JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

4 July 2006 *

In Case T-177/04,

easyJet Airline Co. Ltd, established in Luton (United Kingdom), represented initially by J. Cook, J. Parker and S. Dolan, Solicitors, and subsequently by M. Werner and M. Waha, avocats, L. Mills, Solicitor, M. de Lasala Lobera and R. Malhotra, avocats,

applicant,

v

Commission of the European Communities, represented by P. Oliver, A. Bouquet and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

French Republic, represented by G. de Bergues, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for the annulment of the Commission Decision of 11 February 2004 declaring the concentration between Société Air France and Koninklijke Luchtvaart Maatschappij NV compatible with the common market, subject to fulfilment of the proposed commitments (Case COMP/M.3280 — Air France/KLM),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2005,

gives the following

Judgment

Legal context

1 Article 1 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, as rectified (OJ 1990 L 257, p. 13), and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1), as rectified (OJ 1998 L 40, p.17)) provides that that regulation is to apply to all concentrations with a Community dimension, as defined in paragraphs 2 and 3 of that article.

2 Article 4(1) of Regulation No 4064/89 provides that concentrations with a Community dimension are to be notified in advance to the Commission.

3 Article 6(1)(b) of Regulation No 4064/89 provides that where the Commission finds that the concentration notified, although falling within the scope of that regulation, does not raise serious doubts as to its compatibility with the common market, it is to decide not to oppose it and is to declare that it is compatible with the common market ('phase I').

4 Article 6(1)(c) of Regulation No 4064/89 provides that if, on the other hand, the Commission finds that the concentration notified falls within the scope of that regulation and raises serious doubts as to its compatibility with the common market, it is to decide to initiate proceedings ('phase II').

5 Article 6(2) of Regulation No 4064/89 provides:

'Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.'

6 Article 6(3)(b) of Regulation No 4064/89 provides that the Commission may revoke the decision it has taken where the undertakings concerned commit a breach of an obligation attached to that decision.

7 In the Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ 2001 C 68, p. 3, 'the notice

on remedies') the Commission sets out the guidelines which it intends to follow in relation to commitments, and states in particular that:

— the parties are required to show clearly that the remedy restores conditions of effective competition in the common market on a permanent basis (paragraph 6) and from the outset to remove any uncertainties as to the type, scale and scope of the proposed remedy and as to the likelihood of its successful, full and timely implementation by the parties (paragraph 7);

— the basic aim of commitments is to ensure competitive market structures. Commitments which are structural in nature, such as the commitment to sell a subsidiary, are, as a rule, preferable from the point of view of the objective of Regulation No 4064/89, inasmuch as such a commitment prevents the creation or strengthening of a dominant position previously identified by the Commission and does not, moreover, require medium- or long-term monitoring measures. Nevertheless, the possibility cannot automatically be ruled out that other types of commitments may themselves also be capable of preventing the emergence or strengthening of a dominant position. However, whether such commitments can be accepted has to be determined on a case-by-case basis (paragraph 9);

— commitments submitted to the Commission in phase I must be sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) of Regulation No 4064/89 (paragraph 11);

— where a proposed merger threatens to create or strengthen a dominant position which would impede effective competition, the most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors by means of divestiture (paragraph 13);

— the divested activities must consist of a viable business which, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. Normally a viable business is an existing one which can operate on a stand-alone basis, which means independently of the merging parties as regards the supply of input materials or other forms of cooperation other than during a transitional period (paragraph 14);

— there are cases where the viability of the divestiture package depends, in view of the assets which are part of the business, to a large extent on the identity of the purchaser. In such circumstances, the Commission will not clear the merger unless the parties undertake not to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business, approved by the Commission (paragraph 20);

— whilst being the preferred remedy, divestiture is not the only remedy acceptable to the Commission. There may be situations where a divestiture of a business is impossible. In such circumstances, the Commission has to determine whether or not other types of remedy may have a sufficient effect on the market to restore effective competition (paragraph 26).

8 The Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, 'the notice on market definition') states that firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions (paragraph 13).

Background to the dispute

1. *The companies in question*

9 On 11 February 2004, upon the conclusion of phase I, the Commission adopted a decision declaring the concentration compatible with the common market, subject to fulfilment of the proposed commitments, pursuant to Article 6(2) of Regulation No 4064/89 (Case COMP/M.3280 — Air France/KLM) (OJ 2004 C 60, p. 5, 'the contested decision'). The applicant is a low-cost airline registered in the United Kingdom which offers its services at attractive prices to various destinations in Europe.

10 Air France is an airline established in France which has three main activities: passenger air transport, cargo transport and maintenance services. It operates a hub-and-spoke network, with its principal hub for international operations at Roissy-Charles-de-Gaulle airport ('CDG') and its main domestic hub at Paris-Orly airport ('Orly'). It is also one of the founding members of the SkyTeam alliance, whose other members are Aeromexico, Alitalia, Continental Airlines, CSA Czech Airlines, Delta, Northwest Airlines and Korean Air.

11 KLM is an airline established in the Netherlands with four main activities: passenger air transport, cargo transport, maintenance services and the operation of charter and low-cost scheduled services by its subsidiary Transavia. KLM operates a hub-and-spoke network with its principal hub at Amsterdam-Schiphol airport. It has an alliance with Northwest Airlines covering principally operations on North Atlantic routes.

2. *The administrative procedure before the Commission*

12 On 18 December 2003 Air France and KLM notified to the Commission, pursuant to Regulation No 4064/89, a framework agreement signed on 16 October 2003. This agreement provided for the acquisition by Air France of all KLM's economic interests, together with the gradual acquisition of control of KLM. Air France was to acquire initially 49% of KLM's voting rights, which would confer a right of veto over KLM's strategic operations (the adoption of a strategic plan and of the budget and the appointment of senior management), and at a later date the remaining voting rights ('the merger').

13 On 23 December 2003, on the basis of Article 11 of Regulation No 4064/89, the Commission sent a request for information about the merger to more than 90 competitors, including the applicant. On 14 January 2004 the applicant submitted its observations.

14 On 21 January 2004, Air France and KLM proposed commitments to the Commission pursuant to Article 6(2) of Regulation No 4064/89. On 23 January 2004 the Commission sent the commitments to the interested parties for their observations. On 30 January and 4 February 2004 the applicant submitted its comments on the commitments proposed by the parties to the merger.

15 On 11 February 2004, at the conclusion of phase I, the Commission adopted the contested decision, finding that the merger was compatible with the common market, subject to compliance with the proposed commitments.

3. *The commitments accepted by the Commission*

16 In order to dispel the serious doubts which had arisen as to the merger's compatibility with the common market, Air France and KLM offered commitments with a view to resolving competition problems in relation to 14 services, 9 of which are in Europe (Paris-Amsterdam, Lyons-Amsterdam, Marseilles-Amsterdam, Toulouse-Amsterdam, Bordeaux-Amsterdam, Milan-Amsterdam, Rome-Amsterdam, Venice-Amsterdam and Bologna-Amsterdam). The commitments, which are subject to the supervision of a trustee, may be summarised as follows:

— commitments concerning short-haul/European routes: the merged entity undertakes to make a number of slots available, without financial compensation and in accordance with the procedure specified in the commitments, at Amsterdam and/or Paris and/or Lyons and/or Milan and/or Rome, and to allow one or more new entrants to operate, on identified European routes, (new or additional) non-stop scheduled daily passenger air services. For the Paris-Amsterdam route, up to six frequencies per day must be made available, for the Milan-Amsterdam route, up to four frequencies per day, for the Lyons-Amsterdam and Rome-Amsterdam routes, up to three frequencies per day and for the Marseilles-Amsterdam, Toulouse-Amsterdam, Bordeaux-Amsterdam, Venice-Amsterdam and Bologna-Amsterdam routes, up to two frequencies per day;

— commitments concerning long-haul/intercontinental routes: slots will be made available at the Amsterdam and Paris airports for the long-haul routes specified in the contested decision where competition problems arise;

— commitments concerning conditions for the release of slots: the slots released by the merged entity will be situated in a range not differing by more than 90 minutes from the time requested by the new entrant for long-haul routes and in a range not differing by more than 30 minutes from the time requested by the new entrant for intra-European routes. On the basis that CDG and Orly are substitutable for the purposes of intra-European passenger air services, potential new entrants may request slots at either of those airports;

— duration of commitments relating to slots: unlimited. However, the merged entity may invoke the review clause if that is justified by exceptional circumstances or radical changes in market conditions, such as the operation of a competing air transport service on an identified European or long-haul route. The Commission may then decide to waive, modify or replace one or more of the commitments. If, following such a review, the Commission concludes that the merged entity's obligation to release slots on a given route is extinguished, the new entrant may continue to use the slots it has previously received. If it ceases to use the slots on a given route, they must be surrendered to the slot coordinator;

— frequency freeze: the merged entity undertakes not to add frequencies on the Paris-Amsterdam or Lyons-Amsterdam routes, as the case may be, for a period beginning on the start of operations by the new provider of air transport services on the route in question. The frequency freeze will last for six consecutive IATA (International Air Transport Association) seasons. The merged entity undertakes not to add frequencies beyond a total of 14 per week on the Amsterdam-New York (J.F. Kennedy Airport) route and not to add frequencies on the Amsterdam-New York (Newark Airport) route for six consecutive IATA seasons beginning on the start of the operation of a non-stop service by the new provider of air transport services on that route;

— interline agreements: the merged entity undertakes, at the request of a new entrant, to enter into an interline agreement concerning all the routes specified in the contested decision;

— special pro-rate agreements: if so requested by a potential new entrant, the merged entity undertakes to enter into a special pro-rate agreement for traffic with a true origin and destination in France and/or the Netherlands, provided that part of the journey is on the Paris-Amsterdam route;

— frequent flyer programme: if so requested by a new entrant, the merged entity will allow it to participate in its frequent flyer programme for the routes specified in the contested decision, on the same conditions as the other partners who are members of the merged entity's alliance;

— intermodal services: if so requested by a railway company or other surface transport company operating routes between France and the Netherlands and/or between Italy and the Netherlands, the merged entity undertakes to conclude an intermodal agreement with it. Under such agreement, the merged entity will provide air passenger transport as a segment of an itinerary also comprising surface transport provided by the intermodal partner;

— blocked-space agreements: if so requested by a potential new entrant, the merged entity undertakes to conclude with it a blocked-space agreement for traffic with a true origin and destination, on the one hand, in the Netherlands and, on the other, at Marseilles, Toulouse or Bordeaux, provided that part of the journey is on the Paris-Amsterdam route. The blocked-space agreement is based on a fixed number of seats and remains in force for at least one entire IATA season. The number of seats covered by the agreement is a maximum of 15% of the seats offered on a given frequency and must not be more than 30 in one aircraft;

— obligations pertaining to fares: whenever the merged entity reduces a published fare on the Paris-Amsterdam route, it undertakes to apply an equivalent reduction to the corresponding fare on the Lyons-Amsterdam route, provided that there is no competitive air transport service on that route.

Procedure and forms of order sought

17 The applicant brought the present action by application lodged at the Court Registry on 14 May 2004.

18 By document lodged at the Court Registry on 24 September 2004, the French Republic sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. On 9 November 2004 the applicant requested confidential treatment of certain information relating, it claimed, to its business secrets. By order of 17 December 2004 the President of the Second Chamber of the Court of First Instance granted the French Republic leave to intervene. The intervener lodged its statement and the other parties lodged their observations on the statement within the time-limits allowed.

19 As the intervener raised no objections to the applicant's request for confidentiality, a non-confidential version of the pleadings was sent to the intervener, as originally provided for by the abovementioned order of 17 December 2004.

20 By letter of 26 October 2005, the intervener informed the Court Registry that it did not intend to take part in the hearing.

21 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure. The oral arguments of the parties and their replies to the questions of the Court were heard at the hearing of 23 November 2005.

22 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

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

— dismiss the application;

— order the applicant to pay the costs.

The request that measures of inquiry be adopted

24 By letter lodged at the Court Registry on 3 October 2005, the applicant requested the adoption of measures of inquiry requiring the Commission to disclose, first, all the replies received to its request for information of 23 December 2003 as well as all the documents sent to it by the airlines Meridiana, Virgin Express and Volare and,

second, all its working documents on the proposed commitments together with all the correspondence relating thereto with the parties to the merger.

25 The Court considers that that request constitutes in reality an offer of further evidence. Under Article 48(1) of the Rules of Procedure of the Court of First Instance, the parties may in a reply or rejoinder offer further evidence in support of their case and must give reasons for the delay in offering it.

26 In the present case, the applicant requested the adoption of measures of inquiry almost 11 months after having lodged its reply, and without offering any explanation for that delay. Consequently, the applicant was asked at the hearing to explain why, in its view, the delay in making its request was justified. It stated in that connection that the delay was explained by the fact that it had initially intended to bring an action to challenge the Commission's decision refusing it access to the documents it had sought to obtain. Although that hesitation as regards the type of action to bring may explain why the applicant did not lodge its request immediately after that refusal, it cannot however justify the fact that the applicant waited for several further months before acting.

27 Moreover, and independently of the lateness of that request, the Court considers that the information in the pleadings and the submissions of the parties is sufficient to enable it to give judgment in the present case. Therefore the request for the adoption of measures of inquiry is rejected.

Admissibility

1. *Arguments of the parties*

28 The applicant submits that the contested decision is of direct and individual concern to it. As it operates on the markets in which the merged entity will operate, it considers that it is directly concerned by the contested decision. The applicant claims also to be individually concerned since it is one of the main competitors of Air France and KLM on several routes and is also to be regarded as a potential competitor of Air France on other routes in France, particularly those to and from CDG and Orly. It further submits that it participated actively in the administrative procedure leading to the contested decision, which, according to the case-law, distinguishes it individually just as in the case of the persons to whom that decision is addressed (Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 44).

29 The Commission questions whether the action is admissible, given the applicant's lack of interest in the routes affected by the merger.

2. *Findings of the Court*

Standing to bring proceedings

30 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision addressed to it or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to it.

31 The applicant is not a party to the merger in this case and is not therefore a person to whom the contested decision is addressed. It is thus necessary to consider whether it is directly and individually concerned by the decision.

32 The contested decision, in permitting the merger to be put into effect immediately, was capable of bringing about an immediate change in the state of the relevant markets. As the intention of the parties to the merger to bring about such a change was not in doubt, the undertakings engaged in the relevant market or markets could, on the date of the contested decision, be certain of an immediate or imminent change in the state of the market (see, to that effect, Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 80). It follows that the applicant is directly concerned by the contested decision.

33 It is therefore necessary to determine whether the applicant is also individually concerned by the contested decision.

34 According to well-established case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and thus distinguishes them individually just as in the case of the person to whom the decision is addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107; Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 39; and Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 62).

35 Whether a third party is individually concerned by a decision finding a concentration to be compatible with the common market depends, on the one

hand, on that third party's participation in the administrative procedure and, on the other, on the effect on its market position. Whilst mere participation in the procedure is not sufficient to establish that the decision is of individual concern to the applicant, particularly in the field of merger control, the careful examination of which requires regular contact with numerous undertakings, active participation in the administrative procedure is a factor regularly taken into account in the case-law on competition, including in the more specific area of merger control, to establish, in conjunction with other specific circumstances, the admissibility of the action (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 24 and 25; Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission ('Kali & Salz')* [1998] ECR I-1375, paragraphs 54 to 56; *Air France* v *Commission*, paragraph 28 above, paragraphs 44 to 46; and Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, paragraph 95).

36 As regards, first, the issue of participation in the administrative procedure, it must be noted that the applicant took an active part therein, in particular by replying on 14 January 2004 to the Commission's request for information of 23 December 2003 and by giving its views on 30 January 2004 on the terms of the commitments offered by Air France. It also participated on 30 January 2004 in a conference call with the Commission concerning the proposed commitments, and on 4 February 2004 submitted its replies to the questions sent to it by the Commission concerning the commitments offered by the parties to the merger.

37 As regards, secondly, the effect on the applicant's market position, it appears from its written pleadings, and is not challenged by the Commission, that it is one of Air France's main competitors in France on various direct routes, such as Paris-Marseilles, Paris-Nice and Paris-London, and is one of KLM's main competitors on other direct routes, such as Amsterdam-Edinburgh, Amsterdam-London and Amsterdam-Nice. Moreover, the applicant competes on one of the markets on which both parties to the merger operate, the Amsterdam-Nice route.

38 Therefore, the applicant is individually concerned by the contested decision.

39 In the light of the foregoing, the applicant is directly and individually concerned by the contested decision and thus has the requisite standing to bring proceedings to challenge that decision.

Interest in bringing the proceedings

40 As regards the applicant's interest in bringing the proceedings, it is settled case-law that an action for annulment brought by a natural or legal person is admissible only if the applicant has an interest in having the contested measure annulled (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 59; Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 40; and Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, paragraph 33). That interest must be vested and present (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33) and is evaluated as at the date on which the action is brought (Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357, 371, and Case T-159/98 *Torre and Others* v *Commission* [2001] ECR-SC I-A-83 and II-395, paragraph 28). Such an interest exists only if the action, if successful, is likely to procure an advantage for the party who has brought it (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited).

41 On the date on which the applicant brought this action, it had a vested and present interest in having the contested decision annulled, since the decision authorises, subject to certain conditions, a concentration between two of its competitors which may affect its commercial situation. Consequently, the applicant's interest in bringing proceedings against the contested decision cannot be denied. That finding is not put in doubt by the lack of interest in bringing proceedings alleged by the Commission in respect of the third and fifth pleas. Even assuming that the concept

of inadmissibility for lack of interest in bringing proceedings can apply independently to an individual plea, the third and fifth pleas in the present case constitute criticisms of various aspects of the Commission's reasoning which led it to adopt the operative part of the contested decision, which does in fact adversely affect the applicant.

42 Consequently, the action is admissible.

Merits

43 The applicant puts forward five pleas in support of its action for annulment. By the first, it submits that the Commission committed a manifest error of assessment by failing to consider the strengthening of the dominant position of the merged entity on the routes on which the activities of the parties to the merger did not overlap, either directly or indirectly. By the second plea, the applicant submits that the Commission committed a manifest error of assessment by failing to consider the possible strengthening of the dominant position of the merged entity on the market for the purchase of airport services. By the third plea, it submits that the Commission committed a manifest error of assessment by finding that CDG and Orly were substitutable. By the fourth plea, the applicant submits that the Commission committed a manifest error of assessment by failing to take account of the effect on competition in the future if the merger did not take place. Lastly, by the fifth plea, it submits that the contested decision is vitiated by a manifest error of assessment inasmuch as the commitments are not sufficient to dispel the Commission's serious doubts regarding the compatibility of the merger with the common market.

44 According to settled case-law, review by the Community judicature of complex economic assessments made by the Commission in the exercise of the power of assessment conferred on it by Regulation No 4064/89 is limited to ensuring

compliance with the rules governing procedure and the statement of reasons, as well as the substantive accuracy of the facts and the absence of manifest errors of assessment or misuse of powers (see Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1161, paragraph 101, and Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 151).

45 Under Article 2(3) of Regulation No 4064/89, a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. Conversely, the Commission is bound to declare a concentration falling within the scope of the regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled. If, therefore, a dominant position is not created or strengthened, the merger must be authorised and there is no need to examine the effects of the merger on effective competition (*Air France* v *Commission*, paragraph 28 above, paragraph 79).

46 It is in the light of those considerations that the applicant's five pleas must be considered.

1. *The first plea, alleging a manifest error of assessment by reason of the failure to consider the strengthening of the dominant position of the merged entity on the routes on which there was no overlap between the operations of Air France and those of KLM*

Arguments of the parties

47 As regards the scheduled air transport of passengers, the applicant notes that the Commission defined the product market on the basis of point of origin/point of

destination ('O&D') pairs, any combination constituting a separate market from the point of view of demand. The applicant contends that the Commission should have assessed the supply of 'leisure travel by air' on a broader basis than that of segmentation by city-pair route, in the context of the 'general leisure/holiday market'.

48 In addition, the Commission ought to have considered whether the merger was likely to create or strengthen a dominant position on any market in the European Union. Accordingly, the Commission committed a manifest error of assessment by failing to consider the effects of the merger on routes on which the operations of Air France and those of KLM did not overlap. In particular, the applicant alleges that the Commission failed to consider whether the additional benefits resulting from the merger and the increase in Air France's network or its presence at international level would have the effect of strengthening its position on those routes. The applicant thus considers that the Commission departed from its practice in assessing the strengthening of a dominant position, as shown by several decisions adopted on the basis of Article 8(2) of Regulation No 4064/89 in which the broader impact of the notified concentration in related markets beyond the area of direct overlap was considered (see, to that effect, inter alia Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case COMP/M.2220 — *General Electric* v *Honeywell*) (OJ 2004 L 48, p. 1).

49 The manifest error of assessment arising from that failure to assess the strengthening of the dominant position of the merged entity was compounded by the fact that, pursuant to Article 81(3) EC, the Commission has acknowledged the benefits to consumers arising from joint ventures and other cooperative activities between airlines. In this case the applicant considers that the ability of an airline or alliance to offer competitive benefits, such as better connections, lower prices and new routes, is likely to influence consumers as regards the choice of airline or alliance. However, the Commission found, wrongly, that those benefits favoured competition and not that they strengthened a dominant position.

50 As an example, as regards the increase in flight connections, the applicant submits that passengers wishing to travel from Biarritz to Amsterdam cannot do so directly, but must change at Clermont-Ferrand, Lyons, Paris or Nice. Consequently, the merger will strengthen Air France's position on the Biarritz-Amsterdam market. Thus, passengers wishing to travel from Biarritz to Amsterdam will be more likely to travel with Air France because the merger has increased the flight connections between those four airports and Amsterdam. The same argument applies to the Brest-Amsterdam route, on which the increase in flight connections resulting from the merger reinforces Air France's position.

51 The Commission considers that the market for passenger air transport services had to be defined in this case according to the O&D approach. It points out that the applicant did not specify what it means by 'leisure travel by air' or 'the general leisure holiday market', thus failing to show clearly what a more broadly-based approach to defining the market would be.

52 The Commission argues that the applicant cannot merely assert that it should have considered the effects on non-overlapping routes without explaining which routes that applied to in this case. Moreover, neither the parties to the merger nor the third parties consulted during the administrative procedure claimed that there was a risk that the merger would have anti-competitive effects on non-overlapping routes, apart from those in which Air France or KLM were potential competitors. As for the applicant's allegation in respect of the Biarritz-Amsterdam route, the Commission considers that to be a separate market and that its analysis must be based, first, on potential competition in the form of direct flights between Biarritz and Amsterdam and, second, on actual or potential competition on the indirect routes between those destinations. It follows from that analysis that the merger does not restrict competition and a similar conclusion applies to the Brest-Amsterdam route. The plea is thus wholly unfounded.

53 The intervener considers that the Commission defined the relevant market correctly and that the applicant's argument that the Commission did not consider the effects of the merger on non-overlapping markets is unfounded.

Findings of the Court

54 The plea is in two parts. First, the applicant submits that the Commission failed to consider the effect of the merger on competition in the market for 'leisure travel by air'. Second, it alleges that the Commission failed to assess the effects of the merger on non-overlapping markets.

55 In order to assess whether a proposed merger creates or strengthens a dominant position, the Commission must first of all define the relevant market (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 32, and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraphs 46 and 64).

56 For the purposes of defining the relevant product market in this case the Commission carried out an analysis of demand-side substitution. The contested decision records that, in the case of passenger air transport, the Commission's view was that the product market should be defined according to the O&D method, whereby each route between a point of origin and a point of destination is treated as a separate market. In order to establish whether the combination of a place of origin and a place of destination is a relevant product market, the Commission rightly examined, in recital 9 of the contested decision, the various transport options available to passengers between those two points (see, to that effect, Case 66/86 *Ahmed Saeed Flugreisen and Others* [1989] ECR 803, paragraphs 39 to 41, and *Air France* v *Commission*, paragraph 28 above, paragraph 84).

57 At the hearing the Court asked the applicant to clarify its position with regard to market definition so as to state whether or not it was seeking to challenge the Commission's definition of the market. The applicant replied in the negative, explaining that it did not intend to challenge the merits of the O&D method, but wished to highlight the fact that, in its view, the Commission ought to have assessed the effect on competition on other markets, which should have been defined differently.

The failure to analyse the effect of the merger on the market in 'leisure travel by air'

58 Article 44(1)(c) of the Rules of Procedure of the Court of First Instance provides that an application must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case, if appropriate without other information. In order to ensure legal certainty and the sound administration of justice, for an action to be admissible the essential points of fact and law on which it is based must be apparent from the text of the application itself, even if stated only briefly, provided the statement is coherent and comprehensible (see the order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29).

59 Apart from the reference to failure to analyse the merger's effect on the market in 'leisure travel by air', a market which is not clearly defined by the applicant in its pleadings, the applicant has put forward no argument in these proceedings in support of its contention. It has merely asserted that, for some passengers wishing to travel for leisure purposes, various destinations were interchangeable. However, it did not describe the characteristics of that alleged market. In the absence of any more precise definition of the market for which the applicant contends, it is impossible for the Court to determine whether it was necessary for the Commission to consider it.

60 Accordingly, it must be held that the requirements of Article 44(1)(c) of the Rules of Procedure are not satisfied in the present case.

61 In any event, the Court considers that the applicant has failed to demonstrate why a market definition based on the O&D approach, which in substance includes the routes for 'leisure travel by air', does not allow analysis of all the competition problems which the merger is liable to entail.

62 Consequently, the first part of the plea is inadmissible.

The failure to analyse the effect of the merger on non-overlapping markets

63 Pursuant to Article 2 of Regulation No 4064/89, in particular, the Commission is required to examine the effects on competition in the markets in which there is a risk of the creation or strengthening of a dominant position as a result of which competition would be significantly impeded. It is possible that a concentration may have such an effect in markets in which there is no overlap between the activities of the parties to a merger.

64 Although the Commission's analysis of the effect on competition may be oriented, in part, towards the concerns raised by the third parties consulted during the administrative procedure, the Commission is bound, even in the absence of any express request by such third parties, but where there are serious indications to that effect, to assess the competition problems created by the merger on all the markets which may be affected by it.

65 Nevertheless, where it is alleged that the Commission failed to have regard to a possible competition problem on the markets on which the activities of the parties to a merger do not overlap, it is for the applicant to adduce serious evidence of the genuine existence of a competition problem which, by reason of that effect, should have been examined by the Commission.

66 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 on those markets.

67 In the present case the applicant merely asserts that the Commission wrongly confined its analysis to the effects on competition in markets on which the activities of the parties to the merger overlapped either directly or indirectly, without adducing evidence in support of its argument. The applicant simply points out that Air France has a monopoly on 27 of the 42 domestic routes from Paris, that it has 61.8% of the total capacity on routes from France and that it has 53% of the total number of slots available at Orly and 74% of those at CDG.

68 Those figures are not sufficient, however, to substantiate the applicant's argument in respect of the non-overlapping markets, since it fails to identify them clearly.

69 As regards the examples put forward by the applicant in respect of passengers wishing to travel from Brest or Biarritz to Amsterdam and who would be inclined to choose Air France because of the increase in flight connections arising from the merger, the applicant's case rests on that bare assertion, for which there is no supporting evidence. Moreover, as the Commission shows, the analysis of the market must take account, first, of potential competition on direct flights between

Biarritz or Brest and Amsterdam and, second, of actual or potential competition on indirect flights between those cities. According to the Commission, there is no tangible evidence to show that Air France and KLM were potential competitors on the Biarritz-Amsterdam route for direct flights or that KLM could be viewed as a potential competitor of Air France on indirect flights between those cities.

70 Furthermore, with regard to the Brest-Amsterdam route, the Commission, unchallenged on this point by the applicant, pointed out that there was no direct flight as passengers had to change at Lyons, Marseilles, Nice or Paris. It should be noted in this regard that the contested decision recognised that the Lyon-Amsterdam, Marseilles-Amsterdam and Paris-Amsterdam markets raised competition problems, and commitments were offered in order to remedy them. As regards the Nice-Amsterdam market, which concerns only a small number of passengers, the contested decision states that KLM and its subsidiary Basiq Air are competing with the applicant, which holds a substantial share of the market on that route. Conversely, Air France operates only an indirect service and its market share on that route is less than 1% (recital 79 of the contested decision). Consequently, the Commission considered that that route did not give rise to competition problems.

71 The Court concludes that the applicant has brought forward no matter that could show that these findings were vitiated by a manifest error of assessment.

72 Lastly, the fact that the Commission recognised, pursuant to Article 81(1) and (3) EC, the advantages to the consumer of joint ventures or cooperation agreements between airlines does not reveal a manifest error of assessment. A merger, like an agreement between competitors which is exempt under Article 81(3) EC, may give rise to consequent competitive advantages that may benefit consumers. It should be noted in this regard that merger control is not premissed on the prohibition of such advantages, but on the aim of avoiding the creationor strengthening of a dominant

position as a result of which effective competition could be significantly impeded in the common market. The ability as a result of the merger to offer passengers services at a better price could only constitute evidence of the creation or strengthening of a dominant position in limited cases, for example where the merged entity intends or has the capacity to operate a predatory pricing policy.

73 Since the applicant has not provided tangible evidence that the merged entity is able to offer passengers attractive competitive advantages on other markets, which it has not in any case defined, the creation or strengthening of a dominant position and the corresponding harm to competition which might arise on those markets have not been established.

74 Accordingly, the Court finds that the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment by not extending its assessment to the non-overlapping markets.

75 Consequently, the second part of the plea and thus the first plea in its entirety must be rejected.

2. *The second plea, alleging a manifest error of assessment by reason of the failure to assess the strengthening of the dominant position of the merged entity on the market for the purchase of airport services*

Arguments of the parties

76 The applicant submits that the Commission failed to take account of the fact that Air France and KLM are purchasers of airport services, whereas in past decisions it

has assessed the effects of a merger on the purchasing market (Commission Decision 97/227/EC of 20 November 1996 declaring a concentration to be incompatible with the common market (Case No IV/M.784 — Kesko/Tuko) (OJ 1997 L 110, p. 53); Commission Decision 97/816/EC of 30 July 1997 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No IV/M.877 — Boeing/McDonnell Douglas) (OJ 1997 L 336, p. 16); and Commission Decision 1999/674/EC of 3 February 1999 relating to proceedings under Council Regulation (EEC) No 4064/89 (Case No IV/M.1221 — Rewe/Meinl) (OJ 1999 L 274, p. 1)). In this case the upstream market is the market in services linked to airport infrastructures for which a fee is payable, being the use and maintenance of runways, the use of taxiways and aprons, and approach guidance for civil aircraft (Commission Decision 2000/521/EC of 26 July 2000 relating to a proceeding pursuant to Article 86(3) of the EC Treaty (OJ 2000 L 208, p. 36)).

77 The applicant argues that the Commission acknowledged in the contested decision that it took account of the concerns raised by competitors, in particular with regard to hub dominance (recital 161 of the contested decision). Thus, the Commission required certain commitments to be given in order to deal with Air France's dominant position in its Paris hub. In so doing the Commission implicitly found that the merger would strengthen Air France's position at CDG and Orly in the market for the purchase of airport services.

78 The applicant argues that CDG and Orly are dominated by Air France, and points out that Aéroports de Paris ('AdP'), which runs those airports and allocates slots, and Air France were State-owned companies. The bodies responsible for allocating slots may be regarded as performing an economic activity (Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, paragraph 121). The Commission did not

take account of the fact that the merger might result in the creation or strengthening of a dominant position on a market for the purchase of airport services, such as that of Paris dominated by AdP.

79 The Commission observes that the applicant alleges for the first time, in these proceedings, the existence of a market for the purchase of airport services. That is a matter which was not raised during the administrative procedure. Moreover, the applicant does not explain what it means by 'airport services' and merely puts forward arguments relating to the allocation of slots. It makes no reference to airport services as these are generally understood, for example catering and ground-handling services. Consequently, the Commission considers that there was no need to examine them and underlines the fact that there was no evidence that the market for the purchase of those services required investigation.

80 In the first place, the Commission points out that it is generally recognised that slots are indispensable to the provision of air transport services. Consequently, there was no reason to treat the latter as a separate activity. Moreover, the allocation of slots is an administrative activity and not an economic one, since AdP acts in that respect as a public authority and not as a company. In the case of coordinated airports the body responsible for the allocation of slots in France is anyway the Association pour la coordination des horaires (COHOR), and not AdP as the applicant claims. Moreover, there is no question of either the merged entity or any other company being able to wield power over the bodies responsible for allocating slots, which might be regarded as a dominant position within the meaning of Regulation No 4064/89 or Article 82 EC.

81 In the second place, the Commission considers that in the case of services defined as relating to access to airport infrastructures for which a fee is payable it does not suffice for the applicant to show that such a market exists: it must go on to demonstrate that the Commission committed a manifest error of assessment by failing to investigate that market.

Findings of the Court

82 There are two parts to the present plea. First, the applicant submits that the Commission failed to assess the strengthening of the position of the merged entity on the market for the purchase of airport services, which it defines as that for services relating to infrastructures, such as the use and maintenance of runways, the use of taxiways and aprons, and approach guidance for civil aircraft, for which a fee is payable. Secondly, it submits that the Commission failed to consider the commercial influence which the merged entity could wield over AdP.

83 The parties were invited at the hearing to state whether those services constitute one or several relevant markets, which should be separated from those defined according to the O&D method. The Commission, unchallenged on this point by the applicant, considered that those services constituted several relevant markets separate from those defined according to that approach.

The failure to take into account the strengthening of the dominant position on the market for the purchase of airport services

84 In these proceedings the applicant merely asserts that there is a separate market for services linked to access to airport services for which a fee is payable and on which the merged entity would wield increased purchasing power, without adducing any evidence of the creation or strengthening of a dominant position likely to impede competition on that market.

85 At the hearing, the applicant was asked to explain how, in its view, the merger strengthened the dominant position on the relevant market, since its written pleadings were silent in that regard. However, the Court considers that the applicant has not been able to adduce relevant matters that could demonstrate such strengthening and, consequently, show that there was a manifest error of assessment on the part of the Commission in that regard.

86 For the sake of completeness, the Court notes that recital 73 of the contested decision recognises that the parties to the merger 'in comparison to their competitors ... benefit from economies of scale at both airports ... and the increased leverage to negotiate pricing with third-party service providers such as engineering, ground-handling services and airport facilities etc.'. It follows, according to the contested decision, that 'the merged entity would have a very strong position on [the Paris-Amsterdam] hub-to-hub route'.

87 Accordingly, the Commission has recognised the possibility of the effects on competition at hubs likely to result from the merger. The Commission's acknowledgment of the existence of adverse effects on competition in respect of the commercial activities of the parties to the merger at the hubs, without carrying out a precise analysis of those markets, is not a manifest error of assessment such as to undermine the legality of the contested decision. In fact, this finding led the Commission to accept the commitments the stated aim of which was to counteract the increased weight of the merged entity at the hubs, taken as a whole, and in particular in the light of the recognition of a dominant position.

88 Consequently, the first part of the plea must be rejected.

The strengthened influence of the merged entity with regard to AdP

89 The applicant alleges that AdP, in its view responsible inter alia for the allocation of slots, might be affected by the dominant position of the merged entity in Paris.

90 As regards first the allocation of slots, it should be noted that at the relevant time this was governed by 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). Article 4 of that regulation provided:

'... A Member State shall ensure that the coordinator carries out his duties under this Regulation in an independent manner ... The coordinator shall act in ... a neutral, non-discriminatory and transparent way ... The coordinator shall be responsible for the allocation of slots [and] shall monitor the use of slots.'

91 It follows from the foregoing that the allocation of slots is governed by a regulatory framework which in principle prevents the body responsible for allocating slots from favouring the merged entity by awarding it more slots than its competitors. In that regard the applicant and the Commission stated at the hearing that they did not wish to say whether AdP or COHOR was in fact the competent authority.

92 Furthermore, the applicant has adduced no relevant evidence to show that the parties to the merger could influence that body one way or the other.

93 Second, a distinction is generally drawn between AdP's purely administrative activities, in particular supervisory activities, and the management and operation of the Paris airports, which are remunerated by commercial fees which vary according to turnover (*Aéroports de Paris* v *Commission*, paragraph 78 above, paragraph 112). Thus, it cannot be denied that AdP is in charge of two types of activity which are intrinsically different: those referred to as 'public service' activities, and commercial activities which are necessarily subject to the competition rules. Consequently, the fact that Air France and AdP were two State-owned companies could not give rise to any presumption of concertation, as the applicant seems to imply.

94 In the light of the foregoing, the second part of the plea and therefore the second plea as a whole must be rejected.

3. *The third plea, alleging a manifest error of assessment as regards the substitutability of CDG and Orly*

Arguments of the parties

95 The applicant challenges the Commission's reasoning concerning the substitutability of CDG and Orly. With regard to the location of the airports, the applicant observes that according to its calculations CDG is almost twice as far from the centre of Paris as Orly (30 km as against 18 km), Orly being south of central Paris and CDG to the north-east. In addition the applicant considers that, as Orly is a smaller airport, the time taken to get from the aircraft to connections with other means of transport is less than in the case of CDG. Consequently, it is quicker to reach the centre of Paris from Orly.

96 The applicant submits that in practice most long-haul network carriers have concentrated their activities at CDG, while Orly is used more for short-haul intra-European and domestic traffic. According to the applicant, CDG handles large volumes of transfers between flights, whereas Orly is an older airport and is consequently less well-equipped to cope with such volumes. Air France thus concentrates its long-haul intercontinental flights at CDG and uses Orly for its domestic routes. To gain access to intercontinental flights, it is accordingly necessary to fly from CDG, since all network carriers are based there. As airport charges are significantly higher than at Orly, low-cost carriers prefer to operate from Orly. The applicant adds that the Commission itself recognised that many customers do not consider the two airports to be substitutable (recital 28 of the contested decision). Whilst the Commission states that the substitutability of the airports must be looked at from both the demand and the supply side, it does not analyse the situation by considering the airports as suppliers of services directly to the airlines. Thus, the Commission did not arrive at the logical conclusion that the airlines as consumers of airport services have different needs according to whether they are network carriers such as Air France or low-cost carriers.

97 The Commission observes that recognition of CDG and Orly as substitutable for each other means that prospective new entrants may request slots at either airport (paragraph 1.3.9 of the commitments package). In those circumstances, the contested finding does not place the applicant at a disadvantage, so that it has no legitimate interest in raising this plea, which is therefore inadmissible (*NBV and NVB* v *Commission*, paragraph 40 above, paragraph 31 et seq.).

98 As to the substance of this plea, the Commission observes that what determines the geographical substitutability is not the distance of the two airports from central Paris, but rather the time taken to reach it. Contrary to what the applicant implies, CDG is well served by public transport from the centre of the city. Moreover, the

Commission does not dispute the applicant's arguments that CDG is used mainly for long-haul flights whereas Orly concentrates on short-haul flights, but these arguments refer to the supply side, which is less important than the demand side in determining substitutability.

Findings of the Court

99 As the Commission stated in the notice on market definition, companies are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view and for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions (paragraph 13). Substitutability must therefore be looked at not only from the supply side but also from the demand side, which remains, in principle, the most effective assessment criterion.

— The location of the two airports

100 As the Commission points out, the decisive factor in assessing the geographic substitutability of CDG and Orly on the demand side is not the distance between a main starting point and the two airports, but the time required to travel from that point to the airports. The applicant has adduced no evidence to show that that test is not an important indicator of geographic substitutability.

101 The applicant cannot deny that the travelling time to those two airports is the same since it stated itself that from Boulevard Saint-Michel it took 33 minutes (by RER line B) to get to CDG and 30 minutes to get to Orly (by RER line B or the Orlyval line). The applicant's argument in that regard — that the travelling time to the centre of Paris from the two airports differs because of the time required, from leaving the aircraft, to reach other means of transport — is not supported by any evidence.

102 Consequently, the applicant has not shown that the Commission committed a manifest error of assessment by finding that the two airports were substitutable given the lack of consumer preference for flights as between CDG or Orly as regards travel to and from the centre of Paris.

— The type of flights provided from the two airports

103 First, as regards demand-side substitutability, the Commission found that for point-to-point traffic comprising both time-sensitive and non-time-sensitive passengers, CDG and Orly were substitutable as they are located in the same catchment area and have comparable access facilities (recital 29 of the contested decision).

104 It should be noted that, for the purposes of examining the substitutability of the two airports, the Commission must take account of all demand, since customers for whom time is not a priority have different requirements because they are more flexible. Therefore, the Commission was entitled to find that for numerous business customers CDG and Orly were not substitutable, since Orly offers fewer connections (recital 28 of the contested decision). The particular expectations of business customers therefore led the Commission to find that there were 'sub-

markets', depending on whether or not customers were time sensitive. However, those considerations, peculiar to certain business customers, which are only one part of the demand, do not undermine the finding on substitutability. First, the Commission expressly recognised the specific requirements of that category of passengers. Second, the applicant adduces no evidence to show that the particular requirements of time-sensitive passengers, which are in effect those of most business customers, should have taken priority over those of other customers who are not time sensitive and who consider the two airports to be substitutable.

105 As for the applicant's argument that the Commission wrongly failed to consider that the airlines, as customers and therefore consumers of airport services, would have different needs depending on whether they are network or low-cost carriers, so that the two airports could not be regarded as substitutable, the Court finds that the applicant has not provided any data capable of substantiating that view.

106 It follows from the foregoing that the applicant has adduced no relevant evidence to show that the Commission erred in finding that there was demand-side substitutability between the two Paris airports.

107 Second, as regards the services offered to consumers by the airlines from one or other of the airports, it must be held that the applicant's arguments concerning, first, the types of flights which the airports offer on the basis of their specific infrastructures and, second, the particular characteristics of the two airports have, as has already been noted, a more limited impact.

108 The Court notes that the Commission acknowledged the functional particularities of the two airports pointed out by the applicant since it found that, on the supply side, most network carriers regarded the two airports as substitutable even if they concentrated their operations at CDG, whereas the airlines based at Orly concentrated their operations primarily on domestic traffic. For certain airlines, the two might not be substitutable, depending on the markets they serve (transit or point to point, domestic or international traffic) and the costs incurred (see, to that effect, recital 28 of the contested decision). Thus, the contested decision states that substitutability may be assessed differently, in particular for low-cost airlines for whom it is important to be able to choose between airports in order to minimise their costs, since airport taxes may differ from one airport to another (recital 28 of the contested decision). It follows that the Commission carried out a comprehensive analysis on the basis of which it found that the two airports were substitutable, while taking account of criteria which included the commercial factors peculiar to low-cost carriers.

109 In the light of the foregoing, the applicant has not adduced evidence capable of showing that there was a manifest error of assessment of the substitutability of CDG and Orly.

110 Therefore, the third plea must be rejected.

4. *The fourth plea, alleging a manifest error of assessment by reason of the failure to examine the effects of the merger on potential competition*

Arguments of the parties

111 The applicant maintains, first, that the Commission ought to have considered the commercial strategy of KLM if the merger were not put into effect, in the light of the

impact of the liberalisation of the air transport sector and the grant to the Commission of a mandate to negotiate air services agreements between the Community and third countries. It submits that Community airlines such as KLM should gain the freedom to offer unlimited services with, inter alia, wide traffic rights and no limitations on pricing or scheduling.

112 The applicant submits, second, that in the absence of a merger with Air France, KLM would be the most likely new entrant at Paris since KLM's domestic market is somewhat limited, which would encourage it to expand internationally and within Europe. Moreover, KLM carries out its operations in proximity to Paris and is familiar with the Franco-Belgian market, and the competition in international air transport services operating from Paris is anyway limited. Thus, the applicant considers that the merger enables Air France to eliminate its most likely potential competitor at Paris and preserve its dominant position in its domestic markets.

113 The Commission submits that because of the scale of liberalisation in the air transport sector and the large number of agreements involved, any prediction as to the duration of such a process can only be a matter of speculation. Moreover, it stresses that since KLM is not likely to have any genuine or specific chance of entering the relevant market, it cannot be regarded as a potential competitor of Air France at Paris.

Findings of the Court

114 This plea is in two parts, the first concerning the effects on competition of the liberalisation of the air transport sector and the second whether KLM is a potential competitor at Paris.

115 As regards liberalisation in the air transport sector, the applicant has not shown, in the absence of specific evidence adduced in support of its argument, that that liberalisation, the impact of which remains difficult to measure, would enable KLM to develop its competitive base and thus increase its commercial strength and compete with Air France at Paris, in particular by offering services from Paris and to non-European countries. Therefore, the first part of the plea must be rejected.

116 As to whether KLM is a potential competitor at Paris, it should be noted that according to settled case-law, the examination of conditions of competition must be based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter the relevant market and compete with established undertakings (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 137).

117 It is necessary to examine first in this connection the argument relating to the limited nature of KLM's domestic market as alleged by the applicant, and secondly the applicant's argument based on the proximity of Amsterdam, KLM's centre of operations, to Paris.

The limited nature of KLM's domestic market

118 The contested decision states that a network carrier can be regarded as a potential competitor on a route only if it can be directly linked to its hub. Recital 17 of the contested decision states that 'the hub-and-spoke system determines the network

carriers' decision to operate (or not) a passenger air transport service on a particular O&D pair'. It adds that 'network airlines concentrate traffic into a specific hub and disperse passengers via connection to numerous spokes' and that 'they normally refrain from entering city pairs which are not connected to their respective hubs'. In that regard, it should be noted that the applicant does not deny that the network airlines in fact concentrate their activities in their respective hubs.

119 For the short-haul routes, as the Commission explains, the costs to the network airlines are such that they generally offer services on those routes only if they are connected to their hubs or if they are the only operator on those routes. Consequently, any new entrant to those routes would logically be the national carrier of the point of origin or destination of those routes or a low-cost company, which explains why KLM would not be likely to operate in those markets if routes are not connected to Amsterdam.

120 As for the long-haul routes, the Commission states in its pleadings that a certain proportion of passengers must be passengers in transit, so that an airline can sell a significant number of seats and maintain the long-term viability of its service. This is only possible if it can feed traffic from the other routes into its long-haul service through its hub.

121 It is not disputed by the parties in this case that at Amsterdam most passengers are in transit, thereby enabling KLM to retain the viability of its operations at that hub. The applicant has not shown that KLM has a network which enables it to carry passengers to other destinations in France from Paris. Accordingly, even if KLM

intended to develop its operations, which the applicant describes as limited, KLM's organisation does not appear to enable it to exert competitive pressure on Air France at Paris.

122 It must be found that in the present case the applicant has not shown to the requisite legal standard that the approach adopted by the Commission regarding the centralisation of KLM's operations in Amsterdam is vitiated by a manifest error of assessment.

The proximity of Amsterdam, KLM's centre of operations, to Paris, and the limited competition in international air transport services from Paris

123 The Commission states in its pleadings that the establishment of a connection between two airports as close as Paris and Amsterdam does not appear to be strategically viable. Thus, other airlines have commercial reasons more obvious than those of KLM to enter that market, as a passenger is unlikely to regard it as an advantage to be able to change at both Paris and Amsterdam. Since KLM's primary destinations from Amsterdam are the United States and the Far East, the applicant has not shown that KLM has a commercial interest in developing its operations from Paris since it benefits at Amsterdam from passengers in transit from the United States and local passengers heading to the Far East. Moreover, such a commercial strategy risks competing directly with the operations developed and centralised at Amsterdam and which appear to be an integral part of KLM's particular organisational structure. Lastly, considerable investment would be necessary without any clearly identifiable return, which significantly limits the pertinence of the applicant's allegation that KLM should be regarded as one of Air France's potential competitors at Paris.

124 Lastly, as regards the applicant's allegation that existing competition in international air transport services from Paris is limited, it should be noted that apart from that bare assertion there is no argument from the applicant to support that position. The Court cannot therefore rule on the impact of that allegation.

125 Consequently, the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment by finding that KLM was not a potential competitor of Air France at Paris.

126 It follows that the second part of the plea and therefore the fourth plea as a whole must be rejected.

5. *The fifth plea, alleging a manifest error of assessment of the commitments given by the parties to the merger*

127 There are seven parts to this plea. In the first, the applicant submits that the commitments should have been extended to the non-overlapping markets. In the second and third parts, it argues that the commitments are not attractive to low-cost airlines and that there is no divestiture of a viable business. In the fourth and fifth parts, it submits that the divestiture of slots and the other remedial measures adopted are inadequate. In the sixth part, the applicant stresses the failure to identify a new entrant and that there was no rapid entry of a new competitor likely to last. In the seventh part, the applicant points to the failure to take into account the Thalys high-speed train as a competitor.

128 According to settled case-law, the Commission enjoys a broad discretion in assessing the need for commitments to be given in order to dispel the serious doubts raised by a concentration. It follows that it is not for the Court of First Instance to substitute its own assessment for that of the Commission: the Court's review must be limited to ascertaining that the Commission has not committed a manifest error of assessment. In particular, the alleged failure to take into consideration the commitments suggested by the applicant does not by itself prove that the contested decision is vitiated by a manifest error of assessment. Moreover, the fact that other commitments might also have been accepted, or might even have been more favourable to competition, cannot justify annulment of that decision in so far as the Commission was reasonably entitled to conclude that the commitments set out in the decision served to dispel the serious doubts (Case T-158/00 *ARD* v *Commission* [2003] ECR II-3825, paragraphs 328 and 329).

129 In exercising its power of review, the Court of First Instance must take into account the specific purpose of the commitments entered into during the phase I procedure, which, contrary to those entered into during the phase II procedure, are intended not to prevent the creation or strengthening of a dominant position but rather to dispel any serious doubts in that regard. Consequently, where the Court of First Instance is called on to consider whether, having regard to their scope and content, the commitments entered into during the phase I procedure are such as to permit the Commission to adopt a decision of approval without initiating the phase II procedure, it must examine whether the Commission was entitled, without committing a manifest error of assessment, to take the view that those commitments constituted a direct and sufficient response capable of clearly dispelling all serious doubts (Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraphs 79 and 80).

The first part, alleging failure to extend the commitments to non-overlapping markets

— Arguments of the parties

130 The applicant submits that the commitments should have been extended to include routes on which the Commission had not identified competition problems because

the markets concerned were not attractive. The applicant observes that during the administrative procedure it proposed to the Commission a significant number of slots to be surrendered in order for the commitments to be wholly effective. Accordingly, the applicant questions whether the Commission in fact considered its proposal. Furthermore, it submits that the Commission restricted the commitments on routes without regard to the relevant markets on each of the routes considered.

131 The Commission submits that unless there is a genuine need there is no justification for requiring the parties to the merger to surrender slots on routes on which there are no competition problems.

— Findings of the Court

132 The Commission acknowledges in paragraph 17 of the notice on remedies that 'in order to assure a viable business, it might be necessary to include in a divestiture those activities which are related to markets where the Commission did not raise competition concerns because this would be the only possible way to create an effective competitor in the affected markets'. It explains in its pleadings that those measures must be decided in the light of the principle of proportionality.

133 According to consistent case-law, the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued

(Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60; Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 39; and Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 99).

134 It is clear from the foregoing that commitments must be decided on in the light of the competition problems raised on the affected markets, because if competition can be maintained on those markets it is not necessary for the Commission to extend the scope of the commitments to markets not affected, in accordance with the principle of proportionality.

135 The applicant submits that in this instance the Commission should have extended the commitments to non-overlapping markets so as to eliminate all barriers to entry. However, it merely asserts that to be the case and does not identify the markets to which the Commission should have extended those commitments.

136 Furthermore, the Court observes that during the administrative procedure the applicant appeared minded to use certain slots which were divested by the parties to the merger for markets unaffected by the merger. Accordingly, the applicant demonstrated its intention of taking advantage of the commitments given by the merged entity to increase its commercial presence in the markets in which there were no competition problems, but without showing that that use would ensure effective competition on the markets affected.

137 It should be noted that the commitments cannot be regarded as a means of favouring, without justification on competition grounds, a potential competitor which wishes to enter a particular market. Therefore the fact that the Commission did not extend the commitments to non-overlapping markets, even though that measure might have benefited the applicant's own commercial interests on the markets not affected by the merger, in no way proves that that extension is the only way to create an effective competitor on the markets affected.

138 Lastly, regarding the applicant's argument that the Commission merely accepted commitments concerning routes but not the relevant markets on each of the proposed routes, when requested to clarify that argument at the hearing, the applicant failed to identify those markets and put forward no relevant evidence to prove a manifest error of assessment.

139 It follows from the foregoing that the applicant has not shown that the Commission committed a manifest error of assessment. Therefore the first part of the plea must be rejected.

The second part, alleging that the commitments are not attractive to low-cost airlines

— Arguments of the parties

140 According to the applicant, the remedies are unattractive to low-cost or non-network carriers because they involve commercial links and relationships which raise costs. The most likely competitor to enter the Paris-Amsterdam route is a low-cost carrier. Of the nine markets affected in Europe, the applicant considers that only three carry a sufficient number of passengers to be considered profitable by a low-cost carrier. In addition, substantial investments in advertising would be required on these routes to increase customer awareness of the new entrants in order to counter the presence of the parties to the merger and of Alitalia. Lastly, hubs do not offer attractive conditions for low-cost carriers because of congestion, which gives rise to delays and therefore costs.

141 The Commission challenges the applicant's view that the remedies are unattractive to low-cost airlines.

— Findings of the Court

142 The contested decision indicates that the Commission did not merely accept a divestiture of slots, since other commitments reinforced that measure in order to encourage all airlines, including the low-cost carriers, to enter the markets affected.

143 Under the commitment in respect of frequent flyer programmes, passengers on flights provided by competing airlines on the markets affected are able to obtain 'miles' from the merged entity, so that it confers a non-negligible advantage on those passengers and therefore, indirectly, on the competing airlines (paragraph 6 of the commitments package). If the applicant does not wish to take part, for example, in the frequent flyer programme because of its own needs and organisation, that is its own commercial decision. Accordingly, a strategic choice of that sort does not prove that the commitments were inadequate or, consequently, that the Commission committed a manifest error of assessment.

144 The low-cost airlines could also benefit from interline agreements which provide for round trips to be offered, one leg of which is provided by the merged entity (paragraph 5 of the commitments package). Moreover, the commitments stipulate that at Paris the airlines can acquire slots at either CDG or Orly, so as to satisfy the different organisational and commercial preferences of the airlines.

145 The fact that, of the nine routes identified by the Commission as raising competition problems, only three are profitable for a low-cost airline does not prove that the Commission committed a manifest error of assessment. The commitments at the end of phase I are intended to dispel the serious doubts harboured by the Commission regarding the merger's compatibility with the common market: they cannot exempt new entrants from the costs attendant upon market entry, since those investments are logically inherent in any commercial activity.

146 Moreover, the small number of passengers on certain affected markets, fewer than 70 000 passengers a year, does not show that the commitments are not attractive to low-cost airlines. It is stated in the Commission's pleadings that the applicant expressed an interest in entering that type of market, as demonstrated by its entry in 2003 on the Amsterdam-Bristol market, a route which involved only 59 314 passengers a year.

147 Furthermore, the presence of large companies in a market may make it less easy for a new competitor to enter the market, but this cannot be considered an absolute barrier to such entry, as is demonstrated in particular by the increased number of low-cost airlines which enter markets in which powerful airlines already operate.

148 As to the applicant's argument that hubs do not offer attractive conditions to low-cost airlines because of congestion and periods of peak travel which give rise to delays and consequential costs, the Court observes that during the administrative procedure the applicant endeavoured to show that the divestiture of slots was not sufficient to encourage new entrants. That argument, however, contradicts the tenor of its reply to the Commission of 14 January 2004, in which it explains that 'with a limited presence in Paris, [it] is still Air France's nearest ... competitor in terms of

domestic air travel in France', that '[it] is actively seeking to establish a base of operations at [Orly]', that '[it] currently has four aircraft operating there ... [and] three additional aircraft operate at [CDG]' and lastly that '[it] prefers to use [Orly] rather than [CDG] in view of its proximity to the centre of Paris'.

149 Lastly, it should be noted that the Commission questioned 90 competitors about the market and thus did not restrict its investigation to the concerns of the low-cost airlines, which explains why the commitments might not satisfy the applicant's needs in every respect. The commitments are intended to maintain overall competition on the markets affected, which is not limited to that provided by airlines alone, since rail carriers may be active competitors in some markets, as the Commission pointed out (see, to that effect, paragraph 7 of the commitments package).

150 It follows from the foregoing that the applicant has adduced no relevant evidence to prove a manifest error of assessment on the part of the Commission.

151 Accordingly, the second part of the plea must be rejected.

The third part, alleging no divestiture of a viable business

— Arguments of the parties

152 The applicant submits that the Commission confined itself to reducing the barriers to entry rather than ensuring the divestiture of a viable business or of market shares to a competitor, which is a departure from its normal practice.

153 The Commission considers that it cannot be criticised by the applicant for failing to require the divestiture of a viable business since none of the parties had a business which could easily be divested. It also observes that the notice on remedies states that other types of commitment are acceptable.

— Findings of the Court

154 According to the notice on remedies, the divested activities must consist of a viable business that, if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis. Whilst divestiture is the remedy preferred by the Commission, it may accept others. There may be situations where divestiture of a business is impossible. In such circumstances, the Commission has to determine whether or not other types of remedy may have sufficient effect on the market to restore effective competition (paragraphs 14 and 26 of the notice).

155 The Commission's pleadings indicate that the parties to the merger did not have a viable business to divest, since it found that the main barrier to entering the market was connected to the lack of available slots at the big airports.

156 The Commission has demonstrated to the requisite legal standard in this connection that the transfer of aircraft cannot effectively remedy the competition problems raised by the merger, since it is difficult, if not impossible, to check whether the purchasers of those aircraft in fact use them on the affected markets. Moreover, a potential entrant can lease or buy a second-hand aircraft, as the use or possession of an aircraft does not appear to be the most immediate barrier to entry.

157 It is clear that the applicant has adduced no tangible evidence to prove that access to the slots was not the most significant barrier to entry.

158 The Court notes in this regard that, notwithstanding the arguments on which the applicant relies in this action, it has admitted that access to slots was the essential barrier to entry, since in its replies of 14 and 30 January 2004 it stated as follows:

'The lack of access to slots is the most obvious physical barrier to entry. Without access to slots ... airlines are precluded both from introducing new services and [from] establishing new bases of operations to expand their activities ... [It] is handicapped in this competition, however, by the lack of access to slots and other infrastructure that it needs to expand its network ... The lack of access to slots and other infrastructure inhibits [the applicant] from establishing bases of operations in cities ... like Paris ...'

159 Accordingly, the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment in authorising the merger following commitments based on restriction of the barriers to entry rather than the transfer of a viable business to a competitor.

160 Therefore, the third part of the plea must be rejected.

The fourth part, alleging that the divestiture of slots is inadequate

— Arguments of the parties

161 The applicant submits that the divestiture of slots does not encourage new entrants or succeed in restoring competition, as shown by the cases of Lufthansa/SAS/United Airlines (Cases COMP/D-2/36.201, 36.076 and 36.078) and Swissair/Sabena (Case IV/M.616). Furthermore, as a concentration brings about a lasting structural change in the market, any commitment must be of a permanent nature. Therefore it is irrelevant that the divestiture of slots was required for an unlimited period.

162 According to the applicant, the Commission wrongly limited itself to the barriers to entry constituted by slots and did not address hub dominance, or brand and frequency advantage of the parties to the merger. Moreover, the Commission failed to explain how the number of slots to be divested would ensure that the transfer of market shares was sufficient to enable the quasi-monopoly of the parties to the merger on the affected markets to be eliminated, especially as the slots were not divested 'en bloc'. The divestiture of slots is also inadequate since it ensures a maximum frequency of only six flights per day, and that on the Paris-Amsterdam route alone.

163 The applicant considers that the Commission manifestly erred in its assessment in authorising the parties to retain more than 50% of all the slots available on each of the routes specified in the commitments, without ensuring the entry of a single competitor on those routes. The applicant notes that on the Paris-Amsterdam route

the parties will retain at least 59% of all frequencies, a figure which the applicant regards as prohibitive, given that the attraction of this route is limited by reason of the presence of Thalys, which has a market share of 45% on that route.

164 The Commission denies the assertion that the divestiture of slots is inappropriate and refers to its recent decisions (British Midland/Lufthansa/SAS (Case COMP/38.712) and British Airways/SN Brussels Airlines (Case COMP/A/38.477/D2)).

165 The intervener observes that, for the first time, the divestiture of slots is required for an unlimited period, and stresses that the commitments are accompanied by all the procedural guarantees necessary to ensure their real impact on competition.

— Findings of the Court

166 As the Commission has rightly demonstrated (see paragraph 155 et seq. above), the main barrier to entry in the air transport sector is the lack of available slots at the large airports. Consequently, it is necessary to determine whether the Commission erred in finding that, in the present case, the divestiture of slots provided for in the commitments package could be an effective way to restore effective competition. In that context it is for the applicant to adduce evidence that the divestiture of slots as provided for by the commitments was not sufficient to remedy the competition problems raised.

167 The applicant relies merely on the fact that during the administrative procedure it suggested that the number of slots to be divested be greater, which in its view would have enabled new entrants to provide lasting competition with the parties to the merger.

168 It should be noted in that regard that in determining the appropriate number of slots to be divested the Commission took account of all the matters communicated to it by those participants in the market who were consulted. It is clear from its pleadings that it relied on the fact that, for most business passengers, the decisive factor is not the number of daily flights but the number of flights offered at peak times, enabling those passengers to make a round trip on the same day.

169 Furthermore, the Commission points out that numerous competitors considered the commitments to be satisfactory for the purpose of remedying the competition problems created by the merger. Of the 14 business customers consulted as part of the Commission's investigation of the market, 10 took the view that the divestiture of slots was sufficient, the six frequencies per day constituting in their view an alternative to the merged entity on the Amsterdam-Paris route. The applicant was the only low-cost airline which found them insufficient. Accordingly, in the light of the reaction received, the Commission was entitled to find that the applicant's proposal that some 22 600 slots should be divested at Orly, amounting to about 31 flights per day, was disproportionate.

170 Moreover, a new entrant will in practice be able to exceed six flights per day on that route owing to the blocked-space agreements, since the merged entity is required to make a certain number of seats on its flights available to the passengers of the new entrant (paragraph 9 of the commitments package).

171 As for the frequencies imposed for the other markets affected and which vary from two to four flights per day, the applicant has adduced no evidence to show that these are not sufficient to remedy the competition problems, since it concentrates its argument on the Paris-Amsterdam market.

172 As regards the applicant's argument that the slots should have been divested en bloc, rather than to various competitors, the commitments specify that preference should be given to the prospective new entrant likely to operate the greatest number of frequencies per day on the Paris-Amsterdam route (paragraph 3.4 of the commitments package). Consequently, a divestiture en bloc remains a possibility where a new entrant is able to ensure a high number of daily frequencies on that route. The flexibility thus offered by the commitments enables a divestiture of slots to be made which can be adapted to the needs of potential new entrants, given that the new entrant will be able, in the case of Paris, to choose between Orly and CDG.

173 It follows from the foregoing that the applicant has adduced no relevant evidence to sustain its argument that the Commission failed to demonstrate how the divestiture of those slots would enable a transfer of market shares to be made such as to remove the dominance of the parties to the merger on the 14 markets affected.

174 It is also to be noted that the market shares held by the parties to the merger led the Commission to conclude that commitments should be offered on the markets affected and on which those parties enjoyed a market share of almost 50%, thereby respecting the presumption of dominance as laid down by the case-law (see, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60).

175 Accordingly, the fact that the parties to the merger may retain a sizeable share of the markets affected, as the applicant alleges is the case on the Paris-Amsterdam market, does not prove a manifest error of assessment on the part of the Commission. The Commission accepted significant commitments on that market in the knowledge, first, that the entry of new competitors on that route will be encouraged by the remedial measures and, second, that the improvements in the Thalys infrastructures which will be completed in 2007 will make it more competitive for those passengers for whom time is a priority. Those matters constitute sufficient factors to reduce the competitive strength of the merged entity.

176 It follows from the foregoing that the applicant has not demonstrated that the Commission committed a manifest error of assessment.

177 Therefore, the fourth part of the plea must be rejected.

The fifth part, alleging that the other remedial measures are inadequate

— Arguments of the parties

178 The applicant considers that the remedial measures do not guarantee the level of certainty and confidence required to ensure that a competitive structure will be restored. It notes that the parties to the merger supported their commitments relating to slots with so-called behavioural commitments within the ambit of Article 81 EC. The applicant infers from this that the remedial measures are ineffective and will not prevent the emergence or strengthening of a dominant position because

they are neither economically nor strategically consistent. Furthermore, the Commission has made no provision in the contested decision for revocation in the event that the commitments are not fulfilled.

179 Lastly, the applicant considers that the Commission's approach is a breach of the principle of the protection of legitimate expectations, and adds that the terms of the commitments do not show how they can be fully effective.

180 The Commission claims that the applicant has failed to substantiate its argument. It notes in this regard that the network carriers considered the proposed commitments package sufficient to eliminate the competition problems. Furthermore, as regards the behavioural nature of the commitments in question, the Commission insists that the divestiture of slots, unlimited in duration, is not based on mere behavioural commitments, since the obligations imposed on the merged entity are conditions and not merely obligations.

— Findings of the Court

181 In the present case it is clear from the contested decision that the commitments entered into in respect of slots were reinforced by other, substantial measures favouring competition, such as a frequency freeze for six consecutive IATA seasons, interline agreements, blocked-space agreements, special pro-rate agreements, access to frequent flyer programmes, intermodal services and obligations pertaining to fares. Consequently, the criticism cannot be made that the Commission confined its decision to the question of access to slots.

182 As regards the applicant's argument that the commitments are weak because they are behavioural, it must be borne in mind that behavioural commitments are not by their nature insufficient to prevent the creation or strengthening of a dominant position, and that they must be assessed on a case-by-case basis in the same way as structural commitments (*EDP* v *Commission*, paragraph 44 above, paragraph 100; see also, to that effect, *Gencor* v *Commission*, paragraph 40 above, paragraph 319; Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 161, confirmed in Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 85).

183 In the light of the provisions of the contested decision relating to the divestiture of slots, the most important remedial measure in the present case, the commitments in question may be regarded as structural (paragraphs 2 and 14 of the commitments package). The parties to the merger undertake for a limited period, subject to exceptional circumstances which would justify lifting or amending the undertaking, not to use the slots divested. Therefore the parties to the merger are not able to recover slots once divested since those which are no longer used must be surrendered to the coordinator, which eliminates any behavioural aspect likely to affect the efficacy of the commitments (paragraph 2.2 of the commitments package).

184 It should also be noted that the commitments were significantly reinforced, since the parties to the merger undertook to reduce the bracket periods from 45 to 30 minutes for short-haul routes and from 120 to 90 minutes for long-haul routes, conditions which were regarded as fundamental by the new entrants in order to facilitate market entry (see, to that effect, recitals 159 to 167 of the contested decision).

185 It follows that in the present case the applicant has not shown that the remedial measures are ineffective, its argument in that regard being wholly inadequate.

186 Moreover, as regards the applicant's argument that the Commission failed to make the contested decision expressly subject to revocation should the commitments not be fulfilled, the Court observes that the contested decision lays down a fast-track procedure for resolving disputes where a new entrant, a new supplier of air transport services or an intermodal partner has reason to believe that the merged entity is not complying with the terms of the commitments made vis-à-vis that party (paragraph 12 of the commitments package).

187 It should further be noted that the commitments are subject to supervision by a trustee, who is responsible for monitoring the satisfactory discharge by the merged entity of the obligations entered into in the commitments, in so far as they fall within the scope of that trustee's mandate, and who may propose to the merged entity such measures as he considers necessary to ensure fulfilment of the commitments (paragraph 11.2.1 of the commitments package).

188 It follows from the foregoing that the parties to the merger are not subject to mere declarations of intention but are subject in this case to obligations, any breach of which will result in revocation of the contested decision authorising the merger, pursuant to Article 6(3)(b) of Regulation No 4064/89. It follows that the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment as regards the other measures imposed on the parties to the merger, or that it breached the principle of the protection of legitimate expectations in failing to apply as it should have done the notice on remedies.

189 Lastly, as regards the applicant's argument that the wording of the commitments does not ensure their efficacy in preserving competition, it must be observed that in the circumstances of the present case the commitments cannot be considered to be of such an extent and complexity that the Commission found it impossible to determine with the requisite degree of certainty that effective competition would be

restored in the market (see, to that effect, *BaByliss* v *Commission*, paragraph 35 above, paragraph 178). Similarly, the commitments accepted by the Commission were sufficiently specific to enable the Commission to assess their effects on the markets affected, since the commitments package sets out precisely the way in which the commitments will be implemented. Accordingly, that argument must be rejected as unfounded.

190 Therefore, the fifth part of the plea must be rejected.

The sixth part, alleging failure to identify a new entrant and to set a time-limit for that entry

— Arguments of the parties

191 The applicant observes that in previous decisions relating to the air transport sector the Commission has required the parties to identify in advance a potential new entrant for the services identified by the Commission as raising competition problems (Austrian Airlines/Lufthansa (Case COMP/37.730)). The Commission satisfied itself in the present case with the 'concrete interest' expressed by the airlines Volare, Meridiana and Virgin Express without ensuring that these declarations of intent would be translated into actual entry capable of countering the anti-competitive effects. If the Commission had carried out some simple research, Volare's financial difficulties would have been easily discovered, so that Volare could not be regarded as a suitable purchaser. Consequently, the applicant takes the view that the Commission is gambling on the entry of a new entrant, an attitude inconsistent with the Commission's duty to ensure that serious doubts as to the compatibility of the merger are eliminated.

192 In addition, the Commission merely asserted that the commitments 'reduce significantly the risk of lack of new entry'. However, it recognises that there remains a real risk that new entry will not occur, stating in the defence that 'even if no new competitor enters a particular route, the commitments package may fulfil its purpose' and adding that 'this would be the case if it constrains the merged entity's behaviour on such markets due to potential competition'.

193 The applicant further submits that the notice on remedies states that commitments must be capable of being implemented effectively and within a short period. Thus, and given the importance of the identity of a new entrant and uncertainties as to the existence of potential entrants, the entry should have occurred before the merger was implemented. The applicant stresses that no new entrant has begun to operate on any of the slots divested. Thus, by failing to lay down a mechanism ensuring an effective entry within a precise period, the Commission has breached the requirements laid down by Regulation No 4064/89.

194 The Commission asserts that it was not necessary for the parties to designate a new entrant in advance because the Commission's consultation of the participants in the market before adopting the contested decision itself identified potential new entrants, such as Volare, Virgin Express and Meridiana.

195 As for the applicant's argument that the Commission merely imposed commitments 'reducing significantly the risk of lack of new entry', the Commission stresses that that citation was wrongly interpreted by the applicant since that passage of the defence was intended to show that the impact of the remedies was far-reaching and would thus 'increase the value of the slots released and thereby reduce significantly

the risk of lack of new entry'. The Commission thus made a comparison in that passage between the merger as it actually stood, taking into account the remedies imposed, and previous alliance and merger decisions in the air transport sector.

196 Lastly, as regards the applicant's argument that the contested decision did not provide for fast and effective implementation of the commitments, the Commission points out that this was not pleaded in the application and is therefore inadmissible. In any event, the Commission considers that the fact that there has been no new entrant yet is irrelevant, since the validity of the contested decision must be judged by reference to the situation as it stood at the date of its adoption.

— Findings of the Court

197 Article 6(2) of Regulation No 4064/89 provides that the Commission may authorise a merger if the commitments proposed by the parties dispel the serious doubts as to the compatibility of the merger with the common market. Regulation No 4064/89 thus lays down the objective to be achieved by the Commission, but leaves it a wide discretion as to the form which the commitments in question may take. It does not require the notifying parties to identify a new entrant, even though it may be necessary in certain cases to do so, in particular where no competitor shows any interest in entering an affected market.

198 In this case the applicant has failed to show that identification by name was required, since various competitors, such as Meridiana, Virgin Express and Volare, expressed

an interest during the administrative procedure in entering the affected markets following the commitments made by the parties to the merger.

199 It is stated in the Commission's pleadings that Volare had applied for slots on the Paris-Amsterdam, Amsterdam-Milan, Amsterdam-Venice and Amsterdam-Bologna routes. The Commission also stated at the hearing that Volare had obtained slots following Commission Decision 2004/841/EC of 7 April 2004 relating to a proceeding pursuant to Article 81 of the EC Treaty (COMP/A.38284/D2 — Air France/Alitalia) (OJ 2004 L 362, p. 17), very shortly before the contested decision was adopted, a fact which supported it in finding that the interest shown by Volare in the present case was credible.

200 That company did not enter those markets because of a change in the ownership of Volare's shares, the Commission claims. If the lack of market penetration is linked to financial difficulties faced by Volare, as the applicant submits, and even if the Commission could have made a detailed investigation of the financial situation of that airline so as to ensure that its application for slots would be successful, the lack of any such verification does not amount to a manifest error of assessment such as to undermine the lawfulness of the contested decision. As stated in the Commission's pleadings, other competitors were likely to enter the markets affected, since in Europe there are numerous low-cost airlines inclined to enter these markets, including Ryanair, Virgin Express, Smartwings, Sterling, Air Service and SkyEurope.

201 Moreover, entry to a new market may require time to enable new entrants to assess whether entry to that market is likely to be profitable, in particular because of the investment required. It should be noted in this regard that the contested decision

states that the divestiture of slots is unlimited in duration, thereby enabling new entrants to enter the markets affected at any time and without limitation as to duration (paragraph 2 of the commitments package).

202 Furthermore, if no new entrant enters the affected markets, there is in any event a certain competitive pressure on the parties to the merger because, if the merged entity decides to increase its prices, new competitors may be encouraged to enter those markets, which would become more attractive. According to the file, on the routes between Austria and Germany no airline was competing with Lufthansa and Austrian Airlines five years ago. However, the existence of substantial profit margins due to the high prices charged by those two companies attracted new entrants, thereby forcing Lufthansa and Austrian Airlines to react by adapting their price policy in order to remain competitive. It follows that the Commission was entitled to infer that it was very likely that a new competitor would enter the affected markets.

203 As for the argument that no new entrant has entered the affected markets, it is settled case-law that the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87; Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119).

204 Consequently, the contested decision must be assessed on the basis of the facts existing at the time when the measure was adopted and not in the light of subsequent events. The fact that at the date of the hearing no entrant had penetrated the affected markets is thus irrelevant.

205 As for the applicant's argument that the Commission did not ensure that a new entrant would enter shortly after the merger was authorised, the Court finds that that criticism, which was not put forward in the application, relates to the present plea, since it seeks to show that there was a manifest error of assessment with regard to the content of the commitments made. It follows that that argument is not a new plea in law as the Commission alleges and is consequently admissible.

206 The Commission was not required to identify a definite new entrant since various competitors had expressed an interest in entering the affected markets. Of the applicant's argument there therefore remains only the complaint that the Commission failed to ensure that a new entrant was likely to enter those markets rapidly.

207 According to the notice on remedies, commitments must be capable of being implemented effectively and within a short period for the Commission to authorise a merger (paragraphs 10 and 19). In the present case, the contested decision requires the slots to be released one month after the merger (paragraph 13 of the commitments package). Accordingly, the merger parties were required to release the slots within a short mandatory period, thereby allowing and favouring the rapid entry of a new competitor.

208 Consequently, the complaint that the Commission failed to ensure that a new entrant would intervene rapidly is unfounded.

209 In the light of the foregoing, the applicant has not shown to the requisite legal standard that the Commission committed a manifest error of assessment by failing to identify a new entrant and by failing to set a target date for entry to the affected markets.

210 Therefore, the sixth part of the plea must be rejected.

The seventh part, alleging failure to take account of the Thalys high-speed train as a competitor

— Arguments of the parties

211 According to the applicant, the presence of Thalys deters new entrants from the Paris-Amsterdam route. It observes that Thalys already has a market share of around 45% on that route, which will probably increase as a result of improvements in the infrastructure which will reduce the journey time. Moreover, the Commission erred in finding that a frequency of six flights per day sufficed for time-sensitive passengers, whereas it accepted that such a frequency in the case of Thalys was insufficient (paragraph 71 of the contested decision).

212 The Commission denies that allegation and notes that Thalys is not competitive for time-sensitive customers, mainly owing to the duration of the train journey. This

situation will only change with a reduction in the journey time, which would require significant upgrading of the infrastructure.

— Findings of the Court

213 The applicant's complaint is to be understood as seeking to show that by failing adequately to appreciate Thalys's competitive impact on the Paris-Amsterdam market the Commission committed a manifest error of assessment.

214 The contested decision indicates that on the Paris-Amsterdam route Thalys provides six frequencies per day, with a travelling time of four hours and nine minutes (one way), compared with about three hours by air from city centre to city centre (paragraphs 70 to 72 of the contested decision). Therefore, in the case of passengers who are not time-sensitive, Thalys may be regarded currently as a competitor. By contrast, the Commission was able to find that Thalys was not a competitor in respect of time-sensitive customers on the basis, inter alia, of the travelling time, since the return journey by train takes almost two hours longer. That being so, only reducing the journey time could alter the situation, something which would require, as the Commission points out, significant improvement of the infrastructure.

215 The applicant has adduced no evidence to show that in the case of Thalys the Commission erred in drawing a distinction between passengers who are time-sensitive and those who are not. Consequently, the applicant's criticism that the Commission erred in finding that a frequency of six flights per day was sufficient for time-sensitive passengers, whereas it recognised in paragraph 71 of the contested

decision that such a frequency was insufficient for Thalys to overcome the competition problems with regard to time-sensitive passengers, cannot be upheld.

216 As for the applicant's argument that Thalys deterred new entrants, it should be noted that Thalys's commercial growth preceded the merger, so that airlines wishing to enter that market had to take account of that competitive factor. Thalys's presence on the Paris-Amsterdam market thus prompted the Commission to ensure that not only the competition exercised by the airlines, but also that exercised by suppliers of other modes of transport, such as rail transport, would be preserved.

217 The remedies concerning intermodal services enable, for example, the company operating Thalys to sell a return ticket from Paris to Amsterdam permitting a traveller to take the train one way and return by plane. In order to make that option attractive, it is provided that the Thalys operator will be in a position, as regards the return flight, to benefit from all promotional tariffs offered by the merged entity and will thus be able to offer intermodal services at competitive prices (paragraph 7 of the commitments package). It is stated in this regard in the Commission's pleadings that Georg Verkehrsorganisation GmbH, a rail operator, is in talks with Air France to enter into an intermodal agreement for the Paris-Amsterdam market, which demonstrates the attraction of intermodal agreements.

218 Accordingly, the applicant's argument that Thalys deters new competitors on the Paris-Amsterdam route does not show that the Commission manifestly erred in its

assessment of the competition. Therefore, the seventh part of the plea must be rejected.

219 It is clear from the foregoing considerations that the applicant has not demonstrated the existence of a manifest error of assessment on the part of the Commission, since it has not succeeded in showing that those commitments were not sufficient to dispel the serious doubts which had arisen as to the compatibility of the merger with the common market. Consequently, the fifth plea must be rejected in its entirety.

220 In those circumstances, the action must be dismissed.

Costs

221 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to 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 form of order sought by the Commission.

222 The French Republic is to bear its own costs, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear its own costs and to pay those of the Commission;**

3. **Orders the French Republic to bear its own costs.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 4 July 2006.

E. Coulon J. Pirrung

Registrar President

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