

**Summary of Commission Decision**  
**of 22 June 2009**  
**declaring a concentration compatible with the common market and EEA Agreement**  
**(Case COMP/M.5335 — Lufthansa/SN Airholding)**  
(notified under document C(2009) 4608)  
(Only the English text is authentic)  
(Text with EEA relevance)  
(2009/C 295/10)

On 22 June 2009 the Commission adopted a decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings <sup>(1)</sup>, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at:

[http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html)

**I. INTRODUCTION**

- (1) On 26 November 2008, the Commission received a notification of a proposed concentration by which the undertaking Deutsche Lufthansa AG (LH, Germany) acquires sole control of the undertaking SN Airholding SA/NV (SNAH, Belgium) by way of purchase of shares.

**II. EXPLANATORY MEMORANDUM**

**A. THE PARTIES**

- (2) Deutsche Lufthansa AG (LH or the Notifying Party) is a full-service network carrier with its hubs at Frankfurt International Airport and Munich airport, and a base at Düsseldorf airport. Its two core activities are the air transport of passengers and cargo. LH controls Swiss International Air Lines Ltd (LX), based at Zurich airport, Air Dolomiti, Eurowings, and low-cost carrier Germanwings. Both LH and Swiss are members of the Star Alliance. The Commission approved the project of acquisition of bmi by LH on 14 May 2009 <sup>(2)</sup>.
- (3) SN Airholding SA/NV (SNAH) is the holding company of SN Brussels Airlines (SN), a Belgian network carrier with its hub in Brussels Zaventem Airport. SN's core activity is the air transport of passengers. SN is not a member of any alliance. LH and SN are hereafter referred to as 'the Parties'.

**B. THE CONCENTRATION**

- (4) LH intends to acquire initially 45 % of SNAH's shares, having call options for the remaining shares which can be exercised starting from the first quarter of 2011. Although the present transaction will be completed in two steps, already upon completion of the first step, i.e. the acquisition of 45 % of SNAH's share capital, LH will exercise sole control over SNAH.

**C. COMMUNITY DIMENSION**

- (5) The notified concentration has a Community dimension within the meaning of Article 1(2) of the EC Merger Regulation.

**D. AIR TRANSPORT OF PASSENGERS**

**1. The relevant product and geographic markets**

- (6) The Parties' passenger air transport activities overlap in particular on a number of short-haul routes out of Brussels.
- (7) The market investigation confirmed the Commission's practice in previous cases to consider the relevant market for scheduled passenger air transport services on the basis of the 'point of origin/point of destination' (O&D) city-pair approach while all substitutable airports are included in the respective points of origin and points of destination.
- (8) As regards the distinction between time-sensitive and non-time-sensitive customers, it is not necessary for the Commission to reach a conclusion as to the existence of two distinct product markets for time-sensitive as opposed to non-time-sensitive passengers since the assessment of the competitive situation on the routes affected by the transaction does not differ regardless of the existence of such a distinction.
- (9) The market investigation confirmed the Commission's practice in previous cases that for flights of less than three hours, indirect services do not generally constitute competitive constraint on direct services.

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

<sup>(2)</sup> Case COMP/M.5403 — Lufthansa/BMI.

- (10) The Commission further investigated the issue of substitutability between Brussels National Airport in Zaventem (BRU) and Antwerp Airport (ANR). There are strong indications that flights from ANR are not substitutable with flights from BRU. In any event, even if flights from/to BRU and flights from/to ANR were considered as being part of the same market, they would only be remote competitors. Thus, an entry by a competitor offering flights from ANR on routes where competition concerns were identified during the investigation would not counteract the anti-competitive effects of the merger on these routes.

## 2. Treatment of LH's alliance partners

- (11) LH's alliance partners should not be considered for the determination of affected markets because no merger-specific spillover effects are expected to arise concerning the relationships between SN and LH's partners. With respect to the competitive analysis on the affected markets, the Commission assesses the relationship between LH and its alliance partners and its consequence for their incentive to compete post-merger on a route-by-route basis.

## 3. Route-by-route assessment

### 3.1. The Belgium–Germany bundle of routes

- (12) On the Brussels–Frankfurt route, the Commission found that the merger would lead to a monopoly for time-sensitive passengers. It would also eliminate the close competition between LH and SN for non-time-sensitive passengers and although the merged entity would face competition from the train, the constraint of the train would not be sufficient to compensate for this loss of competition. For all passengers, the merger would eliminate the closest competitor to LH. As a result, the merger is expected to significantly impede effective competition under all alternative market definitions.
- (13) On the Brussels–Munich and Brussels–Hamburg routes, the merger would lead to a monopoly for both time-sensitive and non-time-sensitive passengers (and therefore also for a market including all passengers).
- (14) On the Brussels–Berlin route, easyJet announced that it will expand from one to two daily frequencies as of winter IATA season 2009/2010, allowing for same-day return trips. The Commission concluded that easyJet will sufficiently constrain the merged entity, even for time-sensitive passengers.

### 3.2. The Belgium–Switzerland bundle of routes

- (15) On all three routes between Belgium and Switzerland (Brussels–Basel, Brussels–Geneva and Brussels–Zurich),

one of the Parties is an operating carrier while the other party is a marketing carrier under their code-share agreement. The Commission first investigated whether the code-share agreement should be set aside for the purpose of determining the proper counterfactual.

- (16) On Brussels–Basel, irrespective of the proper counterfactual, the Commission concluded that there is no significant impediment to effective competition as this route is too thin to support direct services by two independently operating carriers.
- (17) On Brussels–Geneva, where SN is the operating carrier, the Commission concluded that LX is not considered as a potential competitor. Thus, there is no competition concern on this route.

- (18) On Brussels–Zurich, where LX is the operating carrier, as regards the counterfactual analysis, the Commission concluded that the code-share agreement would likely be terminated absent the merger because SN would join the one-world alliance (and possibly even be acquired by BA) in the absence of the merger. As a result of the end of the code-share, SN would be likely to enter the Brussels–Zurich route. Therefore, the merger would eliminate the significant likelihood of SN's entry and would therefore lead to a significant impediment of effective competition on the Brussels–Zurich route for both time-sensitive and non-time-sensitive passengers.

### 3.3. Entry barriers

- (19) On the four routes Brussels–Frankfurt, Brussels–Munich, Brussels–Hamburg and Brussels–Zurich, there are significant entry barriers (e.g. slot constraints notably at peak time at one or both ends, hub/base advantages, market presence of the merged entity in Belgium, Germany and Switzerland, etc.); these barriers are particularly high on hub-to-hub routes such as Brussels–Frankfurt, Brussels–Munich and Brussels–Zurich. As a consequence of these high entry barriers, no airline is likely to enter on any of these routes to defeat the anti-competitive impact of the merger under the conditions currently prevailing on these markets.

### 3.4. Other short-, mid- and long-haul routes

- (20) Several other short-, long- and mid-haul routes are affected by the present transaction. However, the proposed concentration does not significantly impede effective competition in the common market as regards any of these routes.

#### 4. Conclusion

- (21) The Commission concluded that the transaction, as originally proposed by LH, would lead to a significant impediment to effective competition on the Brussels–Frankfurt, Brussels–Munich, Brussels–Hamburg and Brussels–Zurich routes, both for time-sensitive passengers and non-time-sensitive passengers, and therefore also for a market including all passengers. The transaction would not lead to competition concerns on the other routes affected by this transaction.

#### E. AIR TRANSPORT OF CARGO

- (22) The Commission concluded that the transaction is unlikely to significantly impede effective competition with respect to any of the air transport of cargo markets.

#### F. EFFICIENCIES

- (23) On the basis of the information submitted, the Commission concluded that the efficiencies are not verifiable and to a large extent are not merger-specific, and that it is not likely that they would benefit consumers on the affected routes to such an extent that they could counterbalance the competitive harm. Indeed, paragraph 84 of the Horizontal Merger Guidelines notes that 'it is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of market power, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects'.

#### G. COMMITMENTS

- (24) LH offered commitments in the form of slots, free of charge, within 20 minutes of the requested time, to allow a new entrant to operate flights on each of the four routes where the Commission identifies competition concerns (hereafter Identified City Pair) for up to three frequencies per day in the case of Brussels–Hamburg and Brussels–Munich, and two frequencies a day in the case of Brussels–Frankfurt and Brussels–Zurich. The commitments provide for a slot allocation mechanism whereby the allocation of the requested slots would occur in a timely manner, as early in the season as possible. Furthermore, as a general rule, the new entrant will obtain grandfather rights over these slots, i.e. would be entitled to use the slots transferred from the Parties for a different intra-European city pair than the Identified City Pairs, once it has operated the relevant Identified City Pair during two full consecutive IATA Seasons for the Brussels–Hamburg route, four full consecutive IATA Seasons for the

Brussels–Munich and Brussels–Zurich routes and eight full consecutive IATA Seasons for the Brussels–Frankfurt route.

- (25) In addition, the commitments offer to a new entrant on the Brussels–Hamburg route the possibility to enter into a special prorate and code-share agreement allowing the new entrant to place its codes on flights operated by the Parties from Brussels for purposes of offering a connecting service to/from Hamburg. Finally, the commitments also include 'ancillary' remedies such as interlining and intermodal agreements, special prorate agreements and FFP access agreements.
- (26) The commitments constitute a comprehensive package which takes into consideration past experience with remedies in merger cases in the aviation sector. The commitments take account of the fact that slot congestion is an important entry barrier on the problematic routes in this case. In light of this, they are designed to remove this barrier and foster entry on the routes where competition concerns were identified.
- (27) The commitments were market-tested with customers and competitors of the Parties. A large number of respondents considered them sufficient to remove the competition concerns created by the merger. Finally, considering the interest demonstrated by several airlines in entering routes where competition concerns have been identified, the Commission concluded that the commitments are very likely to lead to entry by one or several airlines on the Identified City Pairs in a timely manner and that this entry will suffice to resolve the competition concerns identified on these markets.

#### III. CONCLUSION

- (28) The transaction as originally proposed by LH would significantly impede effective competition in the common market or in a substantial part of the common market within the meaning of Article 2(3) of the Merger Regulation. However, LH submitted a set of commitments susceptible to restore effective competition.
- (29) The transaction would not lead to a significant impediment of effective competition, subject to the implementation of the commitments submitted by LH.
- (30) Consequently the concentration is compatible with the common market and the EEA Agreement pursuant to Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement, subject to compliance with the commitments submitted by LH.