



EUROPEAN COMMISSION

DG Competition

***Case M.8633 - LUFTHANSA /  
CERTAIN AIR BERLIN ASSETS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 7(3)

Date: 27.10.2017



Brussels, 27.10.2017  
C(2017) 7355 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

**To the notifying party**

**Subject: Case M.8633 – Lufthansa/Certain Air Berlin Assets Commission decision pursuant to Article 7(3) of Council Regulation (EC) No. 139/2004<sup>1</sup> and Article 57 of the Agreement on the European Economic Area<sup>2</sup>**

**Request for derogation from the suspension obligation**

Dear Sir or Madam,

- (1) On 10 October 2017, Deutsche Lufthansa AG ("**Lufthansa**", Germany) requested, pursuant to Article 7(3) of the Merger Regulation, a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation with regard to its proposed acquisition of the shares of NIKI Luftfahrt GmbH ("**NIKI**", Austria) and Luftfahrtgesellschaft Walter mbH ("**LGW**", Germany) from Air Berlin PLC ("Air Berlin", Germany and the UK) ("the Transaction").
- (2) Lufthansa, NIKI and LGW are collectively referred to as "the Parties".

**1. THE PARTIES AND THE OPERATION**

- (3) Lufthansa is active in air transport business with several airlines under the Lufthansa group, including Lufthansa Passenger Airlines, Swiss, Brussels

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

Airlines, Austrian Airlines, Air Dolomiti, Eurowings, Germanwings, Edelweiss Air and SunExpress. The Lufthansa group operates hubs in Frankfurt, Munich, Brussels, Zurich and Vienna.

- (4) Air Berlin is an insolvent airline currently being sold. The Air Berlin group consists of several subsidiaries including NIKI (a point-to-point carrier focusing on leisure travellers), and LGW. LGW currently operates aircraft which it has wet leased to Air Berlin; it serves short-haul routes to Düsseldorf and Berlin, in particular as a feeder for Air Berlin's long-haul operations.
- (5) Although Air Berlin has entered into insolvency proceedings, NIKI and LGW have not.
- (6) By way of the Transaction, Lufthansa plans to acquire part of the Air Berlin group by way of purchase of shares, in particular NIKI and LGW.

## **2. UNION DIMENSION**

- (7) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (Lufthansa: EUR 31 660 million, and NIKI and LGW combined: EUR [...]). Each of them has a Union-wide turnover in excess of EUR 250 million, and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State (Lufthansa: EUR [...], and NIKI and LGW combined: EUR [...]).<sup>3</sup> The Transaction therefore has a Union dimension within the meaning of Article 1(2) of the Merger Regulation.

## **3. THE APPLICATION FOR A DEROGATION FROM THE SUSPENSION OBLIGATION**

- (8) Lufthansa requests a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation to implement the following measures (together referred to as the "Intended Measures")<sup>4</sup>:
  - (a) Replacement of Air Berlin by Lufthansa as party to dry lease contracts between Air Berlin and the relevant head lessors relating to up to twenty (20) Q400 aircraft.
  - (b) Conclusion of a wet lease agreement relating to seventeen (17) of those twenty leased Q400 aircraft between LGW as wet lessor and Lufthansa as wet lessee.

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<sup>3</sup> The methodology used by Lufthansa to calculate its turnover is the "point of sale" methodology. The turnover of LGW and NIKI combined was also calculated under the "point of sale" methodology. The thresholds for NIKI and LGW's combined turnover are also met under the "point of departure" and "50/50" methodologies since NIKI's turnover alone exceeds the EUR 250 million threshold according to those two methods.

<sup>4</sup> In a letter by Air Berlin of 12 October 2017, Air Berlin also refers to certain other measures: negotiations with third-party providers (including, amongst others, maintenance providers) and data transfer to Eurowings. As those measures do not constitute early implementation measures, they are not further addressed in this Decision.

- (c) Replacement of Air Berlin by Lufthansa as party to dry lease contracts between Air Berlin and the relevant head lessors relating to up to sixteen (16) A320 aircraft.
  - (d) Conclusion of a wet lease agreement relating to thirteen (13) of those sixteen leased A320 aircraft (the "LGW 320 Wet Lease") between LGW as wet lessor and Lufthansa as wet lessee.
  - (e) Submission of the wet lease flight plan from Lufthansa to LGW in order to enable LGW to operate the LGW 320 Wet Lease.
  - (f) Disclosure of Lufthansa's business case based on the Transaction to the German Luftfahrtbundesamt in order to acquire an operating licence for the A320 aircraft to be operated by LGW.<sup>5</sup>
  - (g) Replacement of Air Berlin by Lufthansa as party to dry lease contracts between Air Berlin and the relevant head lessors relating to up to six (6) A320-family aircraft.
  - (h) Conclusion of a wet lease agreement relating to two (2) of those six (6) A320-family aircraft between NIKI as wet lessor and Lufthansa as wet lessee.
  - (i) Replacement of Air Berlin by Lufthansa as party to dry lease contracts or purchase of any aircraft currently leased and operated by NIKI or by LGW.
- (9) Lufthansa does not consider any of the Intended Measures as partial implementation of a notifiable concentration, and applies for a derogation under Article 7(3) of the Merger Regulation only as a matter of precaution.

#### **4. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE MERGER REGULATION**

- (10) Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that regulation shall not be implemented either before its notification or until it has been declared compatible with the internal market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on the basis of a reasoned request, grant a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation.
- (11) Article 7(3) of the Merger Regulation provides that, in deciding on such a request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may

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<sup>5</sup> In order to grant LGW an operating licence for A320 aircraft, the German Luftfahrtbundesamt requires that LGW demonstrates its financial viability. The disclosure of Lufthansa's business case and its project to acquire LGW will help Lufthansa and LGW to advocate the case before the German Luftfahrtbundesamt.

be made subject to conditions and obligations in order to ensure conditions of effective competition.

**A. The Transaction and the Intended Measures fall under the suspension obligation pursuant to Article 7(1) of the Merger Regulation**

(12) The Transaction constitutes a concentration within the meaning of Article 3 of the Merger Regulation and has a Union dimension according to Article 1 thereof. Hence, the Transaction is subject to the suspension obligation laid down in Article 7(1) of the Merger Regulation. Moreover, carrying out the Intended Measures before the notification of the Transaction or before it has been declared compatible with the internal market by the Commission pursuant to the Merger Regulation would amount to an implementation of the Transaction.

**B. The effects of the suspension on the undertakings concerned or on third parties**

*Lufthansa's arguments*

(13) Lufthansa submits that, without the requested derogation for the Intended Measures, lessors of Air Berlin could repossess their aircraft and lease or sell them to third parties [...]. As a result, NIKI and LGW could not operate their current flights anymore.

(14) Lufthansa also submits that, without the requested derogation for the Intended Measures, Lufthansa will not be able to operate its own flight schedule because Air Berlin operates a number of flights on behalf of Lufthansa pursuant to a wet lease agreement.<sup>6</sup>

(15) Lufthansa adds that in terms of timing, securing the operations of NIKI and LGW is paramount to avoid the grounding of NIKI's and LGW's aircraft.<sup>7</sup>

(16) In addition, Lufthansa states that the derogation from the suspension obligation regarding the Intended Measures would not have adverse effects on any third party, since granting the derogation would not create any structural change in the market or give Lufthansa an undue advantage over other potential buyers of Air Berlin's assets. Lufthansa claims that maintaining NIKI and LGW as saleable businesses preserves the pre-Transaction status quo rather than changing it.<sup>8</sup>

(17) According to Lufthansa, a derogation from the suspension obligation regarding the Intended Measures would allow Lufthansa to replace Air Berlin as a lessee in the leasing contracts mentioned above and to conclude wet lease agreements with LGW and NIKI (see paragraph 8).

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<sup>6</sup> These routes include, for example, [...].

<sup>7</sup> See Lufthansa's submission of 20 October 2017.

<sup>8</sup> See Lufthansa's submission of 10 October 2017.

### *The Commission's assessment*

- (18) The Commission considers it likely that, if no derogation from the suspension obligation is granted regarding the Intended Measures, the lessors of the aircraft used by Air Berlin, LGW and NIKI will repossess those aircraft [...]. The repossession of those aircraft will lead to the immediate cessation of all flights by Air Berlin, LGW and NIKI. Although Air Berlin is in insolvency proceedings and therefore likely to cease all its flights in any event, this is not the case for LGW and NIKI.
- (19) The cessation of flights by LGW and NIKI will have serious and negative effects on the undertakings concerned, that is the targets LGW and NIKI and the proposed acquirer Lufthansa. For LGW and NIKI, the cessation of their flights would likely lead to their insolvency. For Lufthansa, the cessation of LGW's and NIKI's activities would prevent Lufthansa (or any other possible buyer) from acquiring LGW and NIKI as going concerns.
- (20) A decision not to grant the requested derogation for the Intended Measures would also have harmful effects on third parties, in particular the employees, customers and creditors of Air Berlin, LGW and NIKI. The cessation of flights by LGW and NIKI would have a negative effect on the customers of NIKI and LGW, as it would lead to flight cancellations and stranded passengers. It would also have harmful effects on the employees of those companies, as the crew operating the aircraft would likely have to be laid off. Finally, if NIKI and LGW ceased their activities and became insolvent, this would be likely to negatively affect creditors, as the latter would be less likely to be paid.
- (21) Furthermore, a derogation from the suspension obligation with regard to the Intended Measures would not have a negative effect on other potential bidders for LGW and NIKI. On the contrary, by preserving LGW and NIKI as going concerns, a derogation from the suspension obligation regarding the Intended Measures would preserve the interests of third parties wishing to acquire LGW and NIKI.
- (22) Against this background and based on the available evidence, the Commission concludes that the suspension of the Intended Measures pursuant to Article 7(1) of the Merger Regulation could lead to serious harm to LGW and NIKI, Lufthansa and third parties.

### **C. The threat to competition posed by the Transaction**

- (23) The Parties to the Transaction provide scheduled passenger air transport services within the EEA. They supply passenger air transport services to end consumers, and they sell seats to tour operators, which then integrate the flights into package holidays.
- (24) In previous decisions, the Commission has distinguished the retail market for the supply of scheduled passenger air transport services from the wholesale market for the supply of airline seats to tour operators.<sup>9</sup>

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<sup>9</sup> See for example case M.8046 – TUI/Transat France, para. 66.

- (25) In its decisional practice, the Commission has defined the retail market for scheduled passenger air transport services on the basis of the "point of origin/point of destination" ("O&D") city-pair approach, with every combination of a point of origin and a point of destination constituting a separate market.<sup>10</sup> The Parties' activities overlap on more than 100 routes, with combined market shares above 60% on around half of those routes, including the creation of monopolies in a number of cases. Thus, *prima facie*, the Transaction appears to create or strengthen Lufthansa's dominant position on those routes.
- (26) The Parties' activities also overlap on the wholesale markets for the supply of airline seats to tour operators. A number of low cost carriers do not appear to be materially active on those wholesale markets, with the result that fewer competitors than in the retail markets could exert competitive pressure on Lufthansa post-Transaction. Thus, *prima facie* the Transaction also raises competition concerns on those wholesale markets.
- (27) In addition, the Parties hold significant slot portfolios, in particular at a number of congested German, Austrian and Swiss airports. Such strong positions at congested airports may contribute to any significant impediment to effective competition to which the Transaction may give rise as they may in particular raise barriers to entry for competitors.
- (28) Therefore, on the basis of available information, it appears *prima facie* that the Transaction is likely to pose a threat to competition within the EEA.

#### **D. Balance of interests**

- (29) In the following, the Commission will balance, on the one hand, the negative effects that the suspension of the Intended Measures would have on the undertakings concerned and third parties, and, on the other hand, the threat to competition in the EEA to which the Transaction is likely to give rise.
- (30) To this end, the Commission, considering also the specific regulatory environment applicable to air transport in the Union, recalls that the suspension of the Intended Measures would seriously and negatively affect the undertakings concerned, namely NIKI, LGW and Lufthansa. The suspension of the Intended Measures would also seriously and negatively affect third parties, specifically the employees, customers and creditors of NIKI and LGW, as well as Air Berlin (see paragraphs (18) to (22)).
- (31) On the other hand, the Commission considers, on the basis of the information currently available, that the Transaction is likely to pose a serious risk to competition in relation to many routes in the EEA. That risk is likely to be facilitated if the Intended Measures could be carried out before the Commission has taken a final decision on the compatibility of the Transaction with the internal market.
- (32) Therefore, in balancing the interests at stake, the Commission considers it necessary that a derogation from the suspension obligation regarding the Intended

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<sup>10</sup> See for example case M.7541 – IAG/Aer Lingus, para.14 *et seq.*

Measures is made subject to adequate conditions, which ensure that carrying out the Intended Measures would not result in anti-competitive effects or bring about an irreversible change in the competitive structure of the affected markets. In particular, such conditions need to ensure that the Intended Measures will not negatively affect NIKI and LGW or make it more difficult for those entities to be sold to any other buyers, should this happen in the future.

- (33) Consequently, the Commission concludes that as the Transaction raises *prima facie* competition concerns, a derogation from the suspension obligation can only be granted for the Intended Measures subject to compliance with the conditions set out in section 5 below.

## **5. CONDITIONS**

- (34) According to Article 7(3), fourth sentence, of the Merger Regulation, a derogation from the suspension obligation laid down in Article 7(1) of the Merger Regulation may be made subject to conditions and obligations in order to ensure conditions of effective competition.
- (35) In order to ensure conditions of effective competition in case the Intended Measures are carried out in full or in part, the Commission considers that a derogation from the suspension obligation would need to be made subject to the conditions.
- (36) The Intended Measures are aimed at ensuring that NIKI and LGW do not become insolvent but instead remain active on the market as going concerns. The Intended Measures will therefore not have any immediate anti-competitive effects.
- (37) However, if the Commission conditionally cleared Lufthansa's acquisition of NIKI and LGW or if it prohibited Lufthansa's acquisition of NIKI and LGW, the Intended Measures would make it more difficult for potential acquirers to acquire NIKI and LGW, thus resulting in anti-competitive effects. Likewise, the Intended Measures would also result in anti-competitive effects if they made it more difficult for other acquirers to acquire NIKI or LGW if Lufthansa abandoned its acquisition project, or if NIKI and LGW entered into insolvency proceedings in spite of the Intended Measures.
- (38) The conditions are therefore aimed at ensuring that the Intended Measures will not negatively affect NIKI and LGW and will not hamper the possible sale of NIKI or LGW to other acquirers. Therefore, to be effective, the conditions should provide for the following.
- (39) First, the conditions should ensure that the leases which Lufthansa enters into can easily be transferred to NIKI, LGW or its acquirers. Such a transfer should not entitle Lufthansa to financial penalties or a premium, as this would make a transfer more difficult.
- (40) Second, if Lufthansa purchased the aircraft used by NIKI or LGW, Lufthansa should give NIKI, LGW or its acquirers the option to lease or buy these aircraft, in full or in parts, at market terms.



- (41) Third, NIKI or LGW may enter into a wet lease with Lufthansa, with NIKI or LGW as lessor and Lufthansa as lessee. In case NIKI or LGW is acquired by an acquirer different from Lufthansa, the acquirer should be able to terminate this wet lease. The wet lease contract should therefore contain a change of control clause, allowing the acquirer to terminate the lease with no penalty or compensation due.
- (42) Those conditions will allow to preserve NIKI and LGW, in case the whole or parts of NIKI or the whole or parts of LGW would be acquired by any other purchaser than Lufthansa.
- (43) On 27 October 2017, Lufthansa expressed its agreement with conditions as those set out in paragraphs (44).

## **6. CONCLUSION**

- (44) The Commission considers that Lufthansa's request for a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation in relation to the Intended Measures meets the requirements set out in Article 7(3) of the Merger Regulation subject to compliance with the following conditions:
  - (a) Lufthansa notifies the Transaction to the Commission pursuant to Article 4 of the Merger Regulation within 10 working days.
  - (b) In entering into any leases with the relevant head lessors pursuant to the Intended Measures, Lufthansa shall do so on terms that permit it to assign any or all of the new leases between Lufthansa and the relevant head lessors to NIKI or LGW (and/or its acquirers), at the request of the latter, subject to any change in the terms of the leases that might be required by the lessor. Lufthansa will be entitled to no financial penalty or premium from Niki or LGW or its acquirers for assigning the new leases.
  - (c) For aircraft purchased by Lufthansa pursuant to the Intended Measures, Lufthansa shall give NIKI or LGW (or its acquirers, in full or in part) the option to lease or buy these aircraft at market terms.
  - (d) Any contract for a wet lease between NIKI or LGW as lessor and Lufthansa as lessee, shall contain a clause whereby in case of a change of control over NIKI or LGW, the acquirer can terminate such leases with no penalty or compensation due.

- (45) Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation and Article 57 of the EEA Agreement, Lufthansa is therefore granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation for the measures referred to as Implemented Measures, subject to the conditions set out in paragraph (44).

*For the Commission*

*(Signed)*  
*Margrethe VESTAGER*  
*Member of the Commission*