General Court of the European Union
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Press and Information

Judgments in Cases T-240/18 and T-296/18
Polskie Linie Lotnicze 'LOT' v Commission

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

Faced with a persistent deterioration of its financial situation, in 2016 Air Berlin plc implemented a restructuring plan. In that context, on 16 December 2016, it entered into an agreement with Deutsche Lufthansa AG ('Lufthansa'), in order to sublet to it various aircraft along with their crew.

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

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

On 31 October 2017, Lufthansa gave notice to the Commission, pursuant to the latter's powers to control mergers, [3] of the operation provided for by the agreement of 13 October 2017. On 7 November 2017, easyJet, in the same manner, gave notice of the operation provided for by the agreement of 27 October 2017 (together with the operation notified by Lufthansa, 'the mergers in question'). In the light of the commitments given by Lufthansa, [4] the Commission found the merger notified by Lufthansa to be compatible, by Decision C(2017) 9118 final of 21 December 2017, as it did with the merger notified by easyJet, by Decision C(2017) 8776 final of 12 December 2017 (collectively, 'the contested decisions'). The Commission concluded that the mergers in question did not raise serious doubts as to their compatibility with the internal market. On that occasion, for the first time in cases concerning air passenger transport services, the Commission did not define the relevant markets by city pairs between a point of origin and a point of destination ('O & D markets'). First, it found that Air Berlin had ceased its operations prior to and independently of those mergers. It concluded that Air Berlin had withdrawn from all the O & D markets in which it

[1] Decision C(2017) 6080 final of 4 September 2017 on State aid SA.48937 (2017/N) – Germany – Rescue Aid in favour of [Air Berlin] (OJ 2017 C 400, p. 7).
[2] The slots represent authorisations, for an airline, to use the full range of airport infrastructure necessary for the provision of air transport services, to and from that airport, at a precise date and time.
[3] In the present case, the powers provided for by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).
[4] In the present case, in order to dispel doubts as to the compatibility of the notified merger relating to its position at Düsseldorf airport, Lufthansa had proposed to the Commission, pursuant to Article 6(2) of the EC Merger Regulation, a substantial reduction in the number of slots that would be transferred to it under that merger.

had previously been present. Second, it held that the mergers in question mainly concerned the transfer of slots and found that those slots were not allocated to any particular O & D market. Consequently, it considered it preferable to aggregate, for the purposes of its analysis, all the O & D markets to and from each of the airports with which those slots were associated. In doing so, it defined the relevant markets as those for air passenger transport services to and from those airports. The Commission then went on to verify that those mergers were not such as to create 'a significant impediment to effective competition', in the present case, in particular, by providing easyJet and Lufthansa, respectively, with the ability and incentive to foreclose access to those markets.

Considering that the analysis carried out by the Commission was incorrect, in terms of both its methodology and its results, Polskie Linie Lotnicze 'LOT' ('the applicant'), which presents itself as a direct competitor of the parties to the mergers in question, brought two actions before the General Court, each seeking the annulment of one of the contested decisions.

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

Findings of the General Court

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

In the second place, with respect to the plea alleging a manifest error in the assessment of the effects of the mergers in question, the General Court recalls, at the outset, that, when exercising the powers conferred on it by the EC Merger Regulation, the Commission has a certain discretion, especially regarding complex assessments of an economic nature which it is called upon to make in that regard. Consequently, review by the EU judicature of the exercise of that discretion must take account of the margin of discretion thus conferred on the Commission. Having stated the above, the General Court considers that the analysis of the effects of the mergers in question on the markets of air passenger transport services to and from the airports concerned did not reveal any manifest error of assessment, taking into account, inter alia, the low rate of congestion at those airports and the limited effect of those mergers on the increase in the slot shares held by Lufthansa and easyJet. With respect to, more specifically, the merger notified by Lufthansa, the applicant is not justified in claiming that the Commission had committed a manifest error in its assessment of the effects of the agreement of 16 December 2016 given, inter alia, that that agreement had already permitted Lufthansa to operate aircraft and their crew for a period of six years before Lufthansa definitively acquired them in connection with that merger. Lastly, as regards the merger notified by easyJet, the General Court notes that the slots are necessary for the provision of air passenger transport services. It concludes that there is a 'vertical' relationship between the

allocation of those slots and the provision of those services and that the Commission was therefore entitled to refer to the guidelines on 'non-horizontal' mergers. [5]

In the third place, the General Court rejects the complaints alleging that the commitments given by Lufthansa in connection with the merger of which it gave notice were insufficient, and that no such commitments were given as regards the merger of which easyJet gave notice, on the ground that the applicant is not justified in claiming that those mergers are manifestly liable to constitute a significant impediment to effective competition. For that reason, it also considers unfounded the applicant's complaints that the Commission failed to take account of any potential efficiency gains which might have resulted from those mergers.

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

Lastly, having held that the applicant's plea alleging a failure to state reasons was unfounded and, thus, having rejected all the pleas in law relied on in each of the two cases, the General Court rules that the two actions are to be dismissed, without there being any need, in those circumstances, to rule on their admissibility.

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 and ten days 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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[5] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6). In addition, the General Court rejects the applicant's complaint alleging infringement of those guidelines, noting that the possession of significant market power on one of the markets concerned is not in itself sufficient to establish the existence of competition concerns.

[6] Specifically, 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).