



2024/1665

13.6.2024

COMMISSION DECISION (EU) 2024/1665

of 12 June 2024

transferring the monitoring and enforcement of commitments made binding in Case M.6447 – IAG / bmi to the designated national competition authority of the United Kingdom pursuant to Article 95(2) of the EU-UK Withdrawal Agreement

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to Article 95(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ⁽¹⁾ (Withdrawal Agreement),

Having regard to the Treaty on the Functioning of the European Union ⁽²⁾,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ⁽³⁾, and in particular Articles 6(1)(b) and 6(2) thereof,

Whereas:

1. The Merger Decision and the Commitments

- (1) In its decision of 30 March 2012 ('the Merger Decision') ⁽⁴⁾, the Commission declared compatible with the internal market and the EEA Agreement, subject to remedies ('the Commitments'), the acquisition of the UK airline British Midlands Limited ('bmi'), by the International Consolidated Airlines Group ('IAG'), the holding company of British Airways, Iberia, Aer Lingus, Vueling and Level.
- (2) The main aspect of the Commitments is the release and transfer of a number of Slots ⁽⁵⁾ at London Heathrow airport ('LHR'), to be operated by Prospective Entrants on the routes London-Aberdeen, London-Edinburgh, London-Nice, London-Moscow ⁽⁶⁾, London-Cairo, and London-Riyadh. In addition, IAG committed to carry connecting passengers to feed the long-haul flights of competing airlines out of LHR. In this respect, the Commitments allow IAG's competitors on long haul routes to enter into Special Prorate Agreements with IAG. Other aspects of the Commitments concern, inter alia, fare combinability and frequent flyer programs.
- (3) The Commitments are of an unlimited duration and will remain in force as long as there is no change to the competitive situation in the relevant markets, justifying a waiver of the Commitments, and are implemented with the support of a Monitoring Trustee.
- (4) Over the years since the adoption of the Merger Decision, Slots were awarded to a number of Prospective Entrants pursuant to the Commitments. Currently, Slots are still available and are being offered to Prospective Entrants in advance of each IATA Season (that is the winter and summer seasons used by IATA and the airline industry in general).

⁽¹⁾ OJ C 384 I, 12.11.2019, p. 1.

⁽²⁾ OJ C 326, 26.10.2012, p. 47.

⁽³⁾ OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

⁽⁴⁾ C(2012) 2320.

⁽⁵⁾ In this decision, capitalised terms bear the meaning given to them in the Commission decision of 30 March 2012 in Case M.6447 – IAG / bmi, unless otherwise indicated.

⁽⁶⁾ Since IATA Winter Season 2022/2023 Slots are not offered to be operated on the route to Moscow due to the sanctions against Russia as a result of Russia's war of aggression against Ukraine.

2. The legal Framework

- (5) On 1 February 2020 the United Kingdom withdrew from the European Union.
- (6) The Withdrawal Agreement was concluded between the European Union and the European Atomic Energy Community, on the one part, and the United Kingdom, on the other part. It was approved by Council Decision (EU) 2020/135 ⁽⁷⁾ of 30 January 2020 and entered into force on 1 February 2020.
- (7) The Withdrawal Agreement provides for a transition period, which started on 1 February 2020 and ended on 31 December 2020, in accordance with Article 126 of the Withdrawal Agreement.
- (8) Pursuant to Article 95(1) of the Withdrawal Agreement, the Merger Decision, which was adopted before the end of the transition period and was addressed to legal persons established in the United Kingdom, is binding on and in the United Kingdom.
- (9) In accordance with Article 95(2) of the Withdrawal Agreement, as a matter of principle, the Commission continues to be competent to monitor and enforce commitments given or remedies imposed in, or in relation to, the United Kingdom in connection with any proceedings conducted by the Commission under, inter alia, the Merger Regulation.
- (10) However, Article 95(2) of the Withdrawal Agreement allows for the monitoring and enforcement of such commitments or remedies to be transferred to the designated national competition authority of the United Kingdom, i.e. the Competition and Markets Authority (the 'CMA'), by an agreement between the Commission and the said authority.

3. Suitability of the case to be transferred to the CMA

3.1. Agreement of the CMA

- (11) The CMA agreed to the monitoring and enforcement of the commitments in connection with the Merger Decision to be transferred to it, pursuant to Article 95(2) of the Withdrawal Agreement, by letter of 5 April 2024 from the Executive Director, Mergers of the CMA to the Deputy Director-General for Mergers of DG Competition of the Commission.

3.2. Views of interested parties

- (12) The Withdrawal Agreement does not specify any requirements for the transfer of the monitoring and enforcement of commitments, in particular in relation to any interested parties. However, it follows from each person's right to good administration ⁽⁸⁾ that the parties that may be affected by the transfer should be given the opportunity to express their views in this respect.
- (13) The transfer changes the authority responsible for the monitoring and the enforcement of the Commitments.
- (14) In the first place, the transfer affects the legal position of IAG, on whom the Commitments have been made binding, since following the transfer IAG would have to perform its obligations under the Commitments vis-à-vis the CMA in accordance with national UK procedures and no longer vis-à-vis the Commission in accordance with procedures under Union law.
- (15) In the second place, the transfer affects the legal position of third parties who have acquired rights under the Commitments, in particular those parties that were awarded Slots pursuant to the Commitments. The General Court has held that the conditions for taking over activities, pursuant to commitments under the Merger Regulation, are determined by those commitments which are thus important for their commercial choices and are likely to give rise to legitimate expectations on their part ⁽⁹⁾.

⁽⁷⁾ Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 1).

⁽⁸⁾ Article 41(2) of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

⁽⁹⁾ Case T-430/18, American Airlines, Inc., ECLI:EU:T:2020:603, §275.

- (16) By analogy to the Commission's Remedies Notice ⁽¹⁰⁾ providing, in the context of a waiver, modification or substitution of commitments that the Commission will take account of the view of third parties and the impact a modification may have on the position of third parties (and thereby on the overall effectiveness of those commitments) ⁽¹¹⁾. The Commission will also consider whether modifications affect the rights already acquired by third parties after implementation of such commitments.
- (17) In the third place, the transfer may also be of interest to other third parties that may in the future want to apply for Slots under the Commitments.
- (18) The Commission has therefore invited any interested parties to express their views on the potential transfer of the monitoring and enforcement of the Commitments to the CMA. The Commission invited IAG ⁽¹²⁾, as the party on whom the Commitments have been made binding, as well as Air France ⁽¹³⁾, Saudi Arabian Airlines ⁽¹⁴⁾, EgyptAir ⁽¹⁵⁾, Virgin Atlantic Airways ⁽¹⁶⁾ and Air Canada ⁽¹⁷⁾, all currently enjoying rights obtained under the Commitments, to submit comments. Finally, the Commission announced publicly its preliminary view that the monitoring and enforcement of the Commitments are suitable to be transferred to the CMA, pursuant to Article 95(2) of the Withdrawal Agreement and invited any interested third parties to submit their possible observations ⁽¹⁸⁾.
- (19) While the Commission is not required to obtain the interested parties' approval of the transfer, it will take due account of the views expressed by those parties and verify that the transfer does not have an undue adverse impact on the rights they previously acquired pursuant to the Commitments.
- (20) In its letter of 13 March 2024, IAG confirmed it has no objection to the proposed transfer.
- (21) By email of 13 March 2024, Air France KLM ('AF-KLM') expressed concerns with respect to the possibility that the proposed transfer would result in a modification of the Commitments, and noted that in case there would indeed be a change in the Commitments, it would 'strongly encourage' the Commission 'to keep the monitoring of the remedies, as it is entitled to pursuant to Article 95(2) of the Withdrawal Agreement, so as to ensure the effectiveness of the remedies, thereby also safeguarding the interests of EU travellers on that route'.
- (22) By letter of 9 April 2024, another remedy taker expressed its view that the Commitments are better monitored and enforced by the Commission. The remedy taker explained that where it has previously faced concerns as a remedy taker under the Commitments in light of the conduct of IAG/British Airways, it has often found it beneficial to raise such concerns directly with the Commission. The remedy taker considers that this approach was effective given the Commission's detailed background and experience of the underlying investigation into the IAG / bmi case and its understanding of the scope and intended aims of the Commitments. The remedy taker is concerned that the CMA will inevitably not hold the same background and experience and that, by transferring responsibility to the CMA, the monitoring and enforcement of the Commitments would be less effective.
- (23) No other parties expressed views in relation to the proposed transfer.

⁽¹⁰⁾ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C 267, 22.10.2008, p. 1), §74.

⁽¹¹⁾ See, e.g. Case M.4494 – Evraz/Highveld, Commission decision of 24 September 2019, recitals 14-16.

⁽¹²⁾ By letter of 28 February 2024.

⁽¹³⁾ By letter of 28 February 2024.

⁽¹⁴⁾ By letter of 28 February 2024.

⁽¹⁵⁾ By letter of 1 March 2024.

⁽¹⁶⁾ By letter of 25 March 2024.

⁽¹⁷⁾ By letter of 25 March 2024.

⁽¹⁸⁾ OJ C, C/2024/1987, 6.3.2024, ELI: <http://data.europa.eu/eli/C/2024/1987/oj>.

3.3. Assessment

- (24) Beyond the requirement for an explicit agreement of the CMA, Article 95(2) of the Withdrawal Agreement does not list any conditions or criteria for such transfer. Therefore, it is at the Commission's discretion to decide whether a case is suitable for a transfer, based on a case-by-case assessment, while taking due account of any views expressed by any interested parties.
- (25) For the reasons set out below, the Commission considers that the monitoring and enforcement of the Commitments in this case is suitable to be transferred to the CMA.
- (26) First, the case concerns mainly UK and other non-EEA consumers and, as such, it is appropriate that the CMA would be responsible for the monitoring and enforcement of the Commitments in order to protect the interests of UK consumers. Pursuant to the Commitments, the remedy Slots are to be operated on specific routes. Only one of these routes involves a destination in the EEA (LHR-Nice), whereas the remaining routes on which remedy Slots could be operated are either intra UK routes (LHR-Aberdeen and LHR-Edinburgh), or routes connecting London with non-EEA destinations (Moscow, Cairo, and Riyadh). In 2019, the number of Origin and Destination ('O&D') and total passengers (i.e. including transferring passengers) on the LHR-Nice route (350 034 and 511 494 passenger respectively) represented 16 % and 13 % of the O&D and total passengers on all remedy routes (2 188 002 and 3 811 214 passengers) ⁽¹⁹⁾. In this respect, the Commission considers that the CMA has all incentives to implement the Commitments, including on the LHR-Nice route, as the Commitments affect many UK customers. Moreover, the CMA has reason to implement the Commitments, including on the LHR-Nice route, as the services provided to EEA customers on this route are also provided in the UK, and as the LHR-Nice route matters for ensuring the connection of leisure and business travellers to the London metropolitan area.
- (27) Second, the Commitments with respect to Slots and pro-rate agreements among others are to be implemented at LHR in the UK, and the LHR Slots are subject to UK rules and regulatory decisions by UK national authorities including the LHR slot coordinator and the UK's Department for Transport. The CMA is better placed than the Commission to handle contacts with these authorities.
- (28) Third, the Commission does not consider that the transfer will have an adverse effect on any of the interested parties. In the first place, with respect to AF-KLM's concern that the Transfer may lead to a modification of the Commitments, the Commission notes that the current decision transfers the Commitments as they stand. No modification or waiver of the Commitments were requested by IAG in the context of the proposed transfer. While it cannot be excluded that modifications or waiver requests will be made in the future pursuant to UK national proceedings, any such requests would have to be assessed based on the principles set out in the review clause included in the Commitments, which are transferred as a whole.
- (29) In the second place, with respect to the other remedy taker's concern that the CMA will not hold the same background and experience compared to the Commission to monitor and enforce the Commitments (as described in recital 22 above), the Commission notes that the Monitoring Trustee, who has expertise in the aviation industry and has assisted the Commission with the monitoring of the Commitments since the Merger Decision, will continue providing similar assistance to the CMA after the transfer. Furthermore, the CMA has experience in monitoring and enforcement of slot remedies and pro-rate agreements, through the interim measures issued in its investigation into the Atlantic Joint Business Agreement ⁽²⁰⁾. The Commission therefore considers that the transfer will not negatively affect the effectiveness of the monitoring and enforcement of the Commitments.

⁽¹⁹⁾ Monitoring Trustee estimates using MIDT data and CAA data. In 2023 the share of the LHR-Nice route increased to 24 % (434 214 passengers) and 19 % (633 101 passengers) of the O&D and total passenger on the remedy routes respectively, among others due to the fact that no passengers are currently flying on the LHE-Moscow route.

⁽²⁰⁾ CMA case number 50616, decisions of 7 September 2020 and 4 April 2022.

- (30) Fourth, the case is expected to continue requiring resources in the future. Given that the case mainly affects UK markets and UK consumers, or other non-EEA customers travelling to/from the UK, it seems appropriate that these resources are vested by the UK. As explained in recital 3 above, the Commitments are of unlimited duration and, except for any waiver granted pursuant to the review clause, will remain in force as long as there is no change to the competitive situation in the relevant markets. As long as Slots remain available or become available again, and applications are made to obtain them, decisions assessing the viability of Prospective Entrants applying for remedy Slots and approval of agreements between IAG/British Airways and the remedy takers, as well as decisions granting grandfathering rights will continue to be required. Even if and when all the remedy Slots are granted to remedy takers, monitoring of IAG's compliance with the Commitments will continue as long as the Commitments remain in force.
- (31) Fifth, the transfer of the implementation of all of the remedy obligations is justified and proportionate. It is not possible to separate the LHR-Nice route (the only route with an EEA destination) from the other routes. Pursuant to the Commitments ⁽²¹⁾, Slots are offered as a pool, with a maximal number of Slots that could be used on certain types of routes (namely intra-UK or not). Out of the routes covered by the Commitments, the routes on which the Slots will actually be operated depend on the requests of the Prospective Entrants.

4. Scope of the transfer

- (32) The transfer to the CMA covers the effective monitoring and enforcement of the Commitments in their entirety. As a consequence of the transfer, the Commission will no longer pursue any monitoring and enforcement activities in relation to this case.
- (33) According to the first sentence of Article 95(2) of the Withdrawal Agreement, 'unless otherwise agreed between the European Commission and the designated national competition authority of the United Kingdom, the European Commission shall continue to be competent to monitor and enforce commitments ...'. The second sentence of Article 95(2) refers to the possibility to transfer to the CMA 'the monitoring and enforcement of such commitments ...'. Accordingly, pursuant to Article 95(2) of the Withdrawal Agreement, the transfer shall in principle cover all the aspects of monitoring and enforcement and all the actions necessary for such monitoring and enforcement.
- (34) In view of the above, after the transfer under Article 95(2) of the Withdrawal Agreement, the Commission will no longer intervene regarding any aspect of the monitoring and enforcement of the Commitments. In particular, it can no longer be called upon to review or revoke the Commitments, nor would it impose fines in the event of a violation that happened as of the transfer ⁽²²⁾. Accordingly, after the transfer, the CMA will henceforth be responsible for the monitoring and enforcement of the Commitments in all respects.
- (35) Finally, it should be clarified that, after the transfer pursuant to Article 95(2) of the Withdrawal Agreement, the CMA will be responsible to monitor and enforce the Commitments pursuant to its own national law. In this respect, it is important to note that, pursuant to Article 95(1) of the Withdrawal Agreement, the Merger Decision is binding on the UK. It is thus for third parties to assert their possible rights stemming from the Merger Decision within the domestic legal system of the UK.

5. Conclusion

- (36) On the basis of the considerations set out above, and having taken due account of the views of any interested parties, the Commission concludes that the monitoring and enforcement of the Commitments made binding in Case M.6447 – IAG / bmi should be transferred to the CMA,

⁽²¹⁾ Clause 1.1.2.

⁽²²⁾ This also corresponds to the common understanding that reviewing or revoking commitments and imposing fines should be considered as forms of enforcement of commitments pursuant to the Merger Regulation. This is confirmed by recital 31 of the Merger Regulation which, in relation to enforcement of commitments, refers to the ability to revoke merger decisions and the power to impose financial sanctions. See also Case T-471/11, *Editions Odile Jacob*, §§82-83.

HAS ADOPTED THIS DECISION:

Article 1

The monitoring and enforcement of the Commitments in Case M.6447 – IAG / bmi shall be transferred to the designated national competition authority of the United Kingdom, which shall be informed of this Decision.

Article 2

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 July 2024.

Done at Brussels, 12 June 2024.

For the Commission
The President
Ursula VON DER LEYEN
