



Reports of Cases

Case T-712/16

Deutsche Lufthansa AG
v
European Commission

(Competition — Concentrations — Air transport market — Decision declaring a concentration compatible with the internal market subject to certain commitments — Request for a waiver of part of the obligations forming the subject matter of the commitments — Proportionality — Legitimate expectations — Principle of good administration — Misuse of powers)

Summary — Judgment of the General Court (Sixth Chamber), 16 May 2018

1. *Concentrations between undertakings — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Review clause — Purpose*

(Commission Notice 2008/C 267/01, paragraph 74)

2. *Concentrations between undertakings — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Request for a waiver of part of the obligations forming the subject matter of the commitments — Discretion of the Commission — Judicial review — Limits*

(Council Regulation No 139/2004)

3. *Concentrations between undertakings — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Request for a waiver of part of the obligations forming the subject matter of the commitments — Commission decision — Purpose*

(Council Regulation No 139/2004)

4. *Concentrations between undertakings — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Review clause — Expression of the principle of proportionality — Commission's obligation regularly to review long-term commitments of its own motion — No such obligation*

(Council Regulation No 139/2004)

5. *Concentrations between undertakings — Assessment of compatibility with the internal market — Examination by the Commission — Effect of the Commission's previous decision-making practice — None*

(Council Regulation No 139/2004)

6. *Concentrations between undertakings — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Request for a waiver of part of the obligations forming the subject matter of the commitments — Burden of proof — Commission’s obligations in the event of insufficient evidence*

(Council Regulation No 139/2004)

7. *Concentrations between undertakings — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Commission’s use of fare commitments — Lawfulness*

(Council Regulation No 139/2004; Commission Notice 2008/C 267/01)

8. *Concentrations between undertakings — Examination by the Commission — Commitments of the undertakings concerned capable of rendering the notified operation compatible with the internal market — Request for a waiver of part of the obligations forming the subject matter of the commitments — Commission decision — Commitments intended to dispel serious doubts as to the compatibility of a concentration between airlines with the internal market for routes — Failure on the Commission’s part to take account of all the relevant data — Manifest error of assessment*

(Council Regulation No 139/2004)

9. *Actions for annulment — Pleas in law — Misuse of powers — Meaning*

(Art. 263 TFEU)

1. In competition matters, the commitments that the parties enter into in order to dispel the serious doubts raised by a concentration and to render it compatible with the internal market generally contain a review clause stipulating the conditions under which the Commission, on a request from the merged entity, will be able to grant an extension of time limits or waive, amend or substitute those commitments. As is clear from paragraph 74 of the Commission notice on remedies acceptable under Regulation No 139/2004 and under Regulation No 802/2004, the waiver or amendment of commitments is of particular relevance in the case of behavioural commitments, which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption of the merger decision that made the commitments binding. The purpose of commitments is in fact to remedy the competition problems identified in the decision authorising the concentration; accordingly, the commitments might have to be amended, or the need for them might disappear, depending on how the market situation develops.

(see para. 31)

2. The substantive rules of Regulation No 139/2004 confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. The same is true for the assessment not only of (i) the compatibility of a concentration, but also of (ii) the need for commitments to be given in order to dispel the serious doubts raised by a concentration.

As regards, more particularly, a request for a waiver of commitments rendered binding by a decision declaring a concentration compatible with the internal market, although the appraisal of a concentration requires predictions as to future developments that become more difficult and uncertain the longer the relevant time horizon is, the assessment of a request for a waiver of commitments does not necessarily give rise to the same difficulties of prospective analysis. Similarly, there is no provision which lays down periods within which the procedure for examining such a request or certain stages of that procedure have to be completed or which, more generally, regulates or organises that procedure. Nevertheless, as is the case of the other decisions relating to

concentrations, the appraisal of a waiver request entails sometimes complex economic assessments in order, in particular, to ascertain whether market circumstances, more generally, have changed significantly and on a permanent basis, so that the commitments are no longer necessary for the purpose of overcoming the competition problems identified in the merger decision that made the commitments binding.

Therefore, the Commission also has a certain discretion in the assessment of a waiver request entailing complex economic assessments. Consequently, review by the Courts of the European Union of the exercise of that discretion must take account of the margin of assessment implicit in the provisions of an economic nature which form part of the rules on concentrations. However, the Commission is obliged to carry out a careful examination of a request for the waiver of commitments, to conduct, if necessary, an investigation, to make the appropriate enquiries and to base its conclusions on all the relevant information.

(see paras 33-39, 41)

3. A decision concerning a request for the waiver of commitments does not presuppose withdrawal of the decision authorising the merger, which has made those commitments binding, and does not comprise such a withdrawal. Its purpose is to ascertain whether the conditions laid down in the review clause forming part of the commitments are met or, as the case may be, whether the competition concerns identified in the decision authorising the merger subject to the commitments have ceased to exist.

(see para. 42)

4. Review clauses in the commitments presented by parties to a concentration give expression to the principle of proportionality inasmuch as they allow, under exceptional circumstances, the waiver, modification or substitution of those commitments if it is demonstrated that the latter are no longer necessary or proportionate: however, the mere fact that the commitments have been in force for a number of years does not mean that the serious doubts that they addressed have disappeared and that the commitments are no longer justified. Moreover, it is not for the Commission regularly to review long-term commitments of its own motion; rather it is for the parties bound by those commitments to make a request that they be waived or modified and to establish that the conditions laid down for such waiver or modification are fulfilled.

(see paras 53, 54)

5. When the Commission takes a decision on the compatibility of a concentration with the internal market on the basis of a notification and a file pertaining to that transaction, an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical. Neither the Commission nor, a fortiori, the Courts of the European Union are bound by the findings of fact and the economic assessments made in previous decisions.

(see para. 83)

6. In competition matters, it is indeed for the merged entity requesting a waiver of commitments to provide evidence showing that the conditions for waiving the commitments are fulfilled and the Commission cannot be required to carry out a new market investigation for each waiver request. However, the Commission has investigating powers and effective investigative tools and, if it considers that the evidence put forward by the parties is not sufficiently reliable or relevant or that it needs to be supplemented by other information, it is its responsibility to require more specific information or to carry out an investigation in that regard. In this context, the Commission cannot limit itself to

demanding compelling evidence — without, moreover, specifying what that evidence should consist in — but must establish the inaccuracy of the evidence put forward by the parties, make enquiries or conduct, if necessary, an investigation in order to supplement that evidence or show that it is not conclusive.

(see paras 120, 123)

7. The Commission notice on remedies acceptable under Regulation No 139/2004 and under Regulation No 802/2004 does not exclude fare commitments but points out that such commitments will generally not eliminate competition concerns resulting from horizontal overlaps and that those types of remedies can only exceptionally be accepted if they are supplemented with effective implementation and monitoring mechanisms and if they do not risk leading to distorting effects on competition. Moreover, since all concentrations are assessed individually and in the light of the applicable factual and legal circumstances, the fact that commitments have been refused in some, or even most, cases does not prevent them being accepted in a particular situation provided that they serve to resolve the competition problems identified.

(see paras 130, 131)

8. As regards one of the two routes concerned by the request put forward by the parties to the merger for waiver of the fare commitments, namely the Zurich-Stockholm route, attention must be drawn not only to the failure to carry out a proper examination of certain essential matters and the termination of the joint venture agreement between the applicant and the airline SAS, but also to the fact that the Commission (i) did not take into account either the applicant's undertaking also to terminate the bilateral alliance agreement concluded with SAS or the Trustee's Opinion concluding that there was a substantial market change on the route in question and (ii) did not undertake an adequate analysis of the impact of the codeshare agreement on competition between the airlines Swiss and SAS. Consequently, it must be found that the Commission made a manifest error of assessment inasmuch as it failed to take into account all the relevant information and that the matters relied on in the contested decision are not capable of justifying the rejection of the waiver request relating to the route in question.

(see para. 138)

9. See the text of the decision.

(see para. 150)