



EUROPEAN COMMISSION

Hearing Officer

**Final Report<sup>1</sup>**  
**in the Lufthansa / SN Airholding case**  
**COMP/M.5335**

The draft decision gives rise to the following observations:

**Introduction**

On 26 November 2008 the Commission received a notification of a proposed concentration pursuant to Article 3(1)(b) of the Merger Regulation<sup>2</sup> whereby Deutsche Lufthansa AG (“Lufthansa”) intends to acquire sole control over SN Airholding SA/NV (“SN”) by way of purchase of shares. The latter is the holding company of SN Brussels Airlines.

**The procedure in Phase II**

On 26 January 2009 the Commission initiated proceedings on the basis that the concentration raised serious doubts as to the compatibility with the common market<sup>3</sup>. Subsequently, on 24 March 2009, a Statement of Objections (“SO”) was notified to Lufthansa and, on 25 March 2009, access to the Commission's investigation file was granted. The Commission concluded in the SO that the concentration raised competition concerns with regard to the following five routes: Brussels-Frankfurt, Brussels-Munich, Brussels-Berlin, Brussels-Hamburg and Brussels-Zürich.

Lufthansa replied to the SO and requested an Oral Hearing which was held on 15 April 2009. Whereas the notifying party was formally represented at the Oral Hearing, SN was not. However, some employees of SN attended the hearing as part of the Lufthansa delegation.

It became subsequently clear that SN had not been directly informed by the Commission of the objections but rather via the notifying party's legal representatives, who also represented SN. The latter provided SN with a non-confidential version of the SO. SN was

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<sup>1</sup> Pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L162, 19.06.2001, p.21.

<sup>2</sup> Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L24, 29.1.2004, p.1

<sup>3</sup> pursuant to Article 6(1)(c) of the Merger Regulation.

also not formally given a deadline within which it could provide its comments or request to be heard orally. Although SN in fact provided input to Lufthansa's written reply and was represented in the Oral Hearing, the task of being informed and invited to comment on the SO cannot be "sub-delegated" to the notifying party. The Commission itself has to execute its legal obligations vis-à-vis other involved parties pursuant to Article 13(2) of the Implementing Regulation<sup>4</sup>. The Commission remedied the situation by sending the non-confidential version of the SO and the Supplementary Statement of Objections ("SSO"; see below) to SN on 29 April 2009, and gave the undertaking the opportunity to submit comments before 6 May 2009.

Lufthansa's reply to the SO raised inter alia two procedural issues.

It revealed, first, discrepancies between Lufthansa's and the Commission's interpretation of the results of the market investigation. It turned out that these discrepancies were partially due to erroneous interpretations of the replies by the notifying party. However, some discrepancies occurred because of the fact that Lufthansa did not obtain full access to certain responses for reasons of confidentiality. Upon verification of the replies, the Commission granted Lufthansa access to non-confidential Excel sheets, in which the Commission summarized all responses, on 29 April 2009.

The other issue related to the assessment of a code-sharing agreement under Art. 81 EC Treaty carried out by the Commission as part of a merger proceeding. Lufthansa questioned whether such analysis is possible. It raised in particular the issue whether the direct parties to the code-sharing agreement, i.e. a Lufthansa subsidiary and SN, must not be heard on the Commission findings. In order to avoid any breach of the directly involved parties' rights of defence, the Commission sent the extract of the SO dealing with the preliminary assessment of the code-sharing agreement to both SN and Swiss (Lufthansa's subsidiary) on 20 April 2009 and granted them the opportunity to submit written observations<sup>5</sup>. Both SN and Swiss replied within the given deadline.

On 28 April 2009, the Commission sent an SSO to Lufthansa concerning the Brussels-Zürich route. It granted again access to the Commission file on the following day. The notifying party replied to the SSO on 5 May 2009.

There had been discussions on remedies between the notifying party and the Commission early on in the control procedure. However, the remedies provided on 16 April 2009 were considered inadequate and thus not market tested. Subsequently, Lufthansa submitted further remedy packages on 24 and 29 April 2009. The latter package was preliminarily accepted and market tested by the Commission. The finalized version of the remedies (without affecting the substance of the version of 29 April) was submitted by Lufthansa on 28 May 2009.

## **The draft Decision**

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<sup>4</sup> Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

<sup>5</sup> CFI judgment of 11 July 2007, T-170/06, *Alrosa*.

The draft decision deviates from the SO in three regards. Firstly, the Commission leaves open as to whether time-sensitive and non time-sensitive passengers belong to two distinct product markets.

Furthermore, it sees no longer a need to assess the compatibility of the code-share agreement under Article 81. Thirdly, the Commission concludes that the competition concerns regarding the Brussels-Berlin route have been solved while the merger control proceeding was conducted. Lufthansa's and SN's competitor EasyJet's had decided in the meantime to increase its service from one to two daily frequencies allowing thereby for same-day return trips. For the remaining four routes, the draft Decision states that the transaction would not lead to a significant impediment of effective competition in view of the commitments submitted by the notifying party.

No queries or submissions have been made to me by the notifying party, the other involved party or any third party. In view of thereof, and taking into account the observations mentioned above I consider that the parties' right to be heard in this case has been respected.

Brussels, 11 June 2009

*(signed)*

Michael ALBERS