Reports of Cases

Case T-240/18

Polskie Linie Lotnicze 'LOT' SA
v
European Commission

Judgment of the General Court (Tenth Chamber, Extended Composition), 20 October 2021

(Competition – Concentrations – Air transport – Decision declaring a concentration to be compatible with the internal market and the EEA Agreement – Relevant market – Assessment of the effects of the transaction on competition – Absence of commitment – Obligation to state reasons)

1. *Concentrations between undertakings – Examination by the Commission – Definition of the market in question – Factual premisses concerning the context of the concentration – Review of the accuracy and relevance of the information relied on*
(Council Regulation No 139/2004, Arts 2 and 6)

(see paragraphs 29, 30, 32-34)

2. *Concentrations between undertakings – Examination by the Commission – Definition of the market in question – Material scope – Undertaking concerned – Concept – Partial transfer of assets – Assessment based only on the assets transferred*
(Council Regulation No 139/2004, Art. 2, Art. 3(1)(b) and Art. 5(2); Commission Notice 2008/C 95/01, para. 136)

(see paragraphs 36-39)

3. *Concentrations between undertakings – Examination by the Commission – Definition of the market in question – Concentration between two airlines providing for the transfer of slots – Criteria – Substitutability of products – Approach based on the airports to which the slots concerned relate*
(Council Regulation No 139/2004, Art. 2; Commission Regulation No 802/2004, Annex I, Section 6; Commission Notice 97/C 372/03, paras 13-17, 20, 21 and 24)

(see paragraphs 42, 43, 50-53, 56-58, 63)

4. *Concentrations between undertakings – Examination by the Commission – Definition of the market in question – Concentration between two airlines providing for the transfer of slots – Burden of proof borne by the party challenging the definition of the market in question –*

Need to adduce serious indicia of the genuine existence of a competition concern requiring examination by the Commission – Lack of information provided by the party challenging the approach adopted
(Council Regulation No 139/2004, Arts 2 and 6)

(see paragraphs 44, 59-62, 64)

5. *Concentrations between undertakings – Assessment of compatibility with the internal market – Examination by the Commission – Assessment of the effects of the concentration on competition – Assessments of an economic nature – Discretion – Judicial review – Scope and limits*
(Art. 263 TFEU; Council Regulation No 139/2004, Arts 2 and 6)

(see paragraphs 68, 69)

6. *Concentrations between undertakings – Assessment of compatibility with the internal market – Examination by the Commission – Assessment of the effects of the concentration on competition – Horizontal effects – Cessation of operations by one of the parties to the transaction eliminating the risk of the operations at issue overlapping in the relevant markets*
(Council Regulation No 139/2004, Art. 2; Commission Notice 2004/C 31/03, para. 5)

(see paragraphs 74, 75)

7. *Concentrations between undertakings – Assessment of compatibility with the internal market – Concentration between two airlines – Assessment of anti-competitive effects – Vertical effects – Assessment of the likelihood of an anti-competitive foreclosure scenario – Compliance with the guidelines adopted by the Commission – Taking into account of the assessment criteria referred to in those guidelines – Discretion of the Commission*
(Council Regulation No 139/2004, Art. 2; Commission Notice 2008/C 265/07, paras 24-27 and 32)

(see paragraphs 78-83)

8. *Concentrations between undertakings – Examination by the Commission – Taking into account of the data provided by the parties to the transaction – Whether permissible*
(Council Regulation No 139/2004, Arts 2 and 6)

(see paragraphs 87-93)

9. *Concentrations between undertakings – Assessment of compatibility with the internal market – Criteria – Anti-competitive effects – Alleged increase in barriers to entry to the market – Fact which is not in itself a sufficient indication of a significant impediment to effective competition*
(Council Regulation No 139/2004, Arts 2 and 6)

(see paragraphs 106-109)

10. *Concentrations between undertakings – Examination by the Commission – Adoption of a decision finding a concentration operation compatible with the internal market without opening Phase II – Condition – No serious doubts – Discretion – No manifest error of assessment – Examination of potential efficiencies which could be generated by that concentration and of commitments not offered by the undertakings concerned – Not required*
(Council Regulation No 139/2004, Art. 2(2) and Art. 6(1)(b); Commission Regulation No 802/2004, Annex I, Section 9; Commission Notice 2004/C 31/03, para. 78 and paras 84 to 87)

(see paragraphs 124-128)

11. *Concentrations between undertakings – Assessment of compatibility with the internal market – Criteria – Anti-competitive effects – Failure to take account of the rescue aid granted to the transferor, inter alia, to achieve the sale of its assets in an orderly manner – Burden of proof borne by the party challenging the decision on the compatibility of the concentration – Assessment*
(Council Regulation No 139/2004, Arts 2 and 6)

(see paragraphs 131-137)

12. *Acts of the institutions – Statement of reasons – Obligation – Scope – Commission decision declaring a concentration to be compatible with the internal market*
(Art. 296 TFEU; Council Regulation No 139/2004, Arts 2 and 6)

(see paragraphs 140-146)

Résumé

The General Court dismisses the actions of the airline Polskie Linie Lotnicze 'LOT' against the Commission decisions authorising the concentrations involving the acquisition by easyJet and Lufthansa, respectively, of certain assets of the Air Berlin group

Faced with a persistent deterioration in its financial situation, the airline Air Berlin plc implemented a restructuring plan in 2016. In that context, on 16 December 2016, it concluded an agreement with the airline Deutsche Lufthansa AG ('Lufthansa') under which it would sublease various crewed aircraft to Lufthansa.

However, the loss of the financial support granted to Air Berlin in the form of loans by one of its main shareholders forced it to apply, on 15 August 2017, for insolvency proceedings to be opened. In those circumstances, the guarantee-backed loan granted by the German authorities as rescue aid, endorsed by the Commission,[1] was intended to enable Air Berlin to continue its operations for a period of three months, in order to allow it, inter alia, to dispose of its assets.

[1] Decision C(2017) 6080 final of 4 September 2017 on State aid SA.48937 (2017/N) – Germany – Rescue Aid in favour of Air Berlin (OJ 2017 C 400, p. 7).

That objective was reflected, in particular, by the conclusion of two agreements. First, an agreement concluded on 13 October 2017 providing for the takeover by Lufthansa of, inter alia, a subsidiary of Air Berlin, to which various crewed aircraft, as well as slots [2] that Air Berlin held at a number of airports (including, in particular, Düsseldorf (Germany), Zurich (Switzerland), Hamburg (Germany), Munich (Germany), Stuttgart (Germany) and Berlin-Tegel (Germany)), were to be transferred prior to the implementation of the agreement. Secondly, an agreement concluded on 27 October 2017 with the airline easyJet plc, aimed primarily at transferring the slots held by Air Berlin, in particular at Berlin-Tegel airport, to easyJet. Air Berlin ceased its operations the following day, before being declared insolvent by judicial decision of 1 November 2017.

On 31 October 2017, Lufthansa notified the Commission, in accordance with its powers in relation to the control of concentrations, [3] of the concentration provided for in the agreement of 13 October 2017. On 7 November 2017, easyJet, in the same manner, gave notice of the transaction provided for in the agreement of 27 October 2017 (together with the transaction notified by Lufthansa; 'the concentrations at issue'). In the light of the commitments given by Lufthansa, [4] the Commission found the concentration notified by Lufthansa to be compatible, by Decision C(2017) 9118 final of 21 December 2017, as it did with the concentration notified by easyJet, by Decision C(2017) 8776 final of 12 December 2017 ('the contested decisions'). The Commission concluded that the concentrations at issue did not raise serious doubts as to their compatibility with the internal market. On that occasion, for the first time in cases concerning passenger air transport services, the Commission did not define the relevant markets on the basis of the point of origin/point of destination ('the O&D markets') city-pair approach. First, it found that Air Berlin had ceased its operations prior to and independently of those concentrations. It concluded that Air Berlin had withdrawn from all the O&D markets in which it had previously been present. Secondly, it found that the concentrations at issue primarily concerned the transfer of slots and found that those slots were not allocated to any particular O&D market. Consequently, it considered it preferable to aggregate, for the purposes of its assessment, all the O&D markets from or to each of the airports to which those slots related. In doing so, it therefore defined the relevant markets as the markets for passenger air transport services from or to those airports. The Commission then went on to verify that those concentrations were not such as to create 'a significant impediment to effective competition', in the present case, in particular, by giving easyJet and Lufthansa, respectively, the ability and incentive to foreclose access to those markets.

Taking the view that the assessment thus carried out by the Commission was incorrect, in terms of both its methodology and its results, Polskie Linie Lotnicze 'LOT' ('the applicant'), which presents itself as a direct competitor of the parties to the concentrations at issue, brought two actions before the Court, each seeking the annulment of one of the contested decisions.

[2] Slots represent the permission granted to an airline to use the full range of airport infrastructure necessary to operate an air service on a specific date and time, for the purpose of take-off or landing.

[3] In the present case, the powers provided for by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

[4] In the present case, in order to dispel doubts as to the compatibility of the notified concentration relating to its position at Düsseldorf airport, Lufthansa had proposed to the Commission, pursuant to Article 6(2) of the EC Merger Regulation, a substantial reduction in the number of slots that would be transferred to it under that concentration.

By its judgments of 20 October 2021, the Court dismisses those actions, thus accepting, in particular, that the Commission could confine itself to a joint examination of the O&D markets from or to the airports to which Air Berlin's slots related, instead of examining individually each of the O&D markets in which Air Berlin, on the one hand, and Lufthansa and easyJet, on the other, were present.

Findings of the Court

In the first place, with respect to the plea alleging a poor definition of the relevant markets, the Court considers, first of all, that it is futile for the applicant to seek to challenge the factual accuracy of the presentation, made by the Commission, of the concentrations at issue and of their context. In that connection, the Court observes, inter alia, that the Commission was entitled to consider that Air Berlin's operations had ceased prior to, and independently of, the concentrations at issue, and that, as a result, Air Berlin was no longer present in any O&D market. Next, in so far as Air Berlin's slots were not associated with any O&D market, the Court considers that the Commission rightly pointed out that those slots could be used by Lufthansa and easyJet, respectively, in O&D markets other than those in which Air Berlin operated. Consequently, the Court holds that, unlike concentrations involving airlines which are still in operation, it was not certain, in this particular case, that the concentrations at issue would have any effect on competition in the O&D markets in which Air Berlin had been present before it ceased its operations. Lastly, the Court finds that the applicant has not provided any serious evidence that an individual examination of the O&D markets that it identified could have made it possible to establish the existence of a significant impediment to effective competition which could not be revealed by the market definition adopted by the Commission.

In the second place, as regards the plea alleging a manifest error in the assessment of the effects of the concentrations at issue, the Court states, at the outset, that, when exercising the powers conferred on it by the EC Merger Regulation, the Commission has a certain discretion, especially with regard to assessments of an economic nature which it is called upon to make in that regard. Consequently, a review by the EU judicature of the exercise of that discretion must take account of the discretionary margin thus conferred on the Commission. Having provided that clarification, the Court considers that the assessment of the effects of the concentrations at issue on the markets for passenger air transport services from or to the airports concerned did not reveal any manifest error of assessment, in view of, inter alia, the low congestion rate at those airports and the limited impact of those concentrations on the increase in the slot holdings that Lufthansa and easyJet had at those airports. As regards, more specifically, the concentration notified by Lufthansa, the applicant is also not justified in claiming that the Commission had made a manifest error in its assessment of the effects of the agreement of 16 December 2016 given, inter alia, that, under that agreement, Lufthansa was already permitted to operate aircraft with crew for a period of six years before it definitively acquired them in the context of that concentration. Lastly, as regards the concentration notified by easyJet, the Court points out that slots are necessary for the provision of passenger air transport services. It concludes that there is a 'vertical' relationship between the allocation of those slots and the provision of those services, and that the Commission was therefore entitled to refer to the guidelines on 'non-horizontal' mergers. [5]

[5] Guidelines on the assessment of non-horizontal mergers under the EC Merger Regulation (OJ 2008 C 265, p. 6) In addition, the Court rejects the applicant's complaint alleging infringement of those guidelines, pointing out that the existence of a significant degree of market power in one of the markets concerned is not, in itself, sufficient for a finding of competitive concerns.

In the third place, the Court rejects the complaints alleging that the commitments given by Lufthansa in the context of the concentration it had notified were insufficient, and that no such commitments were given as regards the concentration notified by easyJet, on the ground that the applicant is not justified in claiming that those concentrations are manifestly liable to constitute a significant impediment to effective competition. For that reason, it also considers the applicant's complaints that the Commission failed to take account of any potential efficiencies which could have been generated by those concentrations to be unfounded.

In the fourth place, the Court observes that the applicant has not shown that the financial support which Air Berlin had received under the rescue aid formed part of the assets transferred to easyJet and Lufthansa, respectively, in the context of the concentrations at issue, and, consequently, rejects the complaints that the Commission should have taken account of that aid for the purposes of its assessment. Furthermore, as regards the infringement of Article 8a(2) of Regulation No 95/93,[6] also alleged by the applicant in one of its actions, the Court points out that the Commission lacked competence to apply that provision.

Lastly, having held that the applicant's plea alleging a failure to state reasons was unfounded and, thus, having rejected all the pleas relied on in each of the two cases, the Court dismisses the two actions, without it being necessary, in those circumstances, to rule on their admissibility.

[6] Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), as amended by Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 167, p. 24).