



OBSERVATORY ON COMPETITION LAW ENFORCEMENT

Acquisition of Air Berlin subsidiary LGW by Lufthansa conditionally approved by the European Commission

Carmo Ayres Pereira

On 21 December 2017, the European Commission announced the approval of Lufthansa's proposed acquisition of LGW (an Air Berlin asset) under the EU Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings).

Air Berlin filed for insolvency in August 2017. Though a bidding process was launched for the sale of Air Berlin's assets and a number of bids for various parts of Air Berlin were received, on September 2017 a decision to continue negotiations exclusively with Lufthansa for most of these assets was announced (the other bids were therefore rejected, except for easyJet's, concerning Air Berlin's Berlin Tegel operations).

Under the EU Merger Regulation (Article 7(1)), a concentration with Community dimension shall not be implemented until it has been declared compatible with the common market. The Commission has the duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds and to prevent concentrations that would significantly impede competition. Additionally, it can give a temporary approval for certain parts of a transaction.

On October 2017, Air Berlin entered into a sale and purchase agreement with Lufthansa to acquire:

- Leisure air carrier NIKI with its aircraft, crew and slots¹;
- Regional air carrier LGW, which had been primarily providing feeder traffic for Air Berlin's short and long-haul operations at Berlin and Düsseldorf airports; and
- A collection of additional Air Berlin aircraft, crew and slots at several EU airports, in particular in Austria, Germany and Switzerland (these assets were later transferred to LGW).

On 13 December 2017, during the course of the Commission's merger review process, Lufthansa decided to drop the acquisition of NIKI, as it posed serious risks that European consumers would face reduced choices and higher prices, long-term. In fact, Lufthansa's and NIKI's activities overlapped on around 130 routes. As a result of the takeover, competition would have been very limited on 70 of these 130 routes, approximately. Moreover, on around 50 of those routes Lufthansa would have had a quasi-monopoly for the supply of seats to tour operators and passengers. Proposed remedies by Lufthansa and market participants were

¹ The permission to land and take-off at a specific date and time at an airport.



OBSERVATORY ON COMPETITION LAW ENFORCEMENT

considered insufficient to avoid harm to consumers and competition. Lufthansa later decided to exercise its pre-negotiated right to drop NIKI from the scope of the transaction. This would lead to NIKI filing for insolvency on the same day (the sales process launched for this carrier is ongoing).

Following Lufthansa's decision, the Commission limited its investigation to the impact of the remaining part of the transaction on competition. It found that the increase in Lufthansa's slot portfolio at Düsseldorf airport, through the acquisition of LGW, was likely to adversely affect passengers in terms of fares and/or choice of services.

Lufthansa offered a set of commitments to address such competition concerns. It proposed limiting the transfer of slots at Düsseldorf airport for the summer season to the number of slots used by two aircraft. As the European Commissioner for Competition, Margrethe Vestager, had the opportunity to highlight, at Düsseldorf airport Lufthansa's slot portfolio would only increase by 1% and half of all the slots would be held by Lufthansa's competitors. The Commission concluded that the proposed transaction, as modified by the final commitments, would no longer raise competition concerns. This decision is conditional upon full compliance with the commitments and without prejudice to the application of the EU Slots Regulation (Council Regulation (EEC) No 95/93 of 18 January 1993, on common rules for the allocation of slots at Community airports).

No concerns were identified at the other airports where Lufthansa acquired slots, either because such airports were not as highly congested, the size of Lufthansa's slot portfolio after the acquisition did not create competition issues or due to the low increment generated by the transaction.