General Court of the European Union
PRESS RELEASE No 66/18
Luxembourg, 16 May 2018

Press and Information

Judgment in Case T-712/16
Deutsche Lufthansa AG v Commission

The Commission must re-examine the request made by Lufthansa and Swiss concerning the waiver of their pricing commitments for the Zurich-Stockholm route

However, the General Court dismisses Lufthansa's action so far as the Zurich-Warsaw route is concerned

In 2005 the Commission cleared, subject to conditions, the planned acquisition of Swiss by Lufthansa, a founding member of Star Alliance (the largest global airline alliance).[1]

Those conditions included compliance with commitments on pricing (fare commitments)[2] given by Lufthansa and Swiss in respect of the Zurich-Stockholm and Zurich-Warsaw routes. Those commitments provided that the merged entity would apply, each time it reduced a published fare on a comparable reference route, an equivalent reduction (in percentage) to the corresponding fares on those two routes. It was stipulated that that obligation would cease once a new air service provider began operations on the routes concerned.

By those commitments Lufthansa and Swiss addressed the Commission's concerns regarding competition on those two routes. First, those routes were operated only by Swiss (which the Commission viewed as a likely future member of Star Alliance) and by Star Alliance partners (SAS3 on the Zurich-Stockholm route and LOT4 on the Zurich-Warsaw route) and, secondly, Zurich and Stockholm airports were congested.

On 4 November 2013, Lufthansa and Swiss submitted a request to the Commission seeking a waiver of the fare commitments in question. They argued (i) that a joint venture agreement entered into between Lufthansa and Swiss in 1995 had been terminated, (ii) that there had in the meantime been a change in the Commission's policy with respect to the treatment of alliance partners in the context of merger review and (iii) that there was competition between, on the one hand, Swiss and, on the other, SAS/LOT.

The Commission rejected that request by a decision of 25 July 2016.[5] It took the view that the conditions for a waiver of the commitments, which had been stipulated in the review clauses included in the 2005 clearance decision, were not met.

Lufthansa has brought an action before the General Court seeking annulment of the decision rejecting the waiver request.

By today's judgment, the General Court annuls the Commission's decision in so far as it concerns the Zurich-Stockholm route and dismisses the remainder of the action.

The Court starts by observing that a decision concerning a request for the waiver of commitments does not presuppose withdrawal of the decision which authorised the merger and made those

[1] Decision of 4 July 2005 (Case COMP/M.3770 — Lufthansa/Swiss). See also Commission press release IP/05/837.
[2] Lufthansa and Swiss also gave commitments concerning slots on those two routes. However, the present action does not concern those commitments.
[3] Scandinavian Airlines System.
[4] Polskie Linie Lotnicze LOT.
[5] Decision C(2016) 4964 final of 25 July 2016.

commitments binding, and does not comprise such a withdrawal. The purpose of such a decision is to determine whether the conditions laid down in the review clause are met or, as the case may be, whether the competition concerns identified in the decision authorising the merger subject to observance of the commitments have ceased to exist. The Court makes clear in this regard that although the Commission has a certain discretion in carrying out such an assessment, **it is** nonetheless **obliged to undertake a careful examination of the request, to conduct, if necessary, an investigation, to make the appropriate enquiries and to base its conclusions on all the relevant information.**

The Court considers that the Commission failed to fulfil that obligation.

In particular, the Commission did not examine the impact on competition of termination of the joint venture agreement concluded between Lufthansa and SAS in 1995, either on its own or in conjunction with Lufthansa's offer to terminate its existing bilateral alliance agreement with SAS.

Nor did the Commission adequately answer Lufthansa's argument that the Commission had changed its policy by no longer taking alliance partners into account for the determination of affected markets.

In addition, as regards the codeshare agreement[6] concluded between Swiss and SAS in 2006 (and thus after the 2005 clearance decision), the Court considers that the Commission could take that agreement into account for the purpose of assessing whether, and to what extent, it was liable to restrict or remove competition between Swiss and SAS. However, the Commission did not undertake a concrete analysis of that agreement and failed to mention elements that might establish that that agreement restricted competition between Swiss and SAS. Although the codeshare agreement perhaps gives rise to only a low level of competition for the sale of codeshare tickets, the Commission has put forward nothing that can establish that the effect of that agreement is to reduce competition between the flights operated by each of the two companies.

Lastly, the Court finds that the Commission failed to fulfil its duty carefully to examine all the relevant information, to make enquiries or to conduct the necessary investigations in order to determine whether there was competition between Swiss and, inter alia, SAS.

As regards the Zurich-Stockholm route, the Court concludes that the Commission made a manifest error of assessment and that the matters relied on in the contested decision are not capable of justifying the rejection of the waiver request relating to that route.

On the other hand, as regards the Zurich-Warsaw route, the Court holds that, in the absence of any change in the contractual relationships between Swiss and LOT, in the light of which the fare commitments were made binding by the 2005 Decision, **the failures established are not sufficient to cause the contested decision to be annulled so far as that route is concerned.**

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.

Press contact: Holly Gallagher ☎ (+352) 4303 3355

[6] That codeshare agreement is an agreement (common in the air-transport sector) under which Swiss, in addition to selling tickets on Swiss-operated flights, can sell tickets under its own designator for flights operated by SAS and vice versa. There is no 'joint pricing' under the codeshare agreement, and no joint network and flight planning.