



Press and Information

General Court of the European Union  
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Judgments in Cases T-511/09 and T-162/10  
Niki Luftfahrt GmbH v Commission

## **The General Court dismisses the actions brought by the airline Niki Luftfahrt against Lufthansa's acquisition of Austrian Airlines and the restructuring aid granted by Austria to Austrian in that regard**

*None of the arguments put forward by Niki is capable of casting doubt on the Commission's authorisation of that concentration and that aid, which it granted subject to conditions*

Austrian Airlines is the largest Austrian airline.<sup>1</sup> Its main hub is Vienna International Airport (Austria). Due to financial difficulties faced by Austrian Airlines, the Austrian State decided to privatise it in 2008 by selling its majority shareholding of 41.56%.

The bid of Germany's largest airline, Lufthansa, whose hubs are Frankfurt International Airport (Germany) and Munich airport (Germany), was retained.<sup>2</sup>

In exchange for the transfer of the shares held by the Austrian State, Lufthansa's bid proposed (i) to pay a purchase price of €366 268.75, (ii) to grant a debtor warrant capable of giving rise to an additional payment of up to €162 million should Austrian Airlines's financial situation improve and (iii) that the Austrian State<sup>3</sup> pay Austrian Airlines a subsidy of €500 million by means of a securitisation structure to be used to increase the capital of Austrian Airlines.

In addition, Lufthansa initiated a take-over bid for Austrian Airlines's remaining floating shares, which more shareholders accepted than was required. Including the Austrian State's stake, Lufthansa was therefore in a position to acquire 85% of the shares of Austrian Airlines.

In two decisions of 28 August 2009, and on condition that Lufthansa and Austrian Airlines respect their respective commitments, the Commission authorised Lufthansa's planned acquisition of Austrian Airlines<sup>4</sup> and, subject to certain conditions and full implementation of the restructuring plan as notified, the restructuring aid<sup>5</sup> included in the negative purchase price<sup>6</sup> to be paid by Lufthansa.

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<sup>1</sup> Austrian Airlines provides scheduled passenger and cargo air transport and related services. Including codeshare agreements with other airlines, it operates services to 121 destinations in 63 countries. It has two subsidiaries, Lauda Air and Tyrolean Airways. It also holds 22.5% of the shares in Ukraine International Airlines. Austrian Airlines is a member of the Star Alliance.

<sup>2</sup> Lufthansa also provides scheduled passenger and cargo air transport and related services. In 2008, Lufthansa operated 272 aircraft, transporting 45 million passengers to more than 200 destinations in 85 countries. Lufthansa also controls Swiss International Air Lines Ltd, based at Zurich Airport (Switzerland), Air Dolomiti, Eurowings and the low-cost carrier, Germanwings. In addition, it recently acquired British Midlands and Brussels Airlines. Lufthansa holds 19% of the shares in Jet Blue, a low-cost carrier operating in the United States. Just as Austrian, Lufthansa and Swiss are members of the Star Alliance.

<sup>3</sup> That is to say, the state-owned holding company, Österreichische Industrieholding AG, by which the Austrian State held shares in Austrian Airlines.

<sup>4</sup> Decision C (2009) 6690 final of 28 August 2009 (Case COMP/M.5440 – Lufthansa/Austrian Airlines) (OJ 2010, C 16, p. 11); see also Commission Press Release IP/09/1255.

<sup>5</sup> Decision 2010/137/EC, on State aid C 6/09 (ex N 663/08) — Austria Austrian Airlines — Restructuring Plan (OJ 2010, L 59, p. 1); see also Commission Press Release IP/09/1256.

<sup>6</sup> The Commission was of the view that the purchase price paid by Lufthansa for the shares held by the Austrian State in Austrian Airlines amounted to a negative price to the extent that the difference between the amount of the subsidy paid to Austrian Airlines, on the one hand, and the debtors warrant and the purchase price of the shares, on the other hand, resulted in a negative balance. According to the Commission, that negative price corresponded to the market price and could not therefore be considered on that basis to be State aid in favour of Lufthansa. Nevertheless, it had to be

Niki Luftfahrt GmbH is a company governed by Austrian law with its registered office in Vienna which runs an airline known as 'FlyNiki' or 'Niki'. The latter operates from Vienna, Linz, Salzburg, Graz and Innsbruck (Austria), from which it operates, in particular, flights to destinations across Europe and North Africa. At the time when the actions were brought, 76% of the shares in Niki Luftfahrt were held by Privatstiftung Lauda, a private foundation, and 24% by the second largest German airline, Air Berlin.

Niki Luftfahrt brought actions before the General Court for annulment of the Commission's approval decisions.<sup>7</sup>

By its judgments delivered today, the General Court dismisses those actions.

In the view of the General Court, none of the arguments put forward by Niki Luftfahrt is capable of casting doubt on the two decisions of the Commission.

In particular, Niki Luftfahrt was unsuccessful in refuting the Commission's finding that the compatibility of Lufthansa's acquisition of Austrian Airlines with EU competition law gave rise to serious doubts only as regards the Vienna-Stuttgart, Vienna-Cologne-Bonn and Vienna-Munich services as well as the Vienna-Frankfurt (operating between Austria and Germany) and Vienna-Brussels (operating between Austria and Belgium) services. Nor was Niki Luftfahrt able to show that the commitments proposed by Lufthansa and Austrian Airlines were insufficient to dispel those doubts. Those commitments aimed to reduce barriers to entry and to facilitate the entry of one or several new entrants or the expansion of competitors already operating those services, in particular, by making certain time slots available.

Niki Luftfahrt was further unable to show that the Commission erred in finding that the State aid granted to Austrian Airlines, which was included in the negative price to be paid by Lufthansa, was, as restructuring aid, compatible with EU law on State aid. That State aid was aimed at reducing Austrian Airlines's indebtedness and a restructuring plan aimed at ensuring Austrian Airlines's viability in the long-term.

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**NOTE:** An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

**NOTE:** An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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*The full text of judgments [T-511/09](#) and [T-162/10](#) is made available on the CURIA website on the day of delivery*

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regarded as State aid since the cost of Austrian Airlines's insolvency would have had no bearing on the State and would have been more advantageous for the State than for it to have sold its shares for a negative price.

<sup>7</sup> The Commission was supported in both cases by Austria, Lufthansa and the Österreichische Industrieholding and, in Case [T-511/09](#), by Austrian Airlines.