Reports of Cases

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 – Commitments – Obligation to state reasons)

In Case T-296/18,

Polskie Linie Lotnicze 'LOT' S.A., established in Warsaw (Poland), represented by M. Jeżewski and M. König, lawyers,

applicant,

v

European Commission, represented by L. Wildpanner, T. Franchoo and J. Szczodrowski, acting as Agents,

defendant

supported by

Deutsche Lufthansa AG, established in Cologne (Germany), represented by S. Völcker and R. Benditz, lawyers,

intervener,

APPLICATION based on Article 263 TFEU seeking annulment of Commission Decision C(2017) 9118 final of 21 December 2017 declaring a concentration compatible with the internal market and the EEA Agreement (Case COMP/M.8633 – Lufthansa/Certain Air Berlin assets),

The GENERAL COURT (Tenth Chamber, Extended Composition),

composed of M. van der Woude, President, A. Kornezov, E. Buttigieg, K. Kowalik-Bańczyk (Rapporteur) and G. Hesse, Judges,

Registrar: R. Ūkelytė, Administrator,

* Language of the case: Polish.

having regard to the written part of the procedure and further to the hearing on 10 September 2020,

gives the following

Judgment

Background to the dispute

1 Air Berlin plc was an airline of which Luftfahrtgesellschaft Walter mbH ('LGW') and NIKI Luftfahrt GmbH were subsidiaries. Under an agreement known as a 'wet lease' ('the wet lease'), LGW leased crewed regional airliners to Air Berlin in order to provide feeder traffic for other routes operated by Air Berlin.

2 In 2016, as a result of financial difficulties, Air Berlin implemented a restructuring plan which was to be financed in part by loans from one of its shareholders, Etihad Airways PJSC.

3 On 16 December 2016, in the context of its restructuring plan, Air Berlin concluded an agreement with the intervener, Deutsche Lufthansa AG, ('the roof wet lease') whereby it was to sublease crewed aircraft to two subsidiaries of the latter. Those aircraft had previously been leased from third parties by Air Berlin under dry lease agreements.

4 By decision of 30 January 2017, the Bundeskartellamt (Federal Competition Authority, Germany) approved the roof wet lease.

5 On 9 August 2017, Etihad Airways did not pay the instalment of a loan that was due.

6 On 11 August 2017, Etihad Airways publicly announced that it would no longer provide financial support to Air Berlin.

7 On 15 August 2017, first, Air Berlin filed an application before the Amtsgericht Charlottenburg (District Court, Charlottenburg, Germany) for insolvency proceedings to be opened, which authorised it to continue managing and disposing of its assets under the supervision of an interim administrator.

8 Secondly, the German Government notified the European Commission, in accordance with Article 108(3) TFEU, of an aid measure in the form of a guarantee-backed loan for a maximum amount of EUR 150 million in favour of Air Berlin ('the rescue aid'). By 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; 'the decision declaring the rescue aid compatible with the internal market'), the Commission declared the rescue aid compatible with the internal market. In that regard, it stated that the aid was to enable Air Berlin to continue operations for a maximum of three months, during which time Air Berlin's assets were to be sold.

9 On 10 October 2017, the intervener requested the Commission, pursuant to Article 7(3) of 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), to grant it a derogation from the obligation according to which a concentration cannot be implemented either before its notification or until it has been declared compatible with the internal market. More specifically,

it requested that it be allowed to replace Air Berlin as lessee of several aircraft being leased under agreements with third parties in order to avoid the those aircraft being repossessed because of Air Berlin's inability to pay the amounts due under those agreements. In addition, it requested that it be allowed to lease crewed aircraft from LGW and NIKI Luftfahrt, in order to enable LGW and NIKI Luftfahrt to replace Air Berlin in the context of the roof wet lease.

10 On 13 October 2017, the intervener and Air Berlin entered into an agreement to acquire all shares in LGW and NIKI Luftfahrt ('the agreement of 13 October 2017'). Prior to the implementation of that agreement, Air Berlin was to transfer to LGW certain crewed aircraft, as well as slots for the winter 2017/18 International Air Transport Association (IATA) planning period (season) and the summer 2018 IATA season at eight German airports (Düsseldorf, Hamburg, Munich, Berlin-Tegel, Cologne-Bonn, Nuremberg, Saarbrücken, Stuttgart), three Italian airports (Bologna, Florence and Venice), two Swiss airports (Geneva and Zurich), one Czech airport (Prague), one Danish airport (Copenhagen Kastrup), one Spanish airport (Barcelona-El Prat), one Austrian airport (Salzburg), one Polish airport (Warsaw), and one Swedish airport (Gothenburg).

11 The intervener's request for a derogation referred to in paragraph 9 above was granted by the Commission, subject to conditions, by Decision C(2017) 7355 final of 27 October 2017 ('the decision of 27 October 2017').

12 On 28 October 2017, Air Berlin ceased its operations in the passenger air transport service markets. LGW thus ceased operating as a wet lessor to Air Berlin under the wet lease, but continued to operate as a wet lessor to the intervener under the roof wet lease, pursuant to the decision of 27 October 2017.

13 On 31 October 2017, pursuant to the first subparagraph of Article 4(1) of Regulation No 139/2004, the intervener notified the Commission of the concentration by which it would acquire all shares in LGW and NIKI Luftfahrt, as well as certain other Air Berlin assets which were yet to be transferred to LGW, pursuant to the agreement of 13 October 2017.

14 By order of 1 November 2017, the Amtsgericht Charlottenburg (District Court, Charlottenburg) found that Air Berlin was in a situation of established insolvency and over-indebtedness.

15 On 13 December 2017, the intervener decided not to acquire the shares in NIKI Luftfahrt.

16 On 15 December 2017, the intervener proposed to the Commission that the number of weekly slots at Düsseldorf airport for the summer 2018 IATA season to be transferred to the intervener under the agreement of 13 October 2017 would be reduced from 450 to 108 ('the commitments given by the intervener').

17 By Decision C(2017) 9118 final of 21 December 2017 (COMP/M.8633 – Lufthansa/Certain Air Berlin assets) ('the contested decision'), the Commission held that, in view of the commitments given by the intervener, the acquisition of LGW and the other assets that would be transferred by Air Berlin to the latter ('the concentration at issue') was compatible with the internal market under Article 6(1)(b) and 6(2) of Regulation No 139/2004.

18 More specifically, in the first place, the Commission considered, first, that the concentration at issue primarily entailed the transfer of slots from Air Berlin to the intervener and, secondly, that Air Berlin had ceased its passenger air transport operations prior to, and independently of, that concentration. The Commission noted, in that regard, that those slots were not linked to any

specific routes and that Air Berlin no longer operated any routes. The Commission concluded that, in those circumstances, the assessment of the effects of that concentration on the passenger air transport service markets, defined on the basis of the point of origin/point of destination city-pair approach ('the O&D markets'), failed to capture the 'structural effects' on competition brought about by such a concentration. Accordingly, rather than assessing, in accordance with its previous decision-making practice, the effects of the concentration at issue on each of the markets in which Air Berlin and the intervener were present, it defined the relevant markets for passenger air transport services by aggregating all the O&D markets originating from or arriving at each of the airports at which Air Berlin's slots were transferred to the intervener. The Commission therefore defined the relevant markets as the markets for passenger air transport services from or to those airports.

19 In the second place, the Commission considered that the intervener would have the ability to foreclose access to the relevant markets for passenger air transport services if three conditions were met. First, if the number of slots held by the intervener at one of the airports concerned represented a significant share of the total number of slots at that airport, in particular at the airport's peak times. Secondly, if the concentration at issue significantly increased the number of slots held by the intervener at that airport, in particular at peak times. Thirdly, if the intervener's slot holding could negatively affect the overall available slot capacity at that airport, given the high congestion rate at the airport and the large number of slots held by the intervener.

20 The Commission thus held that the three conditions mentioned in paragraph 19 above were satisfied only as regards Düsseldorf airport during the summer 2018 IATA season. More specifically, it noted that, in the absence of the commitments given by the intervener, the latter would probably acquire a dominant slot holding position which would give it the ability and incentive to foreclose access to the market for passenger air transport services from or to that airport. However, it held that those commitments to reduce the number of slots to be transferred to the intervener were sufficient to eliminate the serious doubts as to the compatibility of the concentration at issue with the internal market.

Procedure and forms of order sought

21 By application lodged at the Court Registry on 7 May 2018, the applicant, Polskie Linie Lotnicze 'LOT' S.A., brought the present action.

22 By letter of 12 June 2018, the applicant requested the Court, pursuant to Article 88 of the Rules of Procedure of the General Court, to adopt measures of organisation of procedure and measures of inquiry relating to the rescue aid, the cessation of Air Berlin's operations and the sale of its assets.

23 By document lodged at the Court Registry on 23 August 2018, the intervener sought leave to intervene in support of the form of order sought by the Commission. By order of 28 November 2018, the President of the Ninth Chamber of the General Court granted that application for leave to intervene.

24 By document of 17 September 2018, the applicant requested that certain information contained in its pleadings and the annexes thereto be treated as confidential. By document of 21 December 2018, the intervener submitted objections to that request for confidential treatment.

25 By order of 20 May 2019, the President of the Ninth Chamber of the General Court granted in part the applicant's request for confidential treatment. By letter of 26 June 2019, the intervener reiterated its objection to the confidential treatment of the data in respect of which that request had been granted.

26 Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Tenth Chamber, to which the present case was accordingly allocated.

27 On a proposal from the Tenth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

28 By way of measures of organisation of procedure of 11 February and 27 April 2020, adopted on the basis of Article 89(3)(b) of the Rules of Procedure, the Court put questions to the Commission. The Commission answered those questions within the prescribed period.

29 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs;

– order the intervener to bear its own costs.

30 The Commission and the intervener contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

31 As a preliminary point, it should be noted that the intervener disputes the admissibility of the action. However, it should be observed in that regard that it is not necessary to rule on the admissibility of an action where it must, in any event, be dismissed on the merits (see, to that effect, judgment of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraphs 51 and 52). Consequently, in the present case, in so far as, for the reasons set out below, the action must be dismissed on the merits, it is not necessary to rule on its admissibility.

32 In support of the action, the applicant raises seven pleas in law, alleging, first, a poor definition of the relevant markets; secondly, a manifest error in the assessment of the effects of the concentration at issue; thirdly, infringement of 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); fourthly, failure to examine any potential efficiencies generated by that concentration; fifthly, the inadequacy of the commitments given by the intervener; sixthly, failure to take account of the rescue aid in the assessment of the effects of that concentration; and seventhly, infringement of Article 296 TFEU.

The first plea, alleging a poor definition of the relevant markets

33 In the context of the first plea, the applicant complains that the Commission adopted a poor definition of the relevant markets. This plea essentially comprises two parts. By the first part, the applicant disputes the premisses underlying the Commission's reasoning, namely first, that Air Berlin, including LGW, had ceased its operations prior to, and independently of, the concentration at issue and, secondly, that the intervener was acquiring only Air Berlin's assets, and not Air Berlin as an undertaking. By the second part, it complains that the Commission did not define the relevant markets for passenger air transport services on the basis of the O&D markets, including where Air Berlin is regarded as having already withdrawn from some of those markets.

34 The Commission and the intervener dispute the applicant's arguments.

The first part of the first plea, alleging that Air Berlin had not ceased its operations prior to, and independently of, the concentration and should be regarded as an undertaking for the purposes of assessing the effects of that concentration

35 In the contested decision, the Commission found that, with the exception of the implementation of the roof wet lease authorised by the decision of 27 October 2017, Air Berlin (including LGW) had ceased its operations on 28 October 2017 and, consequently, withdrawn from all the O&D markets in which it had been present prior to, and independently of, the concentration at issue. In those circumstances, it considered that, in so far as that concentration primarily related to slots, it would result in the takeover by the intervener of Air Berlin's positions, not specifically in the O&D markets in which the latter was present, but at the airports to which those slots related.

36 In the first place, the applicant submits that the Commission was wrong to consider that Air Berlin had ceased its operations independently of the implementation of the concentration at issue. It notes that on 15 August 2017, the day that Air Berlin filed an application for insolvency proceedings to be opened, the German authorities decided to grant rescue aid to Air Berlin. That aid enabled Air Berlin to avoid having its operating licence withdrawn and, consequently, to continue its operations and retain its assets, including its slots. The purpose of that aid was thus to enable some of its slots to be transferred to the intervener, pursuant to Article 8a of Council Regulation No 95/93.

37 In that regard, it is common ground that Air Berlin's insolvency proceedings were opened on 15 August 2017 and that those proceedings arose as a result of Air Berlin's financial difficulties and Etihad Airways' refusal to pay the instalment of a loan to Air Berlin. Furthermore, the applicant does not dispute that, as is apparent from the decision declaring the rescue aid compatible with the internal market, the purpose of that aid was only to delay, for a maximum of three months, the cessation of Air Berlin's operations, not to prevent it.

38 Consequently, Air Berlin would have ceased its operations even in the absence of the concentration at issue, which is why the Commission rightly considered that Air Berlin had ceased its operations independently of that concentration.

39 In the second place, the applicant disputes the fact that Air Berlin had ceased operations prior to the concentration at issue. It submits that the date of the notification of a concentration cannot be a date which is 'indisputable and always used' as a decisive factor in the assessment of that concentration, since it is the notifying party which chooses that date. The notifying party could

thus 'distort' that assessment in such a way as to favour its interests. The applicant infers from this that, in the present case, the Commission should have taken into account a date on which Air Berlin was still operating.

40 More specifically, the applicant argues that Air Berlin did not cease its operations until 28 October 2017, or after the agreement of 13 October 2017 which marked the beginning of the concentration at issue. The fact that, since the opening of the insolvency proceedings on 15 August 2017, Air Berlin had been actively discouraging new bookings in respect of its services does not mean that it was not operating, since, in view of the rescue aid granted to it, it had been able to retain its air operator certificate and its operating licence. Furthermore, the applicant submits that, under Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3), an air carrier which is being wound up should return its slots. However, Air Berlin was granted a temporary licence under Article 9 of that regulation, which allowed it to retain its slots after 28 October 2017, and therefore it cannot be regarded as having definitively ceased its operations on that date.

41 Furthermore, the applicant submits, first, that the deterioration in Air Berlin's financial situation enabled the intervener, as of 2016, gradually to assume control of Air Berlin's 'capacity', in particular through the roof wet lease; secondly, that on 1 February 2017 Air Berlin appointed a former executive of the intervener to the post of CEO and, lastly, that the intervener had confirmed on 5 May 2017 that it had entered into negotiations with a view to acquiring Air Berlin.

42 In that regard, first, it is clear from Article 3(1) of Regulation No 139/2004 that a concentration is to be deemed to arise only where a change in control of the undertakings concerned occurs on a lasting basis. In that regard, it should be observed that it does not matter whether, when they notify a concentration to the Commission, the parties propose to conclude two or more transactions or whether they have already concluded them before notifying them. It is for the Commission to ascertain whether those transactions are unitary in nature, so that they constitute a single concentration for the purposes of that provision. In order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not have been carried out without the other (see, to that effect, judgment of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraphs 105 and 107).

43 In the present case, the links between Air Berlin and the intervener since 2016, alleged by the applicant, do not permit the inference that the intervener had acquired control of Air Berlin prior to the concentration at issue for the purpose of Article 3(1) of Regulation No 139/2004.

44 The fact that a former executive of the intervener was appointed to the post of CEO of Air Berlin on 1 February 2017 does not permit the inference that the intervener acquired control of Air Berlin on that date. Similarly, it cannot be inferred from the May 2017 negotiations, which the intervener entered into with a view to acquiring Air Berlin, that it assumed control of Air Berlin at that time.

45 In addition, as regards the roof wet lease, by which Air Berlin transferred to the intervener the operation of certain crewed aircraft, the applicant merely submits that the Federal Competition Authority had found that that agreement enabled the intervener to boost business development and that a competitor had stated that it was a covert means for the intervener to acquire Air Berlin. However, having found that that agreement did not give rise to competition concerns, the

Federal Competition Authority had dispensed with the need to determine whether the agreement constituted a concentration for the purpose of German law. Furthermore, it must be noted that the applicant has in no way substantiated the competitor's assertion.

46 Moreover, and in any event, it must be noted that the applicant does not claim, let alone demonstrate, that the roof wet lease and the concentration at issue were interdependent transactions, in such a way that one transaction would not have been carried out without the other. On the contrary, it is apparent from Annex C.12 to the reply that the intervener had announced, on 5 May 2017, that it considered Air Berlin's debt to be an obstacle to the acquisition of Air Berlin and that it had therefore not yet decided, on that date, to acquire Air Berlin or any part of it. Consequently, it is not apparent from the evidence produced by the applicant that the conclusion of the roof wet lease on 16 December 2016 depended on the implementation of the concentration at issue. That agreement and the concentration at issue must therefore be regarded as being two separate transactions.

47 Secondly, it should be observed that, under Article 7(1) of Regulation No 139/2004, a concentration with a European dimension may not be implemented either before its notification or until it has been declared compatible with the internal market, unless the Commission grants a derogation from that obligation on the basis of Article 7(3) of that regulation.

48 In the present case, it is true that, by the decision of 27 October 2017, the Commission granted the intervener a derogation on the basis of Article 7(3) of Regulation No 139/2004. However, that derogation related essentially to aircraft lease agreements and not to slots. In addition, it was subject to the condition, inter alia, that, in the event that the concentration at issue was not implemented, those agreements could be either transferred to LGW or to a potential acquirer of LGW, or terminated at their request, without the intervener being able to object or seek compensation. Thus, only a Commission decision declaring that concentration compatible with the internal market could lead to a change of control on a lasting basis of the aircraft concerned. In those circumstances, it should be pointed out that that concentration could not be fully implemented until after the adoption of the contested decision on 21 December 2017, that is to say almost two months after Air Berlin ceased its operations.

49 Therefore, the applicant is not justified in criticising the Commission for having considered that Air Berlin had ceased its operations prior to the concentration at issue.

50 Thirdly, contrary to what is submitted, in essence, by the applicant, the Commission's assessment of the concentration at issue was not vitiated by the intervener's decision to notify that concentration, on 31 October 2017, after Air Berlin ceased its operations.

51 First, it should be observed that, under the first subparagraph of Article 4(1) of Regulation No 139/2004, concentrations with a European dimension referred to in that regulation must be notified to the Commission prior to their implementation and following the conclusion of the agreement concerning that concentration between the undertakings concerned.

52 In the present case, the agreement of 13 October 2017 was concluded before the notification of the concentration at issue, on 31 October 2017. Moreover, it is not disputed that that notification was made prior to the full implementation of that concentration, with the exception only of the matters forming the subject matter of the decision of 27 October 2017.

53 Consequently, by notifying the concentration at issue on 31 October 2017, the intervener complied with the first subparagraph of Article 4(1) of Regulation No 139/2004.

54 Secondly, it should be noted that the control of concentrations aims, on the basis of a prospective analysis of the market structures, to prevent the implementation of a transaction which would significantly impede effective competition in the internal market or a substantial part thereof, in particular by the creation or strengthening of a dominant position (judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 250). It does not therefore entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted. Thus, the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition in a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely (judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraphs 42 and 43).

55 In that regard, it should be noted that the legality of a decision on the compatibility of a concentration with the internal market is to be assessed in the light of the information available to the Commission when the decision was adopted (see, to that effect, judgments of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraph 203, and of 9 July 2007, *Sun Chemical Group and Others* v *Commission*, T-282/06, EU:T:2007:203, paragraph 179). Accordingly, the appraisal by the Commission of the compatibility of a concentration with the internal market must be carried out on the basis of the matters of fact and law existing at the time of notification of that transaction, the economic implications of which can be assessed at the time when the decision is adopted (see, to that effect, judgments of 19 May 1994, *Air France* v *Commission*, T-2/93, EU:T:1994:55, paragraph 70, and of 13 September 2010, *Editions Jacob* v *Commission*, T-279/04, not published, EU:T:2010:384, paragraph 327).

56 However, as observed by the applicant, the exact date of notification of a concentration does not necessarily have a decisive influence on the assessment of that concentration, in particular where, as in the present case, the information used in the prospective analysis is already known before that date.

57 It must be found that Air Berlin's operations had ceased before the notification of the concentration at issue. However, that finding was not decisive since, as is apparent from paragraph 37 above, Air Berlin was insolvent following Etihad Airways' refusal, on 9 August 2017, to pay the instalment of a loan to it, as a result of which Air Berlin would cease its operations definitively. In that regard, the fact, referred to by the applicant, that on 25 October 2017, pursuant to Article 10(4)(c) of Regulation No 95/93 and Article 9(1) of Regulation No 1008/2008, the Luftfahrt-Bundesamt (Federal Office of Aviation, Germany) had granted Air Berlin a temporary licence valid until 3 January 2018, and that that licence authorised it to retain its slots until that date, was not sufficient to enable Air Berlin to resume its operations in view of its insolvency. Therefore, the fact that the concentration at issue was notified on 31 October 2017, which was three days after Air Berlin's operations had actually ceased on 28 October 2017, and not prior to that cessation, was not, in itself, capable of altering the Commission's prospective analysis, including as regards the definition of the relevant markets.

58 In the third place, the applicant criticises the Commission for having artificially disassociated Air Berlin's assets, which are the subject of the concentration at issue, from Air Berlin as an 'entire undertaking', which was one of intervener's rival airlines. Although the intervener acquired only some of Air Berlin's assets, the applicant submits that Air Berlin was both the seller of those assets and one of the parties to that concentration. It adds that only undertakings, and not intangible sets of assets, can be classed as parties to a concentration. However, in view of the transfer of slots and aircraft to LGW for the purpose of implementing the concentration at issue, the intervener did in fact acquire an undertaking in the context of the concentration at issue.

59 In that regard, first, it should be observed that, under Article 3(1)(b) of Regulation No 139/2004, a concentration is to be deemed to arise where a change of control on a lasting basis results from the acquisition, by an undertaking, of direct control of the whole or parts of another undertaking. Furthermore, with regard to the calculation of turnover, Article 5(2) of that regulation provides that, where the concentration consists of the acquisition of parts of an undertaking, only the turnover relating to the parts which are the subject of the concentration are to be taken into account with regard to the seller. Therefore, as is rightly pointed out in paragraph 136 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 (OJ 2008 C 95, p. 1), the undertakings concerned are the acquirer(s) and the acquired part(s) of the target undertaking, but not the remaining businesses of the seller.

60 Therefore, contrary to what the applicant submits, the operations retained by Air Berlin are not to be regarded as an undertaking concerned within the meaning of Regulation No 139/2004.

61 Secondly, it should be noted that the applicant does not dispute the fact, observed by the Commission in recital 13 of the contested decision, that assets may constitute a business with a market presence, to which a market turnover can be clearly attributed. Nor does it dispute that such a business may constitute an undertaking concerned within the meaning of Regulation No 139/2004. In addition, the applicant has not provided any evidence to show that, in the present case, the assets acquired by the intervener, as defined in the contested decision, could not constitute a business with a market presence, to which a market turnover can be clearly attributed.

62 Therefore, the Commission rightly held that the assets acquired by the intervener in the context of the concentration at issue constituted an undertaking or part of an undertaking for the purpose of Regulation No 139/2004, even though Air Berlin had ceased its operations prior to that concentration. Consequently, in so far it is common ground that the intervener acquired only some of Air Berlin's assets, the Commission rightly found that the intervener had acquired control of an undertaking or part of an undertaking corresponding only to certain Air Berlin assets, and that those assets constituted an undertaking concerned within the meaning of that regulation.

63 In those circumstances, the first part of the applicant's first plea must be rejected.

The second part of the first plea, alleging that the Commission should have examined the concentration at issue in each of the relevant O&D markets

64 The applicant complains that the Commission failed to analyse the possible anti-competitive effects of the concentration at issue on the relevant O&D markets.

65 At the outset, it should be observed that, in order to declare a concentration compatible with the internal market, the Commission must, in accordance with Article 2(2) of Regulation No 139/2004, find that the implementation of that concentration would not significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

66 A proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition (judgment of 31 March 1998, *France and Others* v *Commission*, C-68/94 and C-30/95, EU:C:1998:148, paragraph 143). In that regard, it should be observed that the relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, their prices and their intended use (judgment of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 50). In particular, the concept of a relevant market implies that there can be effective competition between the products or services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned (judgment of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 51).

67 However, where it is alleged that the Commission has failed to have regard to a possible competition concern in markets other than those covered by the competitive analysis, it is for the applicant to adduce serious indicia of the genuine existence of a competition concern which, by reason of its effect, should have been examined by the Commission. In order to discharge that burden, the applicant should identify the relevant markets, describe the state of competition in the absence of the merger and indicate what would be the likely effects of a merger given the state of competition in those markets (judgments of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraphs 65 and 66, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraphs 174 and 175).

68 In the present case, the Commission noted, in the contested decision, that the airlines were present on the demand side of the market for airport infrastructure services provided by the airports and on the supply side of the markets for passenger air transport services.

69 As regards, more specifically, slots, the Commission noted that, as is clear from Article 2(a) of Regulation No 95/93, they were defined as the permission given by a coordinator to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport, on a specific date and time, for the purpose of landing or take-off. It concluded that slots were necessary inputs for airlines to gain access to the airport infrastructure services provided by airports and, consequently, to provide passenger air transport services from and to those airports. Consequently, in so far as the concentration at issue was aimed primarily at transferring Air Berlin's slots to the intervener, the Commission considered that the concentration would have effects on the demand side of the markets for airport infrastructure services and on the supply side of the markets for passenger air transport services.

70 In those circumstances, for the purposes of assessing the concentration at issue, the Commission examined whether, as a result of the increment in the number of slots held by the intervener, the latter would have the ability or incentive to foreclose other airlines' access to airport infrastructure services and, consequently, to the markets for passenger air transport services from or to the airports to which Air Berlin's slots related.

71 In that regard, in the first place, the applicant submits that, from the point of view of consumers, passenger air transport services are provided on specific routes and airlines' operations at an airport are conditional on the provision of those services. It concludes that it is not possible to distinguish airlines' operations at an airport from the provision of those services. Thus, the Commission's conclusion was based on the incorrect premiss that airlines are the airport operators offering slots, whereas the exchange of such slots between airlines is not their main activity.

72 The applicant also argues that, in the absence of the concentration at issue, the slots held by Air Berlin would have been made available to other airlines, in accordance with Regulation No 95/93. It thus submits that competition is more intense in the O&D markets when an undertaking withdraws from those markets than when the assets of that undertaking are acquired by a competitor, as is the case here. Consequently, the applicant considers that it does not follow from the fact that Air Berlin had ceased its operations in the O&D markets that the concentration at issue would not have any effects on those markets.

73 In that regard, it is true, as the applicant argues in essence, that the definition of O&D markets reflects the perspective of demand according to which consumers of passenger transport services envisage all possible options, including different forms of transport, in order to travel from a city of origin to a city of destination (judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 138).

74 Furthermore, the Commission held, in the contested decision, that, in the absence of the concentration at issue, the slots acquired by the intervener would probably be returned to the pool referred to in Article 10 of Regulation No 95/93 ('the pool'). In addition, the Commission found that slots were of 'crucial importance' for the provision of passenger air transport services in so far as they affected access to airport infrastructure services. It thus recognised that the concentration was likely to have an impact on the various O&D markets from or to the airports to which Air Berlin's slots related.

75 However, the Commission took the view that an examination of the effects of the concentration at issue on the markets for passenger air transport services from or to the airports to which Air Berlin's slots related made it possible to understand the effects of that concentration on all the O&D markets from or to those airports. The Commission considered, like the applicant, that although the airlines were present on the demand side of the market for airport infrastructure services, the increment in the number of slots held by the intervener could possibly enable it to foreclose access to those services. It thus examined whether the increment in the number of slots held by the intervener would give the latter the ability or the incentive to foreclose access to airport infrastructure services and, consequently, to the various O&D markets from or to those airports.

76 Therefore, contrary to what the applicant submits, the Commission took account of the possible effects of the concentration at issue on the relevant O&D markets, even though it did not examine each of those markets individually.

77 In the second place, the applicant considers that the Commission should have taken account of the market shares of Air Berlin and the intervener and of the impact of the concentration at issue on their competitive relationship, on their customers and on their competitors in the relevant O&D markets. In that regard, the Commission should have identified the routes operated by Air Berlin which would be taken over by the intervener as a result of the concentration, and the O&D

markets on which the concentration was liable to create a monopoly. It adds that the Commission should also have carried out an analysis of the 'trends in demand and in passenger traffic' to the intervener's hub airports.

78 More specifically, the applicant submits that, first, the concentration at issue was likely to significantly impede effective competition in the Düsseldorf – New York (United States), Düsseldorf – Munich, Hamburg – Munich and Berlin-Tegel – Cologne-Bonn markets. In that regard, the intervener would take over the routes operated by Air Berlin following the concentration at issue, contrary to the assertion in the contested decision that 'it [would] not in any sense take over the flights that Air Berlin used to operate'. Secondly, the concentration at issue would enable the intervener to increase the number of transit passengers to Frankfurt (Germany), Munich, Vienna (Austria) and Zurich airports, which are its hub airports, and therefore that concentration would also be likely to have effects on the O&D markets from or to those airports and, in particular, on the O&D markets in which those airports are hubs for routes to Asia or North America. Furthermore, the Commission should have examined the barriers to entry to each of those O&D markets and, in particular, the availability of the various slots at the airports concerned, since airlines should be able to offer flights at different times depending on the O&D market in question, including the O&D market from or to one airport.

79 First, it should be noted, as is apparent from paragraph 73 above, that by assessing the O&D markets, it is possible to identify, among passenger transport services, those which are regarded as interchangeable or substitutable by the consumer. It follows that, where the undertakings concerned by a concentration are airlines which are still in operation, the Commission can identify the O&D markets in which their operations overlap. It can thus assess the competitive impact of that concentration on the provision of passenger transport services in those markets. In particular, it may determine the extent of the changes concerning market shares and concentration levels by calculating the combined post-concentration market share of the undertakings concerned and that of their competitors.

80 However, in the present case, in view of the cessation of Air Berlin's operations, the latter had withdrawn from all the O&D markets in which it was present, so that its operations and those of the intervener no longer overlapped in any of those markets. Furthermore, in so far as Air Berlin's slots were not linked to any routes, the Commission rightly noted that they could, therefore, be used by the intervener in O&D markets other than those in which Air Berlin was previously present. Indeed, it is common ground that the intervener was in a position to reallocate the slots in a large number of O&D markets, and the applicant acknowledges in paragraphs 106 and 115 of the reply that it was impossible for the Commission to examine all the O&D markets in which Air Berlin's slots could be reallocated.

81 It follows that, unlike concentrations involving airlines which are still in operation, it was not certain, in this case, that the concentration 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.

82 Secondly, the applicant does not provide any evidence to show that the examination of the effects of the concentration at issue on the markets for airport infrastructure services did not make it possible to identify possible impediments to effective competition in the various O&D markets from or to the airports to which Air Berlin's slots related.

83 More specifically, although the applicant identifies the O&D markets in which the intervener would either take over the routes previously operated by Air Berlin or would be likely to use Air Berlin's slots, in particular in order to increase the number of passengers in transit to its hubs, it does not claim that the concentration at issue actually constituted a significant impediment to effective competition in those markets. On the contrary, it claims that it is not required to prove the existence of such an impediment, but that it was incumbent on the Commission to demonstrate the absence thereof. Thus, the applicant merely claims that that concentration could constitute such an impediment and that the Commission should have supplemented its analysis, without, however, adducing serious indicia to that effect, within the meaning of the case-law referred to in paragraph 67 above. In particular, the applicant fails to explain how that concentration was likely to significantly impede effective competition in certain O&D markets if the other airlines retained their access to the airport infrastructure services in question.

84 Furthermore, as regards, first, the Munich – Düsseldorf and Vienna – Düsseldorf markets, in which, according to the applicant, the intervener had a monopoly as a result of the concentration at issue, it should be added that it is clear from Annex C.25 to the reply that that monopoly was created as a result of Air Berlin's withdrawal from those markets. However, that withdrawal is the consequence of the cessation of Air Berlin's operations which, as has been pointed out in paragraphs 35 to 57 above, took place prior to, and independently of, the concentration. As regards the Frankfurt – Venice and Zurich – Hamburg markets, also mentioned by the applicant, it is sufficient to note that Air Berlin was not present in those markets, that the alleged increase in the intervener's market share was the result of the withdrawal of other airlines from those markets, and that the applicant does not explain how that withdrawal was linked to the concentration. Consequently, the fact of the intervener having a monopoly in those O&D markets after the implementation of the concentration, cannot, in any event, mean that that concentration could have significantly impeded effective competition in those markets.

85 As regards, secondly, the O&D markets from or to Frankfurt, Munich, Vienna and Zurich airports or the O&D markets in which those airports are hubs, taken as a whole, as the Commission has observed, it is clear from paragraphs 123 to 130 of the reply that the applicant acknowledges that the examination of the intervener's ability, following the concentration at issue, to foreclose access to the airport infrastructure services provided by an airport could make it possible to verify that that concentration would not significantly impede effective competition in the O&D markets from or to those airports. Furthermore, although the applicant refers to the numbers of transit passengers at Frankfurt, Munich, Vienna and Zurich airports, respectively, and to the intervener's market shares on routes between those airports and other airports to which Air Berlin slots related, it does not explain how those data show that the concentration at issue would significantly impede effective competition in those markets.

86 Thirdly, as the Commission has observed, it is to be inferred from the applicant's claim that the intervener would use Air Berlin's slots to increase passenger traffic towards its hubs that the intervener would not take over all of the routes previously operated by Air Berlin. Consequently, it must be held that the Commission rightly considered that the concentration at issue was likely to have effects on all the O&D markets from or to the airports to which Air Berlin's slots related, and therefore the examination of the effects of that concentration could not be limited to the O&D markets identified by the applicant.

87 Fourthly, the Commission noted, in paragraph 42 of the contested decision, that in the notification of the concentration at issue, the intervener had stated that it intended to use the slots which were the subject of that concentration to implement its 'growth plans' and that 'it

[would] not in any sense take over the flights that Air Berlin used to operate.' However, those considerations, referred to by the applicant, merely reiterate the content of that notification and do not constitute a reason for the contested decision the legality of which could be disputed by the applicant.

88 Therefore, the applicant is not justified in claiming that the market definition adopted by the Commission did not make it possible to identify potential significant impediments to effective competition resulting from the concentration at issue, including in the O&D markets which it had identified.

89 Consequently, the second part of the applicant's first plea and, as a result, that plea in its entirety, must be rejected.

The second plea, alleging a manifest error in the assessment of the effects of the concentration at issue

90 The second plea in law essentially comprises two parts. By the first part, formally raised in the application in the context of the first plea, the applicant submits that the Commission made a manifest error of assessment as regards the effects of the roof wet lease and the wet lease in the assessment of that concentration. By the second part, it submits that the Commission made a manifest error in the assessment of the effects of that concentration, in particular on the markets for passenger air transport services from or to Düsseldorf, Zurich, Hamburg, Munich, Stuttgart and Berlin-Tegel airports.

91 The Commission and the intervener dispute the applicant's arguments.

92 It should be noted at the outset that, according to settled case-law, the substantive rules of Regulation No 139/2004, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with regard to assessments of an economic nature, and that, consequently, review by the Courts of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations (judgments of 18 December 2007, *Cementbouw Handel & Industrie* v *Commission*, C-202/06 P, EU:C:2007:814, paragraph 53, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 85). Accordingly, it is settled case-law that the review by the EU Courts of the complex economic assessments made by the Commission is necessarily confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment of the facts or misuse of powers (judgments of 7 May 2020, *BTB Holding Investments and Duferco Participations Holding* v *Commission*, C-148/19 P, EU:C:2020:354, paragraph 56; of 5 September 2014, *Éditions Odile Jacob* v *Commission*, T-471/11, EU:T:2014:739, paragraph 137; and of 12 December 2018, *Servier and Others* v *Commission*, T-691/14, EU:T:2018:922, paragraph 1374, under appeal).

93 However, although it is not for the Court to substitute its own economic assessment for that of the Commission, which has the institutional competence to do so, it is apparent from now well-settled case-law that not only must the EU judicature establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation

and whether it is capable of substantiating the conclusions drawn from it (judgments of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 39, and of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 46).

The first part of the second plea, relating to the effects of the roof wet lease and the wet lease

94 In the first place, the Commission noted in the contested decision that, under the roof wet lease, Air Berlin leased crewed aircraft to two subsidiaries of the intervener. Furthermore, the Commission noted that the replacement of Air Berlin with LGW under that agreement, which it had authorised by the decision of 27 October 2017, was intended to ensure the continuity of that agreement after Air Berlin had ceased operations. It inferred from this that that replacement would, as such, have only a limited impact on the markets for passenger air transport services. Similarly, it considered that the 'integration' of those crewed aircraft into the intervener, via the concentration at issue, would have limited effects on those markets in so far as that integration would replace the roof wet lease. It also noted that the Federal Competition Authority had approved that agreement on 30 January 2017.

95 In that regard, the applicant does not challenge the Federal Competition Authority's decision to approve the roof wet lease. However, it argues that that agreement was merely a 'pre-transaction' part of the concentration at issue which the Commission was required to take into account. It thus claims that the Federal Competition Authority merely examined that agreement in isolation, and that it was for the Commission to assess the concentration as a whole.

96 In those circumstances, the applicant submits that the Commission should have 'assessed the importance' of the assets covered by the roof wet lease for the functioning of the market for passenger air transport services and the market for the leasing of aircraft. It adds that the concentration at issue enabled the intervener to acquire crewed aircraft more quickly than it could have done under normal market conditions, in view, in particular, of the difficulty in recruiting pilots. Lastly, it argues that, in the absence of the concentration at issue, those crewed aircraft could have been acquired by the intervener's competitors.

97 In that regard, as mentioned in paragraph 46 above, the roof wet lease and the concentration at issue must be regarded as being two separate transactions. It follows that, contrary to what the applicant claims, the roof wet lease cannot be regarded as constituting a part of that concentration.

98 Furthermore, the roof wet lease agreement was concluded for a period of six years, which could be extended under certain conditions. It follows that, under that agreement, the intervener could use the crewed aircraft covered by that agreement until at least December 2022. Consequently, the fact, alleged by the applicant, that the agreement of 13 October 2017 concerning the concentration at issue enabled the intervener to acquire those aircraft more quickly and to take on their crew does not, in itself, demonstrate that that concentration was likely to significantly impede effective competition in the market for passenger air transport services and the market for the leasing of aircraft.

99 In those circumstances, the Commission did not manifestly disregard the effects of the roof wet lease in its assessment of the concentration at issue.

100 In the second place, the Commission observed that, under the wet lease, LGW leased crewed aircraft to Air Berlin, and that Air Berlin held the slots necessary for the use of those aircraft and marketed the tickets for the flights operated using those aircraft. It inferred from this that Air Berlin was present in the markets for passenger air transport services and that LGW was present in the market for the leasing of aircraft, although only within the Air Berlin group. Finally, it found that the cessation of Air Berlin's operations had led LGW to withdraw from the market for the leasing of aircraft prior to, and independently of, the concentration at issue.

101 In that regard, the applicant submits that the Commission was wrong to consider that LGW was present on the market for the leasing of aircraft, in so far as the latter merely leased aircraft to its parent company, Air Berlin. It infers from this that the LGW's activities were indissociable from those of Air Berlin and that the Commission should therefore have carried out a specific examination of the wet lease in its assessment of the concentration at issue.

102 It should be noted that the applicant, like the Commission, considers that LGW leased aircraft only to Air Berlin. Accordingly, the Commission correctly found that the wet lease had ended when Air Berlin ceased its operations, which occurred prior to, and independently of, the concentration at issue, as has been pointed out in paragraphs 38 and 49 above. However, the applicant does not explain how that agreement, which had ceased to apply prior to, and independently of, that concentration, was capable of demonstrating that there was a significant impediment to effective competition in the context of the Commission's assessment of that concentration.

103 Furthermore, although the applicant sought to criticise the Commission for failing to take account, in its analysis, of the possible effects of the acquisition by the intervener of regional aircraft leased under the wet lease agreement, it is sufficient to note that the applicant does not explain how, or in what market, that acquisition was liable to constitute a significant impediment to effective competition.

104 It follows that the applicant is not justified in submitting that the Commission should have carried out a specific examination of the effects of the wet lease, and therefore the first part of the applicant's second plea must be rejected.

The second part of the second plea, relating to the effects of the concentration at issue on the markets for passenger air transport services from or to Düsseldorf, Zurich, Hamburg, Munich, Stuttgart and Berlin-Tegel airports

105 In the first place, the applicant submits that the concentration at issue has anti-competitive effects. In the absence of that concentration, a significant proportion of the slots transferred to the intervener would have been allocated to other airlines. The applicant submits, in that regard, that 14 of the 19 airports concerned by that concentration are coordinated airports within the meaning of Regulation No 95/93, including Düsseldorf, Zurich, Hamburg, Munich, Stuttgart and Berlin-Tegel airports. Consequently, pursuant to Article 10 of that regulation, up to 50% of the slots previously held by Air Berlin would, in the absence of that concentration, have been allocated to 'new entrants', which would have reduced the barriers to entry to the relevant markets.

106 In that regard, it should be observed that, in accordance with Article 2(2) and (3) of Regulation No 139/2004, only those concentrations which would significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, are to be declared incompatible with the internal market.

107 Consequently, as the Commission rightly contends, the fact that a concentration produces anti-competitive effects is not, in itself, sufficient for that concentration to be regarded as incompatible with the internal market, provided that it does not significantly impede effective competition in the internal market or in a substantial part of it.

108 In those circumstances, the mere fact that, in the absence of the concentration at issue, some of the slots transferred to the intervener could have been allocated to other airlines, thus reducing the barriers to entry for those airlines as regards the airports concerned, does not, as such, demonstrate that that concentration was likely to significantly impede effective competition in the internal market or in a substantial part of it.

109 In the second place, the applicant submits that the concentration at issue would significantly impede effective competition in the markets for passenger air transport services from or to Düsseldorf, Zurich, Hamburg, Munich, Stuttgart and Berlin-Tegel airports. In that regard, it argues, first, that that concentration would create or strengthen the intervener's dominant position in the markets for passenger air transport services from or to Düsseldorf and Zurich airports. Secondly, as a result of that concentration, the intervener's slot holding at Hamburg, Munich, Stuttgart and Berlin-Tegel airports would significantly exceed 25%, since those airports have high congestion rates.

110 In that regard, the Commission examined the intervener's ability to foreclose access to airport infrastructure services and, consequently, to the markets for passenger air transport services from or to, inter alia, Düsseldorf, Zurich, Hamburg, Munich, Stuttgart and Berlin-Tegel airports. As is apparent from paragraph 19 above, the Commission took into account both the congestion at those airports and the intervener's slot holding, as well as the effect of the concentration at issue on that slot holding.

111 As regards, first, the congestion at the airports, the Commission found that, as is clear from Article 3(5) of Regulation No 95/93, the capacity of coordinated airports was not sufficient to meet the demand of air carriers on the basis of voluntary cooperation between them. However, it noted that an airport could be classified as a coordinated airport within the meaning of that regulation without all of the slots at that airport being used. Thus, where the Commission deemed it necessary, it calculated the congestion rate at the airports concerned by dividing, for each hour that the airports are open, the number of slots allocated to all airlines by the total number of slots available. It considered, without being challenged on that point by the applicant, that the existence of a significant impediment to effective competition could, in principle, be ruled out where the average congestion rate at an airport was below 60%.

112 As regards, secondly, the effect of the concentration at issue on the intervener's slot holding, the Commission found, as mentioned in paragraph 74 above, that, in the absence of the concentration at issue, Air Berlin's slots, including those of Niki Luftfahrt, would be returned to the pool before being redistributed to other air carriers which requested them. In that regard, it stated, as is argued by the applicant, that, in accordance with Article 10(6) of Regulation No 95/93, 50% of those slots were to be allocated to new entrants, unless requests by new entrants amounted to

less than 50% of those slots. Consequently, at least 50% of Air Berlin's slots would have been transferred to the other airlines, including the intervener, which already held sufficient slots at the airports concerned.

113 In those circumstances, the Commission examined in the contested decision what it described as the 'net increment', namely the difference between the intervener's slot holding as a result of the concentration at issue and the intervener's slot holding absent that concentration, taking account of the slots held by Air Berlin (including those of Niki Luftfahrt), which would, where appropriate, be transferred to it via the pool.

– The effects of the concentration at issue on the markets for passenger air transport services from or to Düsseldorf and Zurich airports

114 First, as regards the winter 2017/2018 IATA season at Düsseldorf airport, the Commission stated that the intervener's average slot holding would increase from 26% to 39% or 42%, depending on whether the slots held by Niki Luftfahrt were transferred to another airline or returned to the pool, that the average net increment would be 4% and that the average congestion rate would be 73%. Moreover, the intervener's highest slot holding would increase from 46% to 58% during the hour band 17.00 to 17.59 UTC (Coordinated Universal Time), when the airport reached its highest congestion rate of 99%. The net increment would therefore be 6%.

115 Secondly, as regards the summer 2018 IATA season at Düsseldorf airport, the Commission stated that the intervener's slot holding would increase from 39% to 52% or 54%, depending on whether the slots held by Niki Luftfahrt were transferred to another airline or returned to the pool, and that the average net increment would be 5%. Taking account of the commitments given by the intervener, the Commission observed that the intervener would be transferred only a small number of slots, with the result that the intervener's slot holding would not exceed 50% and the net increment would be limited to 1%. Furthermore, it found that the average congestion rate at Düsseldorf airport was 91% during the summer 2017 IATA season, and that the slots transferred to the intervener would include only two slots between 12.00 and 12.59 UTC, when the airport reached its highest congestion rate of 100%.

116 Thirdly, as regards Zurich airport, the Commission stated that slots would be transferred to the intervener for the summer 2018 IATA season only. More specifically, it noted that the intervener's average slot holding would increase from 51% to 52%, that the average net increment would be close to 0% and that the average congestion rate at Zurich airport was 69%. The intervener's highest slot holding would increase from 81% to 84% during the hour band 04.00 to 04.59 UTC, when the airport reached its highest congestion rate of 94%, but the net increment would therefore be 0%.

117 In the first place, the applicant observes that a market share of more than 50% gives rise to a presumption of a dominant position. In that regard, first, it infers from this that, in the present case, the concentration at issue gave the intervener a dominant position at Düsseldorf airport and would strengthen its dominant position at Zurich airport. Secondly, it submits that the creation and strengthening of the intervener's dominant position constitute, as such, significant impediments to effective competition, by allowing the intervener to foreclose access to passenger air transport services from or to those airports. It thus submits that the intervener's slot holding at Düsseldorf airport would amount to 42% during the winter 2017/2018 IATA season and 54% during the summer 2018 IATA season, and that that airport has a congestion rate of 91%. It states, moreover, that the commitments given by the intervener are insufficient in so far as the

intervener would still hold 50% of slots during the summer 2018 IATA season. As regards Zurich airport, it states that the intervener's slot holding would be 52% on average and, at most, 84% during the summer 2018 IATA season, and that its closest competitor would have a slot holding of only 6%.

118 In that regard, it follows from Article 2(2) and (3) of Regulation No 139/2004 that a concentration may, in certain cases, constitute a significant impediment to effective competition where it leads to the strengthening or creation of a dominant position (see, to that effect and by analogy, judgment of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 87).

119 Moreover, as the applicant argues, although the importance of market shares may vary from one market to another, the view may legitimately be taken that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. That may be the situation where there is a market share of 50% or more (see judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 41 and the case-law cited).

120 However, in the present case, as regards, first, the winter 2017/2018 IATA season at Düsseldorf airport, it should be noted that the intervener would hold, on average, only 42% of the slots. Consequently, as is apparent from the applicant's arguments, it cannot be presumed that the intervener would have a dominant position since its slot holding as a result of the concentration at issue would still be less than 50%. However, in order to demonstrate the existence of the intervener's dominant position, the applicant merely relies on the fact that the share of slots the intervener holds is greater than 40% and the fact that the congestion rate of that airport is high. Nonetheless, in the absence, in particular, of information relating to the other airlines' slot holdings, those facts are not sufficient, in themselves, to demonstrate that the intervener would have such a position. Lastly, the fact that the intervener's highest slot holding could reach 58% between 17.00 and 17.59 UTC does not support the conclusion that the intervener would have a dominant position during the winter 2017/2018 IATA season taken as a whole. In any event, such a fact is not sufficient to establish that the concentration at issue is manifestly liable to constitute a significant impediment to effective competition in accordance with the case-law cited in paragraph 118 above, in view, in particular, of the availability of slots at Düsseldorf airport during that season, as the Commission found in paragraph 214 of the contested decision.

121 As regards, secondly, the summer 2018 IATA season at Düsseldorf and Zurich airports, it is apparent from the contested decision that, following the commitments given by the intervener, the net increment would be 0% or close to 0%, and therefore the intervener's slot holding would be the same, or almost the same, whether or not the concentration at issue was implemented. Consequently, the creation or strengthening of the dominant position alleged by the applicant does not arise as a result of the concentration at issue, as such, but solely as a result of the cessation of Air Berlin's operations. In those circumstances, it cannot be inferred from the mere fact that the intervener's slot holding as a result of the concentration at issue is greater than or equal to 50% that that concentration constitutes a significant impediment to effective competition.

122 In the second place, the applicant submits that, in view of its significant slot holding and the congestion rate, in particular, at Düsseldorf and Zurich airports, the intervener could adopt various foreclosure strategies. It could thus, first, increase the number of flights during the flight schedules planned by a new entrant or on the routes already operated by that entrant so as to

render the latter's business less profitable, secondly, use its slots more effectively by redeploying them, if necessary, on its various routes and, thirdly, offer more advantageous loyalty schemes to its customers.

123 In that regard, first, in the contested decision, the Commission, like the applicant, observed that holding a large slot portfolio could allow airlines to offer flights at times close to those planned by another airline in order, in particular, to make it more difficult for that other airline to enter the market for passenger air transport services from or to the airport concerned.

124 However, it is important to note that the net increment in the number of slots at Düsseldorf and Zurich airports during the summer 2018 IATA season would be 0% or close to 0%. Accordingly, the fact that the intervener could, in view of its increased number of slots, more easily increase the number of flights during the flight schedules planned by a new entrant or on the routes already operated by that entrant, is not a consequence of the concentration at issue, but of the cessation of Air Berlin's operations. In addition, as regards the winter 2017/2018 IATA season at Düsseldorf airport and the summer 2018 IATA season at Zurich airport, the Commission stated in the contested decision that the average congestion rate at those airports, of 73% and 69% respectively, was sufficiently low to allow the development of competitors' operations following the concentration at issue, notwithstanding the intervener's slot holding. The applicant has not adduced any evidence capable of calling that assessment into question.

125 Secondly, it should be observed that the fact that competitors may be harmed because a merger creates efficiencies cannot, in itself, constitute an impediment to competition. However, the applicant does not explain why the intervener's more efficient use of its slots and the introduction of more advantageous loyalty schemes for its customers do not reflect efficiencies which, while they may harm competitors, would not constitute a significant impediment to effective competition.

126 Therefore, the Commission did not commit a manifest error of assessment in finding that the concentration at issue would not significantly impede effective competition in the markets for passenger air transport services from or to Düsseldorf and Zurich airports.

– *The effects of the concentration at issue on the markets for passenger air transport services from or to Hamburg, Munich, Stuttgart and Berlin-Tegel airports*

127 First, as regards the summer 2018 IATA season at Hamburg airport, the Commission stated that the intervener's average slot holding would increase from 30% to 33%, that the average net increment would be 1% and that the average congestion rate would be 54%. The intervener's highest slot holding would increase from 39% to 43% during the hour band 16.00 to 16.59 UTC, when the airport reached its highest congestion rate of 75%. The net increment would, however, be limited to 1%.

128 Secondly, as regards the winter 2017/2018 IATA season at Munich airport, the Commission stated that the intervener's average slot holding would increase from 39% to 41%, that the average net increment would be 0% and that the average congestion rate would be 60%. It also noted that the intervener's highest slot holding would be 78% during the hour band 13.00 to 13.59 UTC, when the airport reached its highest congestion rate of 93%. However, it stated that the net increment would still be 0%.

129 Thirdly, as regards the winter 2017/2018 IATA season at Stuttgart airport, the Commission stated that the intervener's average slot holding would increase from 15% to 17%, that the average net increment would be 1% and that the average congestion rate would be 30%. It also noted that the intervener's highest slot holding would be 33% during the hour band 17.00 to 17.59 UTC, when the airport reached its highest congestion rate of 59%. However, it stated that the net increment would still be limited to 1%. In addition, as regards the summer 2018 IATA season, the intervener's average slot holding would increase from 30% to 33%, the average net increment would be 1% and the average congestion rate would be 43%. Furthermore, the intervener's highest slot holding would be 46% during the hour band 16.00 to 16.59 UTC, when the airport reached its highest congestion rate of 74%. The net increment would therefore be 2%.

130 Fourthly, as regards the winter 2017/2018 IATA season at Berlin-Tegel airport, the Commission stated that the intervener's average slot holding would increase from 16% to 25%, that the average net increment would be 4% and that the average congestion rate would be 54%. It also noted that the intervener's highest slot holding would be 40% during the hour band 19.00 to 19.59 UTC, although the airport reaches its highest congestion rate of 73% during the hour band 07.00 and 07.59 UTC. It also stated that the net increment would be 11% between 19.00 and 19.59 UTC. In addition, as regards the summer 2018 IATA season, the intervener's average slot holding would increase from 28% to 35%, the average net increment would be 3% and the average congestion rate would be 62%. Furthermore, the intervener's highest slot holding would be 52% during the hour band 16.00 to 16.59 UTC, although the airport reaches its highest congestion rate of 83% during the hour band 10.00 and 10.59 UTC. The net increment during the hour band 16.00 to 16.59 UTC would still be limited to 1%.

131 The applicant submits that, as stated in paragraph 18 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5; 'the guidelines on horizontal mergers') and in recital 32 of Regulation No 139/2004, a concentration does not significantly impede effective competition where the market share of the undertakings concerned does not exceed 25%. It argues that, as a result of the concentration at issue, the intervener's market share would significantly exceed 25%, during the summer 2018 IATA season at Hamburg airport, during the winter 2017/2018 IATA season at Munich airport and during the winter 2017/2018 and summer 2018 IATA seasons at Stuttgart and Berlin-Tegel airports. It infers from this that, in view of the high congestion rates at those airports, the Commission made a manifest error of assessment in finding that the concentration at issue would not significantly impede effective competition in the markets for passenger air transport services from or to those airports.

132 In that regard, in the first place, without there being any need to rule on the question whether the concentration at issue constitutes a horizontal merger within the meaning of the guidelines on horizontal mergers, it follows from paragraph 18 of those guidelines and from recital 32 of Regulation No 139/2004 that the fact that the market share of the undertakings concerned does not exceed 25% is an indication that a concentration is compatible with the internal market. Nonetheless, it cannot be inferred from this that a concentration is not compatible with the internal market merely because the market share of the undertakings concerned exceeds 25%.

133 In the second place, although the applicant refers to the airport congestion rates which it has identified, it does not claim, let alone demonstrate, that those rates prevent it from accessing the markets for passenger air transport services from or to those airports. Furthermore, it should be noted that the average congestion rates at those airports remain close to or below the rate of

60%, referred to in paragraph 111 above, below which the Commission held, without being challenged by the applicant, that the existence of a significant impediment to competition could, in principle, be ruled out.

134 It should also be noted that the highest congestion rates at the airports in question are reached at different times. However, although, as the applicant argues, the scheduled times at which flights may take off or land is an important factor for the provision of passenger air transport services, the applicant does not specify which slots at each of the airports it identified would be needed in order to develop such services. More specifically, it does not explain how Air Berlin's slots would allow the intervener to foreclose access to airport infrastructure services and, consequently, to the markets for passenger air transport services from or to each of those airports.

135 In the third place, according to the contested decision, the net increment would be zero at Munich airport and would not exceed 1% at Hamburg airport. At Stuttgart airport, it would be just 2% at most, in the hour band 16.00 to 16.59 UTC during the summer 2018 IATA season, and would be 1% on average across all seasons. Lastly, as regards Berlin-Tegel airport, the net increment would be, on average, 3% during the summer 2018 IATA season and 4% during the winter 2017/2018 IATA season, and at most 11% in the hour band 19.00 to 19.59 UTC during the winter 2017/2018 IATA season. However, the average congestion rate would be just 62% during the summer 2018 IATA season and 54% during the winter 2017/2018 IATA season.

136 In those circumstances, the net increment would remain limited at Hamburg, Munich and Stuttgart airports, and therefore any difficulties in accessing the markets for passenger air transport services from or to those airports are not a consequence of the concentration at issue. The net increment at Berlin-Tegel airport would be slightly higher. Nonetheless, given the congestion rate and the intervener's slot holding as a result of that concentration, that fact does not, in itself, prove that that concentration manifestly constitutes a significant impediment to effective competition.

137 It follows that the Commission did not commit a manifest error of assessment in finding that the concentration at issue would not significantly impede effective competition in the markets for passenger air transport services from or to Hamburg, Munich, Stuttgart and Berlin-Tegel airports.

138 Accordingly, the second part of the applicant's second plea, and, as a result, that plea in its entirety, must be rejected.

The third plea, alleging infringement of Regulation No 95/93

139 The applicant submits that the Commission infringed Article 8a(2)(a) of Regulation No 95/93 and the principles of neutrality, transparency and non-discrimination which stem from that regulation. More specifically, it argues that it is not possible to transfer slots in the context of a concentration where such a transfer may harm the operations of an airport. The concentration at issue would cause such harm, in particular at Düsseldorf and Zurich airports, by creating or strengthening the intervener's dominant position.

140 The Commission and the intervener dispute the applicant's arguments.

141 In that regard, in the first place, it should be observed that, as was pointed out in paragraph 121 above, the creation or strengthening of the dominant position alleged by the applicant does not arise as a result of the concentration at issue.

142 In the second place, it has been mentioned in paragraph 106 above that, in accordance with Article 2(2) and (3) of Regulation No 139/2004, only those concentrations which would significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, are to be declared incompatible with the internal market. Furthermore, it follows from Article 8a(2) of Regulation No 95/93 that it falls solely to the coordinator to decline to confirm the transfers or exchanges of slots notified to it if the coordinator is not satisfied that airport operations would not be prejudiced. Consequently, it must be held that the Commission lacked competence to apply that provision.

143 In those circumstances, the applicant's third plea must be rejected.

The fourth plea, alleging failure to examine the potential efficiencies generated by the concentration at issue

144 The applicant submits that the Commission infringed the guidelines on horizontal mergers by failing to examine the potential efficiencies which could be generated by the concentration at issue.

145 The Commission and the intervener dispute the applicant's arguments.

146 In the first place, it should be noted that – as indeed is apparent from the wording of Section 9 of Form CO relating to the notification of a concentration pursuant to Regulation No 139/2004, set out in Annex I to Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Regulation No 139/2004 (OJ 2004 L 133, p. 1, and corrigendum OJ 2004 L 172, p. 9), and from paragraph 78 of the guidelines on horizontal mergers – the efficiencies generated by the merger must have pro-competitive effects benefiting consumers. Recital 29 of Regulation No 139/2004, to which the applicant refers, thus states that the efficiencies generated by a concentration may counteract the effects on competition, and in particular the potential harm to consumers, which it might otherwise have had and that, as a result, the concentration would not significantly impede effective competition in the internal market or in a substantial part of it.

147 In the present case, it should be noted that the Commission held, on the basis of Article 6(1)(b) and (2) of Regulation No 139/2004, that, in view of the commitments given by the intervener, the concentration at issue was not liable to constitute a significant impediment to effective competition in the internal market or in a substantial part of it, without there being any need for the intervener to put forward efficiencies. Consequently, since, as mentioned in paragraphs 126 and 137 above, the applicant is not justified in claiming that that concentration is manifestly liable to constitute such an impediment, there was no need for the Commission to examine efficiencies that could have counteracted the concentration's effects on competition.

148 In the second place, it is clear from recital 29 of Regulation No 139/2004 and from paragraphs 84 to 87 of the guidelines on horizontal mergers, referred to by the applicant, that it is for the parties to the concentration to put forward any efficiencies generated by that concentration, as is acknowledged by the applicant. Consequently, the applicant cannot criticise the Commission for not having sought to establish the existence of efficiencies not previously put forward by the intervener.

149 In those circumstances, the applicant's fourth plea must be rejected.

The fifth plea, alleging that the commitments given by the intervener are insufficient

150 The applicant submits that, despite the commitments given by the intervener, the intervener's slot holding at Düsseldorf airport would be 50% during the summer 2018 IATA season, which means that the intervener would have a dominant position. Moreover, those commitments do not relate to the winter 2017/2018 IATA season slots, although the intervener would also have a dominant position during that season and the congestion rate at that airport is high.

151 The Commission and the intervener dispute the applicant's arguments.

152 Under Article 6(2) of Regulation No 139/2004, where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts as to its compatibility with the internal market, the Commission is to declare the concentration compatible with it.

153 In that regard, it should be observed that the commitments given with a view to the adoption of a decision under Article 6(2) of Regulation No 139/2004 are intended to dispel any serious doubts as to whether the concentration would significantly impede effective competition in the internal market or in a significant part of it, in particular by creating or strengthening a dominant position (judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 297).

154 In the present case, first, it has been pointed out in paragraph 121 above that, as regards the summer 2018 IATA season at Düsseldorf airport, the intervener's slot holding would remain almost the same, given the commitments it entered into, whether the concentration at issue was implemented or not. It follows that the creation or strengthening of the dominant position alleged by the applicant does not arise as a result of the concentration at issue, as such, but as a result of the cessation of Air Berlin's operations. Consequently, the Commission did not commit a manifest error of assessment in finding that the commitments given by the intervener were sufficient to dispel any doubts as to the compatibility of the concentration at issue with the internal market.

155 Secondly, it has been pointed out in paragraphs 120 and 123 above that, as regards the winter 2017/2018 IATA season, the applicant had not established that, as a result of the concentration at issue, the intervener would have a dominant position or would have the ability to implement foreclosure strategies. In those circumstances, since the applicant is not justified in claiming that that concentration is manifestly liable to constitute a significant impediment to effective competition, there was no need for the Commission to examine commitments which could have prevented that impediment.

156 Thirdly, it is clear from Article 6(2) of Regulation No 139/2004 and Article 19 of Regulation No 802/2004 that it is for the parties to the concentration, where appropriate, to offer modifications to that concentration in the form of commitments. Therefore, the applicant cannot criticise the Commission for not having imposed commitments not previously offered by the intervener in respect of the winter 2017/2018 IATA season.

157 Consequently, the applicant's fifth plea must be rejected.

The sixth plea, alleging failure to take account of the rescue aid in the assessment of the effects of the concentration at issue

158 The applicant submits that the rescue aid was granted to Air Berlin for the purpose of implementing the concentration at issue. In that regard, it argues that that aid was not compatible with the internal market, that certain information relating to that aid was not publicly available and that the negotiations between the intervener and Air Berlin relating to that concentration took place behind closed doors. It infers from this that the rescue aid prevented other 'more efficient operators' from acquiring Air Berlin's assets. Furthermore, it considers that that aid changed Air Berlin's funding capacity, which the Commission should have taken into account, in accordance with Article 2(1)(b) of Regulation No 139/2004.

159 The Commission and the intervener dispute the applicant's arguments.

160 In that regard, in the first place, it is apparent from the decision declaring the rescue aid compatible with the internal market that the purpose of that aid was, inter alia, to achieve the sale of Air Berlin assets in an 'orderly' manner with the least negative consequences for its staff.

161 However, first, it cannot be inferred from the alleged incompatibility of the rescue aid with the internal market, or from the fact that certain information relating to that aid is not publicly accessible and that the negotiations between the intervener and Air Berlin relating to the concentration at issue took place behind closed doors, that the specific objective of that aid was the acquisition, by the intervener, of the Air Berlin assets concerned by the concentration at issue.

162 Secondly, the applicant does not claim, let alone demonstrate, that the 'more efficient operators' to which it refers could not make a bid to acquire Air Berlin's assets in the context of the latter's insolvency proceedings.

163 Thirdly, as mentioned in paragraph 108 above, the mere fact that, in the absence of the concentration at issue, the Air Berlin slots transferred to the intervener would, at least in part, have been allocated to the intervener's competitors is not sufficient, in itself, to support the conclusion that that concentration significantly impedes effective competition and should therefore have been declared incompatible with the internal market by the Commission.

164 In the second place, it follows from Article 2(1)(b) of Regulation No 139/2004 that, when assessing concentrations, the Commission must take into account, inter alia, the market position of the undertakings concerned and their economic and financial power. However, the applicant adduces no evidence to show that the amount of the loan granted to Air Berlin under the rescue aid had been transferred to LGW with a view to its acquisition by the intervener.

165 In those circumstances, it has not been established that the amount of the loan granted to Air Berlin formed part of the concentration at issue, and it must therefore be held that the rescue aid was not such as to affect the market position or the economic and financial power of LGW or of the Air Berlin assets acquired by the intervener. That aid was therefore not capable of altering the Commission's assessment of the concentration.

166 Consequently, the applicant's sixth plea must be rejected.

The seventh plea, alleging infringement of Article 296 TFEU

167 The applicant submits that the Commission infringed Article 296 TFEU because the contested decision contains an inadequate statement of reasons. In particular, it criticises the Commission for having failed to carry out a full analysis of the facts of the concentration at issue. It thus argues that the Commission failed to examine the effects of that concentration on the relevant O&D markets, that it failed to take into account 'some of the information … on the state of competition in the airports covered by [that concentration]', that it did not verify whether the efficiencies generated by that concentration counteracted the anti-competitive effects produced by it, that it did not examine whether the commitments given by the intervener would make it possible to eliminate the significant impediment to effective competition resulting from that concentration and, lastly, that it did not take into account the rescue aid.

168 The Commission and the intervener dispute the applicant's arguments.

169 According to Article 296 TFEU, legal acts adopted by the EU Union institutions are to state the reasons on which they are based.

170 In that regard, it should be observed that the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. Accordingly, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not required that the statement of reasons should specify all the relevant points of fact and law, since the question whether the statement of reasons for an act satisfies the requirements of Article 296 TFEU must be assessed in the light not only of its wording but also of its context and of all the legal rules governing the matter in question (judgments of 2 April 1998 in Case C-367/95 P *Commission* v *Sytraval and Brink's France*, EU:C:1998:154, paragraph 63; of 22 June 2004, *Portugal* v *Commission*, C-42/01, EU:C:2004:379, paragraph 66; and of 15 April 2008, *Nuova Agricast*, C-390/06, EU:C:2008:224, paragraph 79).

171 Thus, the Commission does not infringe its obligation to state reasons if, when exercising its power to examine concentrations, it does not include precise reasoning in its decision as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the appraisal of the concentration (see, to that effect, judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 64). Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations. It follows that where the Commission declares a concentration to be compatible with the common market on the basis of Article 6(1)(b) of Regulation No 139/2004, the requirement to state reasons is satisfied when that decision clearly sets out the reasons for which the Commission considers that the concentration in question, where appropriate following modification by the undertakings concerned, does not significantly impede effective competition in the common market or in a substantial part of it, in particular by creating or strengthening a dominant position (see, by analogy, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 100).

172 In the present case, first, as is apparent from paragraphs 35 and 69 above, the Commission set out, in the contested decision, the reason why it had not assessed the concentration at issue in each of the relevant O&D markets. It explained that, having ceased its activities prior to, and independently of, the concentration at issue, Air Berlin was no longer active in any of the O&D markets in which it had previously been present. It also argued, on the basis that Air Berlin's slots were not allocated to any particular O&D market, that it was appropriate to assess the effects of the concentration on the markets for passenger air transport services from or to the airports to which those slots related.

173 Secondly, the applicant does not identify the 'information … on the state of competition in the airports covered by [that concentration]' on the basis of which it considers that the Commission should have taken a decision.

174 Thirdly, as is apparent from paragraph 147 and 155 above, it was not necessary for the Commission to assess potential efficiencies generated by the concentration at issue or to consider any additional commitments that the intervener might have offered. Similarly, as is apparent from paragraph 165 above, it was not necessary for the Commission to take into account the rescue aid for the purposes of assessing the concentration at issue. It follows that those various matters, referred to by the applicant, could rightly appear to the Commission to be manifestly irrelevant and therefore that, in the light of the case-law referred to in paragraph 171 above, it cannot be accused of having infringed its obligation to state reasons by not mentioning them in the contested decision.

175 In those circumstances, it cannot be held that the contested decision is vitiated by a failure to state reasons, and therefore the applicant's seventh plea must be rejected.

The applicant's request for the adoption of measures of organisation of procedure and measures of inquiry

176 By letter of 12 June 2018, the applicant requested the Court, pursuant to Article 88 of the Rules of Procedure, to adopt measures of organisation of procedure and measures of inquiry relating to rescue aid, the cessation of Air Berlin's operations and the sale of its assets.

177 However, first, contrary to Article 88(2) of the Rules of Procedure, the applicant did not state in a sufficiently detailed manner, the reasons justifying all the measures of organisation of procedure and the measures of inquiry which it was requesting and, secondly, as is apparent in particular from paragraphs 36 to 49 and paragraphs 161 to 165 above, those measures of organisation of procedure and measures of inquiry are not necessary in order to rule on the action.

178 Consequently, there is no need to grant the request for measures of organisation of procedure and measures of inquiry made by the applicant.

179 It follows from the foregoing that the action must be dismissed in its entirety, without there being any need to rule on the admissibility of Annex C.2 to the reply, which is disputed by the Commission. Furthermore, since the form of order sought by the intervener is to be upheld, there is no longer any need to rule on the objection, made by the intervener in the exercise of its procedural rights, to the confidential treatment of the data in respect of which the applicant's request for confidential treatment had been granted by order of 20 May 2019 of the President of the Ninth Chamber of the General Court.

Costs

180 Under Article 134(1) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the Commission and the intervener.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Polskie Linie Lotnicze 'LOT' S.A. to pay the costs.

Van der Woude   Kornezov   Buttigieg

Kowalik-Bańczyk   Hesse

Delivered in open court in Luxembourg on 20 October 2021.

[Signatures]