent context characterized by increased competition and technology that is well-suited to encode customer relationships. But consumers do not

stay unless they find a reason for staying, which means that their satisfaction becomes an issue (confer Oliver 1999). The prevalence of supply market alternatives and consumers' need for variety-seeking might of course create situations where this intuitive condition does not hold. Still, the dominant idea seems to be that satisfied customers pay off as they stay with the supplier and do not spread negative word-of-mouth. The aim to increase profitability per customer and to tie them closer in economies where attention is the only real scarce resource (confer Peppers and Rodgers 1997) ultimately means to make consumers more loyal. Besides everyday-observations of how suppliers compete for our attention and our potential loyalty, there is a host of contributions in this particular vein identified as loyalty management. Customer clubs and loyalty programs urge us to become members and spend more in a more foreseeable fashion. This loyalty engineering by means of bonus systems is an undisputable facet of early 21st century consumer markets. It is adopted by suppliers in many markets, at times successfully, and rather seldom questioned, irrespective of the fact that the alleged benefit that accrues to us as consumers is far from obvious.

EuroBonus on trial²

Like most major airlines, SAS applies a customer loyalty program, EuroBonus. As part of its marketing strategy, SAS thus tries to increase customer loyalty by granting bonus flights as a compensation for flights already undertaken through a system of bonus points. The points serve as a source of redemption for later flights thus discounted at the time of the first. The consequence is that a EuroBonus member-passenger who considers traveling by SAS (or by any of its alliance sisters) in addition to the first flight also receives a debenture regarding future flying options. Obviously, this factor might affect the selection criteria when various carrier alternatives are considered.

In addition to the kind of structural loyalty aimed at through the EuroBonus program, SAS also obtains access to unique and individualized customer data on consumption patterns and preferences. In the start-up phase EuroBonus only applied to international travel but since 1997 (following a change in the Swedish tax legislation) it applies equally also to the domestic flights.

In retrospect, SAS characterises the new program as a reaction to the practices of their American competitors. Allegedly, SAS experienced a sudden drop in demand for

²All translation from Swedish by the authors

traffic in and out of Chicago in the early 1990s. The explanation arrived at was that American Airlines offered their customer a bonus through a program called AAdvantage®. SAS then decides to introduce something of the kind. The new program takes off fast when it is launched in 1992 and SAS notes a large inflow of members.

According to SAS, airline competition appeared in a new guise in those days as re-/deregulation and FFPs jointly changed the rules of the game. Subsequently, this was added to by the creation of global airline alliances. These collaborations are based on a 'hub-spoke'-reasoning and is considered crucial for a peripheral airline like SAS. When asked directly, the head of SAS' FFP states that the impact of FFPs for passenger choice of airline should not be overestimated. In SAS' experience it is (in falling order of importance) the accessible network, the price, the service, other factors, and then bonus point redemption possibilities that matter for people's choice of airline.³

EuroBonus – a questionable practice

In November 1998 the Swedish Competition Authority (SCA) receives a complaint from Braathens Sverige AB, a competitor to SAS on domestic flights (Konkurrensverket 1998). In February 1999, another complaint is received from the Swedish Confederation of Travel Agents (Konkurrensverket 1999a). The complaints concern 'the use of loyalty-creating conditions in company-specific contracts, travel agent contracts, and EuroBonus' (Konkurrensverket 1999b, p 3).

SCA tries the complaints out and decides to impose upon SAS, at a penalty fine of SEK 100 million, the discontinuation of its EuroBonus program on domestic flights (Konkurrensverket 1999b).⁴ SCA concludes that EuroBonus constitutes an abuse of dominant position according to article 19 of the Competition Act (SFS 1993:20). SAS appeals against the decision to the Market court, referring primarily to the fact that 'the relevant market delimitation pursued by SCA [is] incorrect and not in accordance with legal practice of the EU' (Marknadsdomstolen, 2001, p 2)). SAS urges that the decision taken by SCA should be invalidated, something which SCA disputes.

Returning to article 19 of the Competition Act (SFS 1993:20), there are three questions that must be answered whenever abuse is suspected.

³This information mainly stems from an interview conducted (SAS 2003).

⁴Upon a question from SCA, SAS has by then altered its practices concerning company-specific contracts and travel agent contracts. As a consequence, SCA leaves these complaints unattended .

1. Which is the relevant market?
2. Is the defendant predominant in this market?
3. Provided dominance prevails, does the defendant, by the scrutinized practice, abuse its thus dominant position in this market?

Since this text revolves around the topic of possible abuse we will take the answers to the first two questions for granted thus ‘accepting’ the position assumed by the Market court. Accordingly, the relevant market is defined as ‘regular domestic air transport of passengers,’ and ‘the composite market share of SAS inclusive inter alia the company’s extensive line network and financial strength proves that SAS has got a dominant position on the relevant market’ (MD 2001, p 48). But is this dominance abused? That is the issue that we follow through the controversy that develops as the parties successively present their arguments, from the original decision by SCA in late 1999 to the final pleas during the main proceedings at the Market court in the autumn 2000. The presentation format goes as follows. Firstly we listen to how the parties themselves choose to present their original views. Although not verbatim (except for when italics are used) we believe this represents a fairly good and accurate representation of the styles in which the arguments appear. Thereafter we, the external observers, make a summary of the recurrent petitions that unfold prior to the final proceedings in the Market court. The positions as spoken out by the parties and the ruling of the Market court during these final proceedings conclude this section of the paper.

Enough talk. Let the curtain rise!

The decision by SCA as of November 12, 1999

For us this is all very clear. When an abuse is considered it is crucial to observe that a *predominant company has got a particular responsibility not to further weaken competition in markets where it operates* (SCA (1999b, p 21)). That is, a dominant company must necessarily be measured against a special yardstick that takes into account the particular market responsibility such an organization has. To us, an abuse is a business method that diverges from what can be considered as normal practice. Because after all, we are here to protect the normal functioning of markets. When it comes to defining what a dominant company could or could not do, it is necessary to consider an array of factors such as market conditions, the very character of the conduct

undertaken and the effect that this conduct has for competitors and customers. This is quite obvious from the practice of the EU represented by the motivations in the *Hoffman-LaRoche* and *Michelin* cases.

A discount system that creates loyalty can be deemed abusive if such a system lacks an objective justification, such as when volume discounts are offered on the basis of cost reductions. This particularly holds when exclusiveness (eventually substituted by a progressive scale of discount) and a limited time frame are present in the discount arrangement. We admit that a retroactive yearly bonus is not entirely equivalent to a loyalty discount since the time frame in the former is not fixed at the time of purchase. But this could nevertheless be estimated by the supplier on an individual basis which means that a bonus system could constitute a loyalty-creating system of discount. And then it seems that we are quite close to what could be seen as an abuse. In the case of FFPs in general we would like to draw your attention to what Mr Drabbe, who represents the (EU-)Commission, says:

[U]nder certain conditions, the border-line may be transgressed between a non-abusive quantitative rebate and a form of rebate with the object or effect of restricting passengers' freedom to choose freely their sources of supply in air transport and thus of impeding market access of competitors. ... FFPs are a clear attempt to induce passengers to stay loyal to one airline for all of his/her trips (SCA 1999b, p 25).

This clearly shows that FFPs are murky arrangements. A central feature of FFPs is that the points earned are used by the individual traveler, irrespective of who has paid for the tickets. That is, the right of bonus redemption accrues to the businessperson herself and not to the company paying for the tickets that have generated the bonus. A loyalty program membership can then be looked upon as a fringe benefit. This is not the case for bonuses that consumers enjoy connected to what they pay for themselves.

The traveler is thus highly likely to base her choice of company to fly with on the provision of personal advantages, thus attributing less importance to the company's schedule or prices. Since the traveler benefits from the bonus but does not pay for the ticket, normal incentives for price competition are absent (SCA 1999b, pp 25-26).

Let us now focus on the particular case under scrutiny, that of SAS and their EuroBonus program. SAS dominates and has many competitive advantages on the Swedish domestic market for passenger air transport. This should be added to the dubious effect on competition of FFPs such as EuroBonus. For these topics must necessarily be considered in parallel. Taken together, the nature of EuroBonus and the

market position of SAS mean that other carriers are unlikely to be considered by passengers, even though there are alternatives with own bonus programs. As discussed above, dominant companies such as SAS must be given a special responsibility in this regard. SAS is not *any* airline on the Swedish market; it is SAS.

We contend that the fragile competitive situation on the Swedish market means that the loyalty-creating character of EuroBonus benefits SAS in an unsound manner as conventional price competition is weakened. The program also constitutes an entry barrier to the detriment of an already weak competition. The fact that similar loyalty programs are in place in other market contexts does not alter this fact.

There is thus no acceptable reason for SAS to apply EuroBonus in Sweden in the current manner. This application hence constitutes abuse of dominant position (SCA (1999b, p 28)).

SAS' appeal as of December 3, 1999

To understand the issues involved here it is necessary to appreciate the drastic changes that the market for air passenger transport is undergoing. SCA has chosen to apply the 'small brush' in tuning out the details of 'small Sweden', for us, as the company that we are, this is simply not possible. Basically, increased overall competition and changed travel patterns put higher demands on airlines today than before. The vast majority of carriers has faced these new demands 1) by forming worldwide alliances (which means that competition is between alliance constellations rather than between individual airlines!) and 2) by using of FFPs. This is an incontestable fact for us, whether we like it or not. That is to say, given the market conditions at hand, FFPs and their crossover impact within the alliances, make up a natural and established marketing practice adhered to by all companies, more or less everywhere.

[M]ost major international airlines apply some kind of FFP. These systems constitute since long a well established and generally accepted means of competition in both domestic and international air traffic. The structure of the individual markets play no role in this regard ... For SAS this means that the application of EuroBonus cannot be seen as connected to the particular position that SAS enjoys in the Swedish domestic air traffic market (SAS 1999a, pp 29-30).

It is hence also evident that no difference is made between international and domestic markets. This means that on a global level, there are no restrictions on the domestic applicability of FFPs, something applying also to companies such as

Lufthansa and Air France that are both dominant at home. We would also like to emphasize that FFPs, although not tried out extensively, are not deemed abusive according to the EU-view as long as market newcomers are invited to join in. According to some earlier statements (when the EU considered the collaboration between us and Lufthansa), SCA also seems to share this position.

We would like to draw attention to the fact that SCA, in lieu of the commission's statement on the issue, did not oppose the application of EuroBonus on the Swedish domestic market (SAS 1999a, p 28).

EuroBonus is very open and very similar to other FFPs in that membership is not exclusive. Many individuals are in fact members of several programs. There is in consequence neither customer nor supplier exclusivity present; anyone is basically allowed to enter.

Hence, there is a definite practice on the part of the Commission concerning the handling of FFPs. According to the Commission it is enough to allow competitors to access these [FFP] systems in order to counteract the entry barriers that otherwise could prevail. This implies that the decision taken by SCA is a distinct deviation from the Commission's view on FFPs and puts in jeopardy the uniform application of the EU-legislation (SAS 1999a, pp 28-29).

We would also like to draw your attention to the statements made by Mr Drabbe and stress that he states that it is only under certain conditions that FFPs might be harming. Considering the case of *Hoffman-La Roche* we want to emphasize that the EU-view has it that abuse of dominance presupposes that the measures undertaken must deviate from those which are normal in a competitive market. This seems also to be the position of the Swedish Market court, judging from its ruling in the case involving the Swedish Postal Office.

The Market court stresses that also very dominant companies may, like any other company, take reasonable measures in order to meet competition from other companies (SAS 1999a, p 29).

As SCA insists on discussing the particularity of the Swedish domestic market we would like to add the following. Since EuroBonus is already in force since a few years it is already possible to assess the likely impact thereof on domestic competition. Judging from the turnover development of Malmö Aviation (another domestic carrier) in recent years, the impact of EuroBonus must be negligible. Flying from Bromma (a smaller airport than Arlanda that SAS uses, but closer to the Stockholm city center),

this company is able to quote higher prices than SAS and does in parallel experience a substantial income growth.

Just like other companies, SAS must be allowed to meet competition. This is particularly important since SAS faces competition from actors that are part of large international alliances. ... The application of EuroBonus can in no way be seen as constituting an abnormal means of competition. Abuse in breach of section 19 of the Competition Act therefore does not prevail (SAS 1999a, p 33).

The parties' unfolding petitions to the Market court

During the seven-month period from mid-December 1999 and onwards the parties file a number of petitions with the Market court, pronouncements that hence pave the way for the main proceedings to be held during the ensuing autumn semester (SCA 1999c, SAS 1999b, SCA 2000a, SAS 2000a, SCA 2000b, SAS 2000b, SCA 2000c, SAS 2000c, SCA 2000d). Before moving on to the main proceedings in the Market court, and the central aspects of the parties' final argumentations, it seems useful to recapitulate the nuts and bolts of these arguments and complement this with a brief comment from us as externally positioned observers. Although far from exhaustive, the below account of the controversy reveals two almost diametrically opposed positions.

According to SCA it is without any doubt that EuroBonus constitutes an abuse of dominant position by SAS. The major arguments in support of this view are:

1. The EU, and in particular Mr Drabbe, finds that there is a major risk of FFPs being abusive, they can in fact be deemed abusive until the contrary is proven.
2. The reason FFPs are mostly abusive is that they foreclose the market by means of their strong loyalty-creating impact.
3. The use of FFPs renders the market mechanism ineffective since price and quality are no longer the main selection criteria as is normally the case, something vindicated also by SAS' own statements concerning Sturup airport.
4. FFPs are also abnormal in the sense that they constitute a fringe benefit, there is in fact a touch of bribery therein, since the traveler gains personally from what the employer pays for. And she gains more the more she concentrates her purchases where she could gain a lot, with a dominant supplier
5. The market situation in Sweden is vulnerable as competition is very weak which means that exceptions can never be granted regarding abuse.

6. The comparison of Sweden to other markets is irrelevant since these markets display characteristics very different from those that prevail in Sweden.
7. SAS has a special kind of responsibility due to its exceptionally strong market position; any conduct on the verge of abuse must thus be regarded as unlawful.

A striking contrast is provided when we look at the main arguments presented by SAS as to why the use of EuroBonus cannot ever be an abuse.

1. The position of the EU, as endorsed by Mr Drabbe, is that FFPs are acceptable as long as they are open to entry also for market newcomers, a prerequisite complied with by EuroBonus.
2. The use of FFPs is a normal and well-established practice in the air travel market.
3. Since alliances and not individual airlines compete, any issue of abuse must be considered in this light.
4. People are often part of several FFPs which means that the FFPs do not foreclose the market.
5. There are no real proofs that EuroBonus has a strong loyalty-creating effect.
6. The turnover development of competitors shows that the impact of EuroBonus on the Swedish market is negligible.
7. All other airlines that have got FFPs apply them, and are allowed to apply them, also in their home market.
8. In general the arguments presented by SCA are not applicable to the conditions that prevail in today's markets, they constitute too much of a theoretical reasoning to be useful.
9. The argumentation of SCA is at times a bit blurred, such as when EuroBonus at times is said to mean a cost increase and at other times a cost decrease
10. The external reports referred to by SCA are simply out of date whereas more accurate reports show that FFPs do not really impact the choice of airline that much.

In view of the arguments brought forward we would like to note the following:

- a. In their argumentation the parties generally pursue their own line of reasoning, occasionally, however, they choose to directly oppose the other party. In these

cases, some external representation is often referred to in support of the position defended by the opposing party.

- b. SAS seeks to frame the context widely (and discuss other phenomena) as the world market whereas SCA talks about Sweden. Which framing is the more relevant is not for us to dwell on, but obviously, the choice of frame will have import on the evaluation of the EuroBonus practice. This is a little bit reminiscent of how comparing a giant fresco in a medieval duomo and a clean-cut water-color portrait. Whereas details sometimes are in the dark in the former case, the latter provides a less clear view of the context.
- c. Sometimes the parties choose to enroll the same actors (such as Drabbe). When acting as their spokespersons, however, they make highly diverging interpretations as to their positions. At other times, they question the reasoning of the counterpart by enrolling alternative actors (e.g. the external reports alluded to).
- d. One party may draw directly on 'mistakes' made by the other party. For instance when SCA refers to a statement made by SAS' market director or when SAS claims that SCA presents internally inconsistent arguments regarding the cost consequences of EuroBonus.
- e. The identity of the customer is not very well established given the importance it should have. Is the customer the traveler, her employer, or maybe both?
- f. The main interest that SCA is trying to protect is very abstract (competition in Sweden), whereas for SAS it is very concrete (their business success).

Before inviting the Market court on to the stage for its ruling we shall have a brief look at how the parties stage their performances in the course of the main proceedings.

The final arguments by SAS in the autumn proceedings of the Market court

[We believe it is beyond doubt that] *also dominant companies are allowed to protect their commercial interests by competing ... in accordance with normal market conduct. ... [It is furthermore obvious] that the Commission does not rule out the existence of bonus programs ... [and that] there is a uniform Commission praxis as regards the bonus programs. ... The bonus program EuroBonus is like other bonus programs a legitimate and normal means of competition in the air travel market ... [which means] it does not oppose article 19 of the Competition Act. ... If the bonus program has got the loyalty-creating impact that SCA alleges this would have meant more tangible*

effects on the market. ...A ban on EuroBonus on Swedish domestic travel weakens both SAS' position within the Star alliance and the position of the alliance as such and it entails a tangible risk that ... positive effects are hindered to the disadvantage of travelers. ... Another central function of the EuroBonus program, like all bonus programs, is its importance as a customer data base. This function of a bonus program is today possibly even more important to the airlines than its sales-promotion impact. The value thereof is that airlines by application of their programs can identify and communicate with their customers and thereby establish a relationship that is built upon mutual exchange (Marknadsdomstolen 2001:4, pp 15, 16, 17, 20-21).

The final arguments by SCA in the autumn proceedings of the Market court

The outspoken position of the Commission regarding the application of the airlines' various loyalty programs has not in any single case concerned a judgment in a case where an abuse of dominant position is at stake, and in consequence it is not possible to reach a firm conclusion as regards the practice of the Commission. ... In all antitrust cases the starting point is that the conduct under scrutiny shall be judged in light of the particular market conditions which prevail in the individual case. Every measure taken on a highly concentrated market with the result that customers are tied to the predominant company and thereby are out of reach for the competitors must be judged as unacceptable in such a market. ... The purpose of the loyalty programs is that they shall tie the customers to the airlines by a means which is less costly than price reductions and quality-improving measures, that is, via other than normal means of competition. ... The programs fulfill the said purpose primarily as the bonus advantage accrues to the traveler and mostly not to the payer of the trip. ... The customer lock-in of customers that SAS claims it needs ... cannot reasonably be acceptable in light of the domestic market situation. The conduct is in consequence an abnormal means of competition. ... It is not acceptable from the perspective of the Swedish consumers that a situation is created that in principle entails a de facto monopoly in Sweden just because a particular company shall be able to operate in an international market (Marknadsdomstolen 2001:4, pp 26-27, 28-29, 31).

The ruling of the Market court

Just like the Market court has spoken out in an earlier verdict ... also a predominant company, like any company, is allowed to undertake reasonable measures in order to meet competition from other companies. ... The conditions on the Swedish domestic air travel market are ... such that competition is not easily promoted. ... It is beyond doubt that bonus programs have got a loyalty-creating effect. ... Since a traveler obtains the most advantageous payoff from EuroBonus membership by concentrating her traveling with SAS or the alliance wherein the company is a party, there arises, as SCA argues, a considerable loyalty-creating effect. ... In the Market court's opinion the loyalty-creating effect of the EuroBonus program could affect price formation via a reduced price sensitivity among travelers. ... Taking into account [the limited competition in the Swedish air travel market] it means, in the view of the Market court, that the EuroBonus program, applied by SAS, with its considerable loyalty-creating impact and its damaging effect on market entry constitutes yet another obstacle for the maintenance and development of competition. Given these conditions SAS' application of the EuroBonus program cannot be deemed an acceptable means of competition [also in light of what SAS furthers regarding the wide-spread application of bonus programs internationally and the particular design of the EuroBonus program]. ... The market court finds that the reasons presented by SAS in favor of an application of the EuroBonus program, irrespective of its harm to competition [such as SAS' international position and the maintenance of the customer data base], separately or together, do not motivate an acceptance of the program. In consequence, SAS' application of EuroBonus on the Swedish domestic air travel market must be considered an abuse of the company's dominant position (Marknadsdomstolen 2001:4, pp 48, 49, 50, 51, 52, 53).

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With no possibility of further appeals, it would seem that for SAS, an established, and successful marketing practice would have to be discontinued as a consequence of the ruling of the Market court (at least for Swedish domestic flights on distances where SAS faces competition). Obviously, then, EuroBonus was unable to withstand the trial of strength that it was put through as a consequence of the complaints filed by SAS' competitor Braathens Sverige AB and the Swedish Confederation of Travel Agents. Below, we will discuss some of the lessons that we draw from the case.

On the construction of market(ing) practices and principles

Our account sketches the contours of the controversy between SAS and SCA as it emerges through the parties' own efforts to frame the EuroBonus-practice. What is the relevant context for evaluating this practice? Does it, or does it not have a 'loyalty-creating effect'? If it does, is this effect serious enough to render competition through price and quality ineffective? For the purpose of increasing our understanding of the interrelation of market(ing) practices and principles, we will now leave the parties to the controversy behind and try to combine lessons from this particular case with concepts and ideas from another realm, that of constructivist market studies. What can then be learned?

Translating practices and principles

Two very different perspectives clash during these efforts, those of the market practitioner and the market theorist. Most often, these perspectives live quietly in parallel, as practice and principle seldom meet. But here, when marketing practice is brought to court, the yardstick is not other practices (as is the case when competing for customers) but the codified economic principles of the market.

However, the case suggests that it may be unwise to separate strongly between market(ing) principles on the one hand, and market(ing) practices, on the other. Just as the legal principles have their "ideo-logical" backdrop, so has EuroBonus; and just as EuroBonus is practiced, so are the legal principles. As far as the forming of market(ing) practice is concerned, we are simply dealing with a series of different situations, each of which has a potential import on market(ing) practice.

A central feature of these situations are the attempted *translations* (Callon 1986) that the actors perform in order to receive preferential treatment as interpreters of EuroBonus. The reason for characterising the efforts of the parties as translations is twofold: first, whatever the parties choose to bring before the court, they both transport and transform it; second, the fate of these statements, reports, and experts ultimately rests in the hands of others (Latour 1986). In the case of the proceedings, to a considerable extent in the hands of the Market court.

By analogy, this applies also to the ruling of the Market court. It contributes to the construction of both market(ing) practice and market(ing) principles, but the effect of the ruling lies in the hands of SAS, their customers, SCA, etc. It constitutes an attempted stabilisation of a certain practice and a certain principle, but requires active

participation from others. This is particularly so as the Swedish Market court proves to be a highly precarious entity. In fact, as far as SAS vs SCA is concerned, the Market court now exists only in the form of its ruling. Hence, if the attempted stabilisation is to have any enduring effect, it must be maintained by others.

Let us take a brief example: To SAS, the ruling is highly impractical since it does not define under what conditions it is applicable (when does competition exist). Since the Market court does not comment on its rulings, SAS has found it necessary to contact SCA on two occasions, when there has been changes that potentially will affect the competitive situation on certain distances. These contacts, then, serve to maintain the ruling of the court, but also imply a further translation of it to a novel situation.

The morning after, both principles and practice will continue to evolve. They are continuously constructed and reconstructed, through this particular controversy, through the everyday practices of SAS, its alliance partners and its competitors, through SCA, through our efforts to study them, etc.

Forming market(ing) practice through framing and overflowing

Our story supports Callon's contention that market(ing) overflows trigger framing efforts (confer Goffman 1986 (1974); Callon 1998). Allegedly, the EuroBonus-program was modeled on a competing airline's practice. In the late 1980's, SAS arrived at the conclusion that the bonus-program applied by American Airlines interfered with its ability to compete on certain distances. In short, SAS' framing of their operations in terms of how potential customers made their choice of airline, did not perform as expected. Something called FFPs were affecting their reality, and consequently had to be taken into account.

The predecessor of EuroBonus, an insignificant VIP-program in SAS' own words, was deconstructed and new ideas were translated into the EuroBonus-program. Since these events are not really the focus of our account, we are unable to supply details as to the sources of the new ideas. Similarly, it is possible that the EuroBonus-program anno 1992, could be viewed as a breach of the Swedish Competition Act in force at the time. However, since no efforts seems to have been made to this effect, this is irrelevant for our purpose here.

Then, as EuroBonus begins to stabilize as a practice, most notably seen in the program's content developments and the inflow of members, and as the new Competition Act comes into force accompanied by a new and powerful authority of

surveillance (SCA), the contours of a controversy slowly become visible. Here, as well, the starting point for SAS is the recognition of an overflow. Compared to its predecessor, SCA attempts to assume a much more active role in the forming of market(ing) practice. In the period immediately preceding the controversy as depicted here, there is an exchange of questions and answers between SAS and SCA regarding the use of EuroBonus. Letters from the authorities become a very concrete facet of market(ing) practice for SAS, and consequently SCA is recognised as a new and important actor to take into account.

Following SAS' joint creation of and membership in the Star Alliance, EuroBonus also changes guise. And the very prevalence of FFPs seems to attract the attention of SCA in a way not known of before following the formation of such alliances (at times tried out by the EU-commission). In this period, the legally manifest principle is reconstructed over and over again as cases are brought before the Market court, and as the EU-experience in the area grows.

The decision taken by SCA in November 1999 sets off an intensive period of (re)framing efforts on behalf of the two parties. It is through these efforts that we are able to sketch the contours of the controversy. As noted above, all these efforts have the character of translations. They include *defining* the situation at hand; *enrolling* others in support of this definition, e.g. experts, statistics, competitors; and *establishing* the right to speak on behalf of absent parties, such as the customers.

In the aftermath of the controversy, it is obvious that EuroBonus has been reconstructed following the verdict, but also that other events have contributed to this process of successive transformation. In short, as SAS also argued during the proceedings, the framing of EuroBonus suggested by SCA and performed by the Market court is, it seems, too limited really to be practicable. Among such events we find the gradual development and adaptation of the Star alliance program, the overall market development for air travels with its drastic drop in business volume resulting in far fewer outstanding bonus debentures, SAS' acquisition of Braathens (the competitor that filed the original complaint). The effort of the Market court to stabilise EuroBonus, becomes not only a temporary one, but also a highly partial one.

We believe that this characterisation of the case in terms of framing and overflowing can further our understanding of how market(ing) practice is shaped. If any formulation and realisation of a particular version of the market is subject to *overflowing* it must consequently be actively maintained. That is to say, since any

attempted framing of the market, and of what is an accepted practice in that market, necessarily is incomplete, each included entity constitutes a potential conduit through which the world outside can make itself present. The ruling of the Market Court is therefore a temporary rather than an ultimate stabilisation of the situation. In this role it may affect, *for some time*, similar controversies as a prejudice of law. As such, however, it will be subject to a process of framing through which the relevant reality is once again defined.

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