



EUROPEAN COMMISSION  
DG Competition

***Case M.8672 -  
EASYJET / CERTAIN  
AIR BERLIN ASSETS***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 12/12/2017

***In electronic form on the EUR-Lex website under  
document number 32017M8672***



Brussels, 12.12.2017  
C(2017) 8776 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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:**

Dear Sir or Madam,

**Subject: Case M.8672 - EASYJET / CERTAIN AIR BERLIN ASSETS  
Commission decision pursuant to Article 6(1)(b) of Council  
Regulation No 139/2004<sup>1</sup> and Article 57 of the Agreement on the  
European Economic Area<sup>2</sup>**

(1) On 07 November 2017, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which easyJet Airline Company Limited, as the principal operating subsidiary of easyJet PLC ("easyJet", the United Kingdom), acquires from Air Berlin PLC & Co. Luftverkehrs KG ("Air Berlin", Germany) control within the meaning of Article 3(1)(b) of the Merger Regulation of parts of Air Berlin's airline operations at Berlin Tegel airport (the "Target", Germany) by way of purchase of assets (the "Transaction").<sup>3</sup> easyJet and the Target are collectively referred to as the "Parties".

## **1. THE PARTIES**

(2) easyJet is a low-cost point-to point airline domiciled in the United Kingdom that operates in the European short-haul aviation market and is focused primarily on Western and Northern Europe. It operates domestic and international scheduled services over 800 routes in more than 30 countries from/to 132 airports, and

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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").

<sup>3</sup> Publication in the Official Journal of the European Union No C 383, 14.11.2017, p. 11.

operates three licensed airlines within the EU and Switzerland. Between August 2016 and August 2017, easyJet carried more than 79 million passengers. easyJet has a dedicated workforce of over 10 000 people and a total fleet of 279 aircraft in 2017.

- (3) Within Germany, easyJet deploys 15 A319/A320 Airbus aircraft to Hamburg and Berlin, of which 12 are based in Berlin Schoenefeld airport, where easyJet employs a total of over 500 people, including crew and management.<sup>4</sup>
- (4) The Target consists of assets and rights held by Air Berlin for part of its airline operations at Berlin Tegel airport, including in particular (i) slots<sup>5</sup> at Berlin Tegel airport and at some destination airports (e.g. Palma de Mallorca), (ii) overnight parking stands associated with the acquired slots, (iii) Air Berlin's customer bookings in respect of the relevant operations (if any), (iv) historic data relating to the Target, and (v) certain aircraft furnishings and related equipment.
- (5) In addition, easyJet intends to enter into new leases on the open market for approximately 25 aircraft conditional upon the closing of the Transaction, in order to replace the leases of the aircraft previously leased by Air Berlin for part of its airline operations at Berlin Tegel airport. easyJet would also hire crew on the open market to operate the newly leased aircraft, subject to closing taking place. The individuals which would be offered employment would include former employees of Air Berlin engaged in its operations at Berlin Tegel airport, who were made redundant on 1 November 2018.

## **2. THE CONCENTRATION**

### **2.1. Context of the Transaction**

- (6) For several years, Air Berlin, Germany's second largest airline, has faced significant financial difficulties. On 15 August 2017, Air Berlin filed for insolvency after its largest shareholder, Etihad Airways, ceased providing financial support. All Air Berlin's assets had been for sale since that date.
- (7) On 15 September 2017, all interested bidders submitted their binding offers for the acquisition of (parts of) Air Berlin.
- (8) On 21 September 2017, Air Berlin's creditors' committee discussed the binding offers received. On 25 September 2017, following the meeting of its Supervisory Board, Air Berlin announced that negotiations will continue with two bidders, including with easyJet for the acquisition of certain parts of Air Berlin as described in paragraph (4) above.

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<sup>4</sup> Form CO, paragraph 2.

<sup>5</sup> Under Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (the "Slot Regulation"), slots are defined as the permission given to an air carrier to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off (see Article 2(a) of the Slot Regulation). A coordinated airport is defined as an airport with a high level of congestion where demand exceeds capacity during the relevant period and where, in order to land or take off, it is necessary for an air carrier to have a slot allocated by a coordinator.

- (9) On 28 October 2017, insolvent Air Berlin fully ceased its airline operations and grounded its fleet. This implied the termination of all existing contracts, notably the aircraft lease agreements with Air Berlin's lessors and the employment contracts with Air Berlin's personnel.
- (10) On 1 November 2017, the local district court of Berlin-Charlottenburg opened the insolvency proceedings concerning the assets of Air Berlin.
- (11) Air Berlin is expected to be wound up at the end of the insolvency proceedings.<sup>6</sup>

## **2.2. The Transaction constitutes a concentration**

- (12) On 27 October 2017, easyJet and Air Berlin entered into an asset purchase agreement pursuant to which easyJet will take over the Target, corresponding to certain assets and rights held by Air Berlin for parts of its airline operations at Berlin Tegel airport. The transfer of the slots that are part of the Target is subject to compliance with the Slot Regulation, which permits the transfer of slots with the express confirmation by the slot coordinator, in the case of a total or partial take-over of an air carrier when the slots are directly related to the air carrier taken over.
- (13) As previously mentioned, easyJet also intends to enter into new leases on the open market for approximately 25 aircraft conditional upon the closing of the Transaction, in order to replace the leases of the aircraft previously leased by Air Berlin for part of its airline operations at Berlin Tegel airport.<sup>7</sup>
- (14) easyJet would also hire crew on the open market to operate the newly leased aircraft, subject to closing taking place. The individuals which would be offered employment would likely include former employees of Air Berlin engaged in its operations at Berlin Tegel airport, which were made redundant on 1 November 2018.
- (15) According to the Commission Consolidated Jurisdictional Notice ("CJN"),<sup>8</sup> the acquisition of control over assets can only be considered as a concentration if those assets constitute a business with a market presence, to which a market turnover can be attributed. In relation to outsourcing, the CJN clarifies that the assets transferred should include at least core elements that would allow the acquirer to build up a market presence in a time-frame similar to the start-up period for joint ventures (i.e. three years). Similarly, the acquisition of control over assets will constitute a concentration if the acquisition includes the core elements allowing the acquirer to build up a market presence within a relatively short time period.<sup>9</sup>

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<sup>6</sup> State Aid Case SA.48937 – *Rescue aid in favour of Air Berlin PLC & Co. Luftverkehrs KG*.

<sup>7</sup> Such new leases will likely include new leases concerning aircraft previously used by Air Berlin.

<sup>8</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16 April 2008, p. 1, paragraph 24.

<sup>9</sup> CJN, paragraph 24 and, in relation to outsourcing, paragraph 26.

- (16) As further described in section 4.1.1, in the airline industry, slots are a particularly important right, since those slots give access to congested airports.<sup>10</sup> The acquisition by easyJet of the Target will result in the transfer of slots and ancillary assets indispensable for the use of the slots (such as overnight parking stands). These slots will enable easyJet to develop its airline operations at the airports at which Air Berlin used to provide air transport services, in particular at Berlin Tegel airport and at some destination airports. The Transaction therefore results in the transfer of Air Berlin's market position at the relevant airports.
- (17) In view of the above, the acquisition of the Target constitutes the transfer of a business with a market presence, to which a turnover can be attributed.

### **2.3. Conclusion**

- (18) As a result of the Transaction, easyJet will acquire sole control over assets and rights of Air Berlin, which constitute parts of an undertaking as defined in paragraph 24 CJN. Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## **3. EU DIMENSION**

- (19) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>11</sup> (easyJet: EUR [...], the Target: [...]). Each of them has an EU-wide turnover in excess of EUR 250 million (easyJet: EUR [...], the Target: EUR [...]), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.
- (20) The turnover of the Target is estimated on the basis of the sales of airline seats by Air Berlin using the Target's slots. This turnover, as well as easyJet's turnover, are calculated by easyJet using the "point of origin" method. In any event, the EU turnover thresholds would also be met under the "50/50 split" method.<sup>12</sup>
- (21) The Transaction therefore has an EU dimension according to Article 1(2) of the Merger Regulation.

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<sup>10</sup> For the purpose of this Decision, "congested" or "capacity-constrained airports" refer to airports for which demand for air travel by airlines exceeds the available runway and terminal capacity.

<sup>11</sup> Turnover calculated in accordance with Article 5 of the Merger Regulation.

<sup>12</sup> See e.g. Case M.4439 – *Ryanair/Aer Lingus*, paragraph 13 et seq. The point of origin method consists in allocating the revenue from an individual route operated by an air carrier to the country where the place of departure of the flight is located. The 50/50 split method consists in allocating the revenue from an individual route operated by an air carrier in a 50%/50% ratio to the country of origin and the country of final destination so as to take into account the cross border character of the service provided. easyJet is not in a position to allocate its revenue using the "point of sale" method (i.e. allocating the turnover to the country where the ticket sale occurred), [reason why easyJet is not in a position to allocate its revenue using the "point of sale" method]. Nevertheless, easyJet believes that the EU turnover thresholds would also be met under the point of sale method (Form CO, paragraph 55 and footnote 17).

## 4. ANALYTICAL FRAMEWORK

- (22) Proper examination of the competitive effects of a transaction under the Merger Regulation rests in particular on a sound understanding of (i) the competitive constraints under which the merged entity will operate, and (ii) the specific causal effects of the transaction on the development of competition in the market.
- (23) Along those lines, and taking account of the forward-looking nature of merger control, the Commission will, as an introduction, describe the EU slot system (section 4.1). Next, it will define the relevant markets (section 4.2). The Commission will then determine the circumstances likely to prevail on the relevant markets absent the Transaction (the relevant "situation absent the transaction", section 4.3).

### 4.1. Introduction

- (24) The Transaction relates to passenger air transport, considering that (i) easyJet provides passenger air transport services, and (ii) the Target essentially concerns the transfer of slots, which are essential to operate air transport services.
- (25) The Commission will start by describing the relevance of slots as an input for air transport services (section 4.1.1) and the EU rules that govern their allocation at EU airports (section 4.1.2).

#### 4.1.1. Slots as an input for air transport services

- (26) By virtue of the Slot Regulation, slots, i.e. the permission to land and take-off at a specific date and time at congested airports, are essential for airlines' operations. Indeed, only air carriers holding slots are entitled to get access to the airport infrastructure services delivered by airport managers and, consequently, to operate routes from or to those airports.
- (27) The Commission has, in its prior decision practice on mergers involving air carriers, highlighted that the lack of access to slots constitutes a significant barrier to entry or expansion at Europe's busiest airports.<sup>13</sup>
- (28) The Commission has also insisted, in the framework of its airport policy, that *"slots are a rare resource" and "access to such resources is of crucial importance for the provision of air transport services and for the maintenance of effective competition."*<sup>14</sup>
- (29) In addition, the Slot Regulation recalls that, with the increase of air traffic, there is a continuously growing demand for capacity at congested airports.<sup>15</sup> Therefore,

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<sup>13</sup> See e.g. Cases M.5440 – *Lufthansa/Austrian Airlines*, paragraph 354; M.3770 – *Lufthansa/Swiss*, paragraph 34.

<sup>14</sup> Recital (4) of the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (COM/2011/827 final of 01 December 2011).

<sup>15</sup> Slot Regulation, first recital: *"Whereas there is a growing imbalance between the expansion of the air transport system in Europe and the availability of adequate airport infrastructure to meet that demand; whereas there is, as a result, an increasing number of congested airports in the Community."*

the lack of available slots has become a prominent feature of the EU airline industry and is expected to become an even more critical issue for air carriers in the near future.

#### *4.1.2. Rules for the allocation of slots*

- (30) In the context of imbalance between demand and supply of airport capacity, the Slot Regulation defines the rules for the allocation of slots at EU airports. It aims at ensuring that, where airport capacity is scarce, the latter is used in the fullest and most efficient way and slots are distributed in an equitable, non-discriminatory and transparent way.
- (31) Under the Slot Regulation, the general principle regarding slot allocation is that an air carrier having operated its particular slots for at least 80 % during the summer or winter scheduling period is entitled to the same slots in the equivalent scheduling period of the following year (the "grandfather rights").<sup>16</sup> Consequently, slots which are not sufficiently used by air carriers are reallocated (the "use it or lose it" rule).
- (32) The Slot Regulation also provides for the setting up of "pools" containing newly-created time slots, unused slots and slots which have been given up by a carrier or have otherwise become available. 50% of the slots from the slot pool shall be first offered to new entrants. The other 50% of the slots from the slot pool shall be placed at the disposal of other applicant airlines (incumbent airlines). If applications by new entrants amount to less than 50% of the capacity made available through slots from the pool, this remaining capacity shall also be placed at the other applicants' disposal.<sup>17</sup>
- (33) Under the Slot Regulation, slots cannot be traded. They may however be exchanged or transferred between airlines in certain specified circumstances, for instance in the case of partial take-over when the slots are directly related to the air carrier taken over. The transfer of slots from Air Berlin to easyJet if the Transaction is consummated could, subject to the explicit confirmation from the coordinator,<sup>18</sup> take place in the framework of this exception.

## **4.2. Relevant markets**

- (34) The Commission will first address the relevance of the markets, defined in previous cases as passenger air transport on city pairs, for the Transaction in the light of the fact that the Transaction concerns the transfer of slots from a bankrupt air carrier (section 4.2.1). Second, the Commission will define the markets relevant for the assessment of the Transaction (section 4.2.2).

#### *4.2.1. Relevance of markets defined as passenger air transport on city pairs*

- (35) The Commission has, in its prior decision practice related to airlines, defined the relevant market for scheduled passenger air transport services on the basis of the

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<sup>16</sup> Slot Regulation, Article 8(2).

<sup>17</sup> Slot Regulation, Article 10(6).

<sup>18</sup> The coordinator is the person responsible for the allocation of slots (Slot Regulation, Article 4(5)).

"point of origin/point of destination" ("O&D") city-pair approach.<sup>19</sup> Under the O&D approach, every combination of an airport or city of origin to an airport or city of destination is defined as a distinct market. The effects of a transaction on competition are thus assessed for each O&D separately.

- (36) easyJet submits that the Commission's traditional O&D approach for scheduled air transport of passengers is not appropriate for the assessment of the Transaction, considering notably that Air Berlin does no longer operate any routes involving the Target.<sup>20</sup>
- (37) A number of respondents to the market investigation indicate that the traditional O&D approach is not sufficient to fully address the effects of the Transaction.<sup>21</sup> A competitor notably underlines that *"a comprehensive approach shall also include the assessment of the entire market strength of an airline at any respective airport (...)"*, while another states that *"[a]n approach which also takes into account local effects at certain airports, separated from a view on certain routes, should be used."*<sup>22</sup>
- (38) The Commission considers that the traditional O&D approach, under which each O&D city-pair is assessed separately, would fail to capture the structural effects on competition brought about by the Transaction, in view of (i) the termination of Air Berlin's operations, hence its exit from all O&D markets, and (ii) the fact that the Target consists mainly of slots.
- (39) First, Air Berlin has ceased its flight operations and has exited all the routes on which it used the slots forming part of the Target. Such a situation is independent of the Transaction and it is highly unlikely that Air Berlin would resume operations.<sup>23</sup>
- (40) Considering that Air Berlin has, prior to and independently of the Transaction, stopped its activities as an air carrier, it would be inappropriate in the present case to use an analytical framework designed to address the loss of O&D competition following the merger between two air carriers.
- (41) In prior airline cases for which the target was expected to discontinue its operations absent the transaction but had not stopped its operations pre-transaction, the Commission assessed both the route-by-route effects of the transaction (as justified by the on-going operations of the target air carrier) and the transaction's impact on the competitive threat posed by other carriers, which is not necessarily linked to specific routes.<sup>24</sup> Therefore, in those cases, the Commission also performed a detailed analysis of the impact of the transaction on the distribution of slots at each congested airport and, therefore, of the impact of

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<sup>19</sup> See e.g. Cases M.7541 – *IAG/Aer Lingus*, paragraph 14; M.7333 – *Alitalia/Etihad*, paragraph 63; M.6447 – *IAG/bmi*, paragraph 31.

<sup>20</sup> Form CO, paragraph 7.

<sup>21</sup> Replies to Q1 – Questionnaire to Competitors, questions 4.1 and 4.2.

<sup>22</sup> Replies to Q1 – Questionnaire to Competitors, question 4.2.

<sup>23</sup> See section 2.1.

<sup>24</sup> See e.g. Cases M.6447 – *IAG/bmi*, paragraphs 153-157; M.5141 – *KLM/Martinair*, paragraph 175.

the transaction on all the markets (routes) for passenger air transport from or to the congested airport.<sup>25</sup>

- (42) Second, the Transaction mainly entails the transfer of slots. As explained in section 4.1.1, slots are attached to an airport but are not attached to any specific route. This is particularly clear in this case considering that Air Berlin does not use those slots anymore on any route. Consequently, the Transaction entails the transfer to easyJet of certain inputs (i.e. slots) needed to operate routes from or to certain airports, without limiting easyJet to use these inputs on specific routes.<sup>26</sup> Likewise, the parallel lease of aircraft and employment of crew by easyJet are not linked to specific routes, considering that those assets and crew are acquired from the market and not from Air Berlin directly. In this regard, a respondent to the market investigation notes that the appropriateness of the O&D approach *"depends on whether the slots and capacity continue to be allocated in future in the same way as they were under Air Berlin."*<sup>27</sup>
- (43) In light of the above, considering that Air Berlin has exited all the routes and that the Transaction primarily relate to slots, that is to say the right to operate at airports, the Commission considers that the Transaction does not result in the take-over by easyJet of Air Berlin's position on any specific routes. Therefore, the Commission will not carry out an O&D assessment of the effects of the Transaction.
- (44) By contrast, the Transaction results in the take-over by easyJet of Air Berlin's position at certain airports, corresponding to the slots, i.e. the rights to operate flights from or to airports, that constitute the Target and which Air Berlin currently holds before their transfer to easyJet.

#### 4.2.2. Markets relevant for the assessment of the transfer of slots

- (45) According to the Explanatory Memorandum for the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports,<sup>28</sup> *"the emergence of a strong competitor at a given airport requires it to build up a sustainable slot portfolio to allow it to compete effectively with the dominant carrier (usually the "home" carrier)."*
- (46) In this context, as regards the transfer of slots, the Commission has previously aggregated all routes originating or terminating in an airport for the purpose of defining the relevant situation absent the Transaction.<sup>29</sup>

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<sup>25</sup> See e.g. Cases M.6447 – IAG/bmi, paragraph 136 *et seq.*; M.5141 – KLM/ Martinair, paragraphs 195-196.

<sup>26</sup> Although it is expected that easyJet will develop its operations on at least some of the routes exited by Air Berlin, easyJet confirmed that its flight schedule for Winter 2017/2018 and Summer 2018 is still in the process of being finalised and subject to significant change (Form CO, paragraph 207).

<sup>27</sup> Replies to Q1 – Questionnaire to Competitors, question 4.1.

<sup>28</sup> COM/2011/827 final of 01 December 2011.

<sup>29</sup> See e.g. Case M.6447 – IAG/BMI, paragraphs 136-157.

- (47) Accordingly, the Commission has assessed the impact of the Transaction in terms of easyJet's resulting slot holding in relation to the markets for passenger air transport services from or to the relevant airports (section 4.2.2.1). On these markets, the Parties, as slot holders, are both present on the supply side.
- (48) In addition, to be able to operate flights from or to the relevant airports, air carriers need to get access to airport infrastructure, notably to the available runway and terminal capacity, so that there is a market for airport infrastructure services to airlines. On this market, the Parties are both present on the demand side (section 4.2.2.2).

#### 4.2.2.1. Passenger air transport services

##### (a) *Product market*

- (49) In several prior decisions, the Commission has considered the effects of a transaction on the flight operations of air carriers at an airport, without distinguishing between the specific routes served from or to that airport. Such an approach has notably been adopted to assess the risks of foreclosure entailed by a concentration between an airport manager and an air carrier at Prague airport,<sup>30</sup> or the effects of the strengthening of an airline's position at Heathrow airport.<sup>31</sup>
- (50) In those decisions, the Commission has not deemed it necessary to consider the same distinctions as those considered when each O&D market is examined separately (e.g. time sensitive vs. non-time sensitive passengers, direct vs. indirect flights, charter flights vs. scheduled flights, air transport vs. train transport, wholesale vs. retail supply of airline seats, feeder traffic).
- (51) In this case, the Transaction results in a concentration of slots at certain airports in the hand of a single undertaking. As described in section 4.1.1, airline carriers need these slots in order to compete in the various O&D markets originating and arriving at a specific airport. The Transaction's impact on competition, if any, will therefore occur on the various O&D markets originating and arriving at the airport at which slots are acquired. For the purposes of assessing the Transaction, it is, however, not necessary to analyse each of these O&D markets separately. As will be explained in section 5.2, the Transaction potentially only has an impact on the ability of air carriers to operate on these markets in view of their access to slots. As mentioned before, these slots are not linked to specific routes and can be used to operate in any relevant downstream O&D market.
- (52) For the purpose of this Decision, the Commission therefore considers the markets for the provision of passenger air transport services from or to an airport taken together.

##### (b) *Geographic market*

- (53) The Commission has, in its prior decision practice related to the definition of O&D markets, considered flights to or from airports with sufficiently overlapping

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<sup>30</sup> Case M.7270 – *Český Aeroholding/Travel Service/České aerolinie*, paragraph 138.

<sup>31</sup> Case M.6447 – *IAG/bmi*, paragraph 483.

catchment areas to be substitutable with each other (particularly if the airports serve the same main city).<sup>32</sup> The evidence used to characterise airport substitutability includes *inter alia* a comparison of actual distances and travelling times to the indicative benchmark of 100 km/1 hour driving time, the outcome of the market investigation (views of the airports, the competitors, and other market participants), and the parties' practices in terms of monitoring.

- (54) As mentioned in paragraph (51) above, the Commission will not perform a traditional O&D analysis in this case. However, the Commission will assess the position of the Parties at each relevant airport to which the Target's slots relate. Therefore, for the purposes of analysing the Transaction, it is still necessary to consider whether some of these relevant airports are substitutable with other airports in view of their overlapping catchment areas.

### **Overview of the relevant airports**

- (55) The Target's slots relate to Berlin Tegel airport and to 19 destination airports. Of these airports, 18<sup>33</sup> are coordinated airports.<sup>34</sup> The question of substitutability is relevant only for Berlin Tegel airport and 9 destination airports, which serve cities or regions also served by at least one other airport. These airports are discussed below.

### **Substitutability of airports at destination**

- (56) For all 9 relevant destination airports: Stockholm Arlanda, Paris Charles-de-Gaulle, Catania Fontanarossa, Duesseldorf, Vienna International, Göteborg-Landvetter, Roma Fiumicino, Frankfurt, and Munich, (i) easyJet has limited operations in the same catchment area, and (ii) the increment in easyJet's operations brought about by the Transaction is *de minimis*, as explained in section 5.2.3.2.
- (57) Therefore, for those destination airports, it is not necessary to decide whether they are substitutable with other airports.

### **Substitutability of Berlin Tegel and Berlin Schoenefeld airports**

- (58) Pre-Transaction, easyJet operates only from Berlin Schoenefeld airport while the Target's slots relate only to Berlin Tegel airport. Berlin Tegel airport is scheduled to close when all Berlin flights move to the Berlin-Brandenburg International Airport, which is, in effect, an extension of Berlin Schoenefeld. However, Berlin-Brandenburg International Airport is still under construction.

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<sup>32</sup> See e.g. Cases M.8361 – *Qatar Airways/Alisarda/Meridiana*, paragraph 29; M.7333 – *Alitalia/Etihad*, paragraph 82; M.6663 – *Ryanair/Aer Lingus III*, paragraph 65.

<sup>33</sup> These are: Stockholm Arlanda airport, Paris Charles-de-Gaulle airport, Copenhagen Kastrup airport, Catania Fontanarossa airport, Duesseldorf airport, Göteborg-Landvetter airport, Roma Fiumicino airport, Frankfurt airport, Helsinki-Vantaa airport, Keflavik International airport, Munich airport, Naples International airport, Palma de Mallorca airport, Stuttgart airport, Tel Aviv Ben Gurion airport, Vienna International airport, Zurich airport, Berlin Tegel airport.

<sup>34</sup> Under the Slot Regulation, a coordinated airport is defined as an airport with a high level of congestion where demand exceeds capacity during the relevant period and where, in order to land or take off, it is necessary for an air carrier to have a slot allocated by a coordinator (see also footnote 5).

- (59) The Commission has found, in a prior decision, that Berlin Tegel and Schoenefeld airports are substitutable from the point of view of passengers.<sup>35</sup>
- (60) easyJet recognises that this continues to be the case.<sup>36</sup>
- (61) Berlin Tegel airport is located 8 km north-west from Berlin city centre and can be easily reached by car or by bus in a relatively short time (approximately 30 minutes) from the city centre. Berlin Schoenefeld airport is located 19 km south-east from Berlin city centre and can be reached by car or suburban train in less than an hour.<sup>37</sup>
- (62) Therefore, the catchment areas of the two airports largely overlap, although their gravity centres (at the north or south of Berlin) slightly diverge. This was confirmed by the majority of air carriers having responded to the market investigation, which submit that for short-haul routes, passengers consider the two Berlin airports as substitutable.<sup>38</sup>
- (63) In addition, a majority of air carriers operating at one of the Berlin airports declare that they monitor competitors flying from or to the other Berlin airport.<sup>39</sup>
- (64) However, the views of travel agents and consumer associations about the substitutability of the two airports for passengers are more nuanced, as there is no majority among them supporting the substitutability of the two Berlin airports.<sup>40</sup>
- (65) In any case, for the purpose of this Decision, the question of whether Berlin Tegel and Berlin Schoenefeld airports belong to the same geographic market for passenger air transport can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under either plausible market definition.
- (66) Given that easyJet does not currently hold slots at Berlin Tegel airport and operates only from Berlin Schoenefeld airport,<sup>41</sup> and given that the Target includes only slots at Berlin Tegel airport, the Transaction would not give rise to overlaps between easyJet's and the Target's slot portfolios if the two Berlin airports form part of distinct markets. Therefore, the Commission's competitive assessment will be solely conducted under the assumption that the two Berlin airports form part of the same geographic market (see section 5.2.3.1).

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<sup>35</sup> See Case M.5335 – *Lufthansa/ SN Airholding*, paragraphs 205-206.

<sup>36</sup> Form CO, paragraph 93.

<sup>37</sup> Form CO, paragraph 86.

<sup>38</sup> Replies to Q1 – Questionnaire to Competitors, question 8.

<sup>39</sup> Replies to Q1 – Questionnaire to Competitors, question 9.

<sup>40</sup> Replies to Q2 – Questionnaire to Travel Agents, question 8; Q3 – Questionnaire to Consumer Associations, question 6.

<sup>41</sup> Form CO, paragraph 45.

## Conclusion

(67) For the purpose of this Decision, the question of whether geographic scope of the markets for passenger air transport services from or to a relevant airport is limited to the airport or encompasses airports in the same catchment area can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under either plausible market definition (see section 5.2.3).

### 4.2.2.2. Airport infrastructure services

(68) For the purpose of providing passenger air transport services at congested airports, airlines have to source infrastructure services at those airports. As indicated in section 4.1, at congested airports, infrastructure capacity is managed through the allocation of slots, which enable air carriers to fly to and from the airports. Slots are therefore defined, from the point of view of airports, as "*a planning tool for rationing capacity at airports where demand for air travel exceeds the available runway and terminal capacity.*"<sup>42</sup> From the point of view of airlines, the granting of a slot at an airport means that the airline may use the entire range of infrastructure necessary for the operation of a flight at a given time (runway, taxiway, stands and, for passenger flights, terminal infrastructure). This in turn enables the air carriers to provide services on the downstream markets for passenger air transport to and from that airport.

(69) As a consequence, through the transfer of the Target's slots, easyJet obtains a right to access to a higher share of airport infrastructure capacity. The Transaction therefore has an impact on (the demand-side of) the markets for airport infrastructure services at the relevant airports and further on the downstream markets for passenger air transport to and from those airports.

#### (a) *Product market*

(70) The Commission has, in its prior decision practice, delineated a product market for the provision of airport infrastructure services to airlines, which includes the development, maintenance, use and provision of the runway facilities, taxiways and other airport infrastructure.<sup>43</sup> The Commission has considered sub-dividing the market for airport infrastructure services on the basis of airline customers (i.e. charter operators, scheduled full service carriers and scheduled low cost carriers) and on the basis of the type of flights (i.e. short haul and long haul).<sup>44</sup>

(71) For the reasons set out above in section 4.1, the Commission considers that slots are an essential input to enable air carriers to get access to airport infrastructure. As such, via slot holdings, air carriers are present on the demand side of the market for airport infrastructure services.

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<sup>42</sup> Press release of 1 December 2011 accompanying the Airport Package ([http://europa.eu/rapid/press-release\\_MEMO-11-857\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-857_en.htm)).

<sup>43</sup> See e.g. Cases M.7270 – *Český Aeroholding/Travel Service/České aerolinie*, paragraph 50; M.7008 – *Aena International/Axa PE/LLAGL*, paragraph 12.

<sup>44</sup> See e.g. Case M.7398 – *MIRAEL/Ferrovial/NDHI*, paragraph 19.

- (72) Considering that the effects of the Transaction relate only to the reinforcement of easyJet's portfolio of slots and that the latter give access to all infrastructure services necessary to operate at the airport, the Commission considers that, for the purpose of this Decision, it is not necessary to further distinguish within the market for airport infrastructure services.

*(b) Geographic market*

- (73) The Commission has, in its prior decision practice, defined the geographic scope of the market for airport infrastructure services as the catchment area of individual airports.
- (74) The Commission has also considered additional criteria relevant for assessing airport substitutability in relation to the market for airport infrastructure services, while acknowledging that the airlines' choice of airports ultimately depends on passengers' demand. In addition to the catchment area of a particular airport, the Commission has notably analysed the costs of operating from a particular airport, capacity constraints for slots and facilities, passenger volumes or the positioning of the airport (e.g. a niche airport serving high yield time-sensitive passengers or an airport serving mainly leisure, less time-sensitive passengers).<sup>45</sup>

**Overview of the relevant airports**

- (75) As indicated in section 4.2.2.1, the Target's slots relate to Berlin Tegel airport and to 19 destination airports.

**Substitutability of airports at destination**

- (76) As mentioned in section 4.2.2.1, the question of airport substitutability does not need to be assessed in detail for the airports of destination, as it would not change materially the assessment of the effects of the Transaction on easyJet's slot holding at the airports.

**Substitutability of Berlin Tegel and Berlin Schoenefeld airports**

- (77) The question of the catchment area of Berlin Tegel and Berlin Schoenefeld airports is addressed in section 4.2.2.1.
- (78) In terms of congestion, the two airports have limited slot availability at peak times.<sup>46</sup> In addition, the two airports are large airports with more than one terminal, used in 2016 by over 21 million passengers for Berlin Tegel airport and approximately 12 million passengers for Berlin Schoenefeld airport.
- (79) Nevertheless, Berlin Tegel airport appears more congested than Berlin Schoenefeld airport during peak periods and for longer periods throughout the day.<sup>47</sup> The airport manager of the two Berlin airports notes that the two airports

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<sup>45</sup> See e.g. Cases M.5652 – *GIP/Gatwick Airport*, paragraph 14; M.4164 – *Ferrovial/Quebec/GIC/BAA*, paragraphs 15-17; M.3823 – *MAG/Ferrovial Aeropuertos/Exeter Airport*, paragraphs 16-19;

<sup>46</sup> Reply of Flughafen Berlin Brandenburg to Q5 – Questionnaire to Airport Managers, question 6.1.1.

<sup>47</sup> Form CO, paragraph 167.

have different particularities, Berlin Schoenefeld being a more low cost airport than Berlin Tegel, and Berlin Tegel being more used for business traffic and long-haul destinations.<sup>48</sup>

- (80) In any case, for the purpose of this Decision, the question of whether Berlin Tegel and Berlin Schoenefeld airports belong to the same geographic market for airport infrastructure services can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under either plausible market definition (see section 5.2.3.1).

### **Conclusion**

- (81) For the purpose of this Decision, the question of whether geographic scope of the market for airport infrastructure services is limited to the airport or encompasses airports in the same catchment area can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under either plausible market definition (see section 5.2.3).

#### 4.2.2.3. Conclusion

- (82) In light of the above, for the purpose of this Decision, the Commission will assess whether the Transaction has anticompetitive effects on the markets for passenger air transport from or to the relevant airports, under the following two geographic market definitions: (i) a single airport, or (ii) the airports with overlapping catchment areas.
- (83) In order to assess the effects of the Transaction on the markets for passenger air transport from or to airports, the Commission will take account of the reinforcement of easyJet's slot holding at those airports, hence of the reinforcement of its position on the demand-side of the market for airport infrastructure services.

### **4.3. Relevant situation absent the Transaction**

- (84) Pursuant to paragraph 9 of the Horizontal Merger Guidelines,<sup>49</sup> "*[i]n assessing the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger. In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted.*"
- (85) easyJet underlines that Air Berlin, including the Target, has already entered insolvency proceedings, stopped its operations and grounded its aircraft. Therefore, according to easyJet, there is no doubt that Air Berlin will exit the

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<sup>48</sup> Reply of Flughafen Berlin Brandenburg to Q5 – Questionnaire to Airport Managers, question 11.1.

<sup>49</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 05.02.2004, p. 5-18.

market and this inevitable exit must be considered the relevant situation absent the Transaction.<sup>50</sup>

- (86) As set out in section 2.1., Air Berlin's on-going insolvency proceedings will most likely lead Air Berlin to be eventually wound up. In the light of the fact that Air Berlin has already exited the passenger air transport markets at Berlin Tegel airport, the Commission considers that the most likely scenario absent the Transaction is that Air Berlin no longer operates from this airport and that the slots that it currently holds would be made available to third parties.
- (87) More specifically, absent the Transaction, the slots forming part of the Target would either be made available to other third parties than easyJet through the sale of all or parts of an air carrier during the insolvency proceedings,<sup>51</sup> or, in the absence of acquirers, fall back to the slot pools and be subsequently reallocated by the relevant slot coordinators (see section 4.1.2).
- (88) Two factors depend on which of these scenarios would occur in the situation absent the Transaction. First, the number of slots that easyJet would obtain is impacted, as easyJet would likely obtain slots in the second scenario through the reallocation process of slots returned to the pool, but not in the first scenario. This, in turn, has an impact on the difference between the number of slots obtained through the Transaction and the number of slots that easyJet would have obtained in the situation absent the Transaction (i.e. the "net increment" brought about by the Transaction).
- (89) Second, the question of the distribution of the Target's slots absent the Transaction has an impact on the slot holding of easyJet's competitors at the relevant airports (as they would also obtain slots through a possible reallocation process), hence on the competitive constraint they would be able to exert on easyJet absent the Transaction.
- (90) In any case, for the purpose of this Decision, the question of whether, in the situation absent the Transaction, the Target's slots would be transferred to other air carriers rather than easyJet or would fall back to the slot pools can be left open, as the Transaction would not raise serious doubts as to its compatibility with the internal market under either circumstance. In section 5 below, the competitive assessment has been conducted by comparing the effects of the Transaction with a situation where all the slots would be transferred to other air carriers (and none to easyJet). A finding that the Transaction does not raise serious doubts in that scenario necessarily means that it also does not raise serious doubts when compared to a situation in which the slots return to the slot pools. That is so because the comparison to the latter situation would consider a lower increment in slot holdings for easyJet resulting from the Transaction given that it is assessed against a situation in which easyJet would have obtained some slots via the pools.

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<sup>50</sup> Form CO, paragraph 113.

<sup>51</sup> easyJet has notably been informed that [information on the bid of a third party] (Form CO, paragraph 108).

## 5. COMPETITIVE ASSESSMENT

### 5.1. Legal framework

- (91) According to paragraph 36 of the Horizontal Merger Guidelines,<sup>52</sup> *"some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete. In such a case, competitors may not, either individually or in the aggregate, be in a position to constrain the merged entity to such a degree that it would not increase prices or take other actions detrimental to competition. For instance, the merged entity may have such a degree of control, or influence over, the supply of inputs or distribution possibilities that expansion or entry by rival firms may be more costly."*
- (92) Accordingly, the Commission will first assess whether the Transaction, by reinforcing easyJet's slot holding at the relevant airports and granting it broader access to their infrastructure, gives easyJet the ability and incentive to prevent other air carriers from getting access to the downstream markets for the provision of passenger air transport services from those airports, and therefore to prevent or reduce competition on those markets (sections 5.2 and 5.3). The Commission will then analyse the effects of such strategy on the ability of easyJet's rivals to compete at the relevant airports (section 5.4).<sup>53</sup>

### 5.2. Ability of easyJet to foreclose access to the markets for the provision of passenger air transport services

#### 5.2.1. Conditions

- (93) First, input foreclosure may raise competition problems only if it concerns an important input for the downstream product.<sup>54</sup>
- (94) To be able to provide passenger air transport, an air carrier needs access to airport infrastructure. At congested airports, an air carrier must thus hold slots to operate routes from or to those airports.
- (95) Lack of access to slots is therefore a barrier to an air carrier's ability to compete for passengers between an airport and the destinations served from the airport. An airline's slot holding at an airport provides a measure of its ability to compete on the passenger air transport market to or from that airport.
- (96) In the present case, the market investigation unambiguously confirmed that there are advantages in the holding of a large portfolio of slots at an airport.<sup>55</sup> An

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<sup>52</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2017, p. 5.

<sup>53</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18 October 2008, p. 6 (the "Non-Horizontal Merger Guidelines"), paragraph 32.

<sup>54</sup> Non-Horizontal Merger Guidelines, paragraph 34.

airport manager notably underlined that "[t]he more capacity that an airline has at an airport gives it more market power to compete with other airlines."<sup>56</sup> Air carriers also point out that the economies of scale, greater flexibility to react to changes in demand as well as the maximisation of passenger load factors granted by a large slot portfolio, e.g.: "Generally, a large portfolio of slots gives an airline scale in both operation (which enables cost efficiency) and in market position. Indeed, the holding of a large portfolio of slots at the airport provides an airline with a wealth of opportunities to operate different kinds of routes and to propose multiple frequencies. It furthermore gives the airline great flexibility in building the network."<sup>57</sup>

- (97) As a consequence, the Commission considers that the first condition related to the importance of slot holding as an input for the provision of passenger air transport services from or to an airport is fulfilled.
- (98) Second, for input foreclosure to be a concern, the merged entity must have a significant degree of market power in the upstream market.<sup>58</sup>
- (99) This criterion requires, for easyJet to be able to foreclose its competitors, that (i) the slots that easyJet would hold post-Transaction represents a significant share of the airport capacity, in particular at peak times; and (ii) the Transaction has a material impact on easyJet's slot holding at the airport, in particular at peak times.
- (100) Indeed, the market investigation demonstrated the link between the holding of a large portfolio of slots at an airport and the ability to influence access of competitors to the passenger air transport markets at the airport. An air carrier referred to the ability of large slot holders to operate the highest number of, and most demanded flights at congested airports: "Slots are used to allocate the right to operate a flight at a certain time of a day to an airline. Assuming that the number of available slots at an airport is limited, the airline holding the largest slot portfolio at that airport will have the chance to operate the most flights at that airport. Furthermore, this airline will have the highest flexibility to build an ideal schedule. The airline could offer flight times that matches perfectly the demand of the market," while others mentioned more directly the possibility to block entry or expansion, e.g.: "Holding a large slot portfolio allows you to swap slots with yourself. You can also limit competitors' terminal capacity as historic slots have higher priority than new slots" or "At slot constrained airports like Berlin, potential competitors are generally unable to obtain slots at the scale required and at suitable times to effectively compete with airlines that have a large slot portfolio. As stated previously, the unavailability of slots at Berlin is one of the main barriers to entry or expansion there. These market circumstances reduce competitive constraints by impeding the entry or expansion by potential competitors at Berlin, and strengthen the position of easyJet in Berlin." Finally, an air carrier indicated that a large portfolio of slots reinforces the bargaining

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<sup>55</sup> Replies to Q1 – Questionnaire to Competitors, question 18; Q5 – Questionnaire to Airport Managers, question 14.

<sup>56</sup> Reply to Q5 – Questionnaire to Airport Managers, question 14.1.

<sup>57</sup> Replies to Q1 – Questionnaire to Competitors, question 18.1.

<sup>58</sup> Non-Horizontal Merger Guidelines, paragraph 35.

power of airlines vis-à-vis airports, which would be less open to new entrants: *"Controlling a large slot portfolio and the operations associated therewith also enables airlines to exercise significant pressure on the respective airport. For instance criticizing openness to low cost carrier and become more independent of the dominant slot holder. This can be understood as message to airports to minimize their incentives to new airlines as they would otherwise need to fear upsetting their main customer. Such behaviour clearly limits the commercial freedom of the airports, potential new airline entrants and thus ultimately the choice of customers – individual passengers and tour operators alike."*<sup>59</sup>

- (101) The second circumstance under which input foreclosure to be a concern will be analysed in detail in sections 5.2.3.1 and 5.2.3.2.
- (102) Third, the merged entity would only have the ability to foreclose downstream competitors if it could negatively affect the overall availability of input for the passenger air transport markets from or to the relevant airport.
- (103) This criterion requires that (i) the airport at which easyJet would hold a large portfolio of slots does not have sufficient available capacity (i.e. its level of congestion is high); and (ii) the airports considered as substitutable by air carriers (see sections 4.2.2.1 and 4.2.2.2) do not have sufficient available capacity either.
- (104) The Commission should also consider whether there are effective and timely counter-strategies that the rival firms would be likely to deploy in case of foreclosure.<sup>60</sup> In this case, the Commission notes that there are limited effective and timely counter-strategies that easyJet's competitors would be likely to deploy in case of foreclosure strategy by easyJet. There is no possibility for an air carrier to be less reliant on access to airport infrastructure and very limited possibility to sponsor the expansion of airport capacity or the opening of new airports.<sup>61</sup>
- (105) In light of the above, the Commission will assess the ability of easyJet post-Transaction to foreclose access to the markets for the provision of passenger air transport at the relevant airports by taking account of the following three factors together (as it is only if the following three conditions are cumulatively met that the risk of input foreclosure may materialise): (i) the share of slots held by easyJet post-Transaction at the airport or at substitutable airports being high, in particular at peak times;<sup>62</sup> (ii) the net increment in easyJet's slot holding brought about by the Transaction at the airport or at the substitutable airports being material, in particular at peak times; and (iii) the level of congestion at the airport or at the substitutable airports being high.

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<sup>59</sup> Replies to Q1 – Questionnaire to Competitors, question 18.1.

<sup>60</sup> Non-Horizontal Merger Guidelines, paragraph 39.

<sup>61</sup> Without prejudice to the exceptional cases of joint venture between an airport manager and an airline (see e.g. the joint venture between Deutsche Lufthansa AG and Flughafen München GmbH, the company managing Munich airport).

<sup>62</sup> Considering that the Commission assesses the specific effects of the Transaction on easyJet's slot holding, the slots that easyJet has obtained or will obtain through the slot pool at the relevant airports and that are unrelated to Air Berlin's insolvency proceedings are not taken into account in the calculation of easyJet's slot holding post-Transaction.

(106) Before an airport-by-airport assessment of easyJet's ability to foreclose access to the markets for the provision of passenger air transport (section 5.2.3), the Commission will detail the methodologies for determining airport congestion, easyJet's slot holding post-Transaction and the increment brought about by the Transaction.

### 5.2.2. Methodologies

#### 5.2.2.1. Slot holding and increment brought about by the Transaction

(107) A slot holding is defined as the ratio between the number of slots held by an air carrier (or the air carriers that are part of the same group) at an airport and the total available slots at that same airport (i.e. the airport capacity).

(108) easyJet has estimated its slot holding and the Target's slot holding at an airport on the basis of statistical data collected by CRA and DDS.<sup>63</sup>

(109) The Commission has checked the accuracy of the data submitted by easyJet against the information gathered from airport managers and slot coordinators during the market investigation.<sup>64</sup>

(110) The Commission has calculated two values for easyJet's slot holding post-Transaction: (i) its average slot holding during the opening hours of the airport, and (ii) its average slot holding during peak times.

(111) In order to adopt a conservative approach, the Commission has calculated easyJet's highest slot holding at any given hour band throughout the whole week (including any peak hour), which exceeds its average slot holding during peak times.

(112) The increment brought about by the Transaction corresponds to the difference between easyJet's slot holding post-Transaction and easyJet's slot holding in the situation absent the Transaction. To assess the impact of the Transaction, one should calculate the "net increment", which takes account of the Target's slots returned to the slot pools that easyJet would have obtained through the regular allocation process referred to in section 4.1.2. In line with section 4.3 and in order to adopt a conservative approach, the Commission has assessed the Transaction based on the "gross increment", which is the difference between easyJet's slot holding post-Transaction and the situation in which easyJet would not obtain any slots of Air Berlin at all. This is the increment that the Transaction would have caused if a third party other than easyJet had obtained all the slots.<sup>65</sup>

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<sup>63</sup> Form CO, Annexes 12a and 12c; easyJet's replies to Request for information 3 and to Request for information 4.

<sup>64</sup> Replies to Q5 – Questionnaire to Airport Managers, question 4; Q6 – Questionnaire to Slot Coordinators, questions 10 and 11.

<sup>65</sup> Although it is difficult to provide an accurate estimate of the share of the pool that easyJet would have obtained in the situation absent the Transaction, easyJet would have obtained part of it and its slot holding absent the Transaction would have been higher than its slot holding pre-Transaction. Therefore, the net increment brought about by the Transaction would have been inferior to the gross increment. If the Target's slots were sold to another air carrier, no slot would have fallen back to the pool. In this case, the net increment would have been equal to the gross increment.

### 5.2.2.2. Airport congestion

- (113) The Commission used the qualification as a coordinated airport under the Slot Regulation or, for non-EU airports, as a Level 3 airport under the IATA Worldwide Slot Guidelines<sup>66</sup> as a first proxy of the high congestion level of an airport. Indeed, such qualification means that, at these airports, the demand for airport infrastructure, notably slots, significantly exceeds the airport's capacity and the expansion of airport infrastructure to meet demand is not possible in the short term.
- (114) For coordinated and Level 3 airports, the Commission has further calculated the actual congestion rate during the opening hours of an airport by dividing the number of slots allocated to all airlines at the airport in a week of the relevant IATA season by the total capacity of the airport in a week (in terms of slots) in the relevant IATA season. The congestion rate of the airport has also been calculated for each hour band by dividing the number of slots allocated to all airlines during the relevant hour band throughout the whole week by the total capacity of the airport during the same hour band throughout the whole week. An average congestion rate during the opening hours of less than 60% would not be *prima facie* problematic.
- (115) The Commission has qualified as "peak times" the hour bands for which the congestion rate at a given airport was the highest, and therefore very limited, or no, capacity for entry or expansion is left.

### 5.2.3. Airport-by-airport assessment

- (116) Through the Transaction, easyJet would be transferred slots at (i) 19 airports for Winter 2017/2018 IATA Season,<sup>67</sup> and (ii) 20 airports for Summer 2018 IATA Season.<sup>68</sup> easyJet already operates at all these airports, except at Berlin Tegel airport, and would thereby expand its portfolio of slots at these airports. The slots at Berlin Tegel airport would complement its portfolio of slots at Berlin Schoenefeld airport. As indicated in section 4.1.4.3, the Commission will conduct its competitive assessment under the assumption that Berlin Tegel and Berlin Schoenefeld airports form part of the same market.
- (117) Among the 20 airports at which easyJet would be transferred slots through the Transaction, 18 are coordinated or Level 3 airports during the relevant IATA seasons.<sup>69</sup> Therefore, the Commission will assess easyJet's share of slot holding

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<sup>66</sup> IATA Worldwide Slot Guidelines, Annex 11.12, as updated on 13 November 2017.

<sup>67</sup> These are: Stockholm Arlanda airport, Budapest Liszt Ferenc International airport, Paris Charles-de-Gaulle airport, Cologne-Bonn airport, Copenhagen Kastrup airport, Catania Fontanarossa airport, Duesseldorf airport, Roma Fiumicino airport, Frankfurt airport, Helsinki-Vantaa airport, Keflavik International airport, Munich airport, Naples International airport, Palma de Mallorca airport, Stuttgart airport, Tel Aviv Ben Gurion airport, Vienna International airport, Zurich airport, Berlin Tegel airport.

<sup>68</sup> These are the same as in Winter 2017/2018 IATA with the addition of Göteborg-Landvetter airport.

<sup>69</sup> Cologne-Bonn airport and Budapest Liszt Ferenc International airport are Level 2 airports in Winter and Summer IATA Seasons.

during the relevant IATA Season at these 18 airports<sup>70</sup> (see sections 5.2.1 and 5.2.2).

### 5.2.3.1. Berlin airports

*Slot holding and increment brought about by the Transaction*

**Table 1 – Slot holding of easyJet and the Target – Summer<sup>71</sup>**

Airport	Average slot holding			Highest slot holding		
	easyJet	Target	Combined	easyJet	Target	Combined
Berlin Tegel and Berlin Schoenefeld	[5-10]%	[10-20]%	[20-30]%	[10-20]%	[30-40]%	[40-50]%

- (118) In Summer 2018 IATA Season, the Transaction would lead to a slot holding at Berlin airports of less than 25% on average during the airports' opening hours.<sup>72</sup> By analogy with paragraph 25 of the Non-Horizontal Merger Guidelines, according to which a combined market share post-transaction below 30% is indicative of a non-problematic transaction, the level of easyJet's slot holding post-Transaction is unlikely to give rise to competition concerns.
- (119) easyJet's highest share in slot holding would be reached on Fridays during the hour band 14:00-14:59, when it would reach [40-50]%. This hour band does not correspond to the most congested hour band at Berlin airports (see paragraph 124 below). easyJet's average slot holding at peak times as referred to in paragraph 124 below would fall to [30-40]%. However, this share of airport capacity is insufficient for easyJet to be able to foreclose other airlines as (i) it is possible for those other airlines to build up a substantial slot portfolio using the remaining [60-70]% of airport capacity, and (ii) as further explained below, there is available capacity at Berlin airports (46% on average during Summer 2017 IATA Season), even during peak hours (at least 27% during Summer 2017 IATA Season).

<sup>70</sup> These are for Winter IATA Season: Stockholm Arlanda airport, Paris Charles-de-Gaulle airport, Copenhagen Kastrup airport, Catania Fontanarossa airport, Duesseldorf airport, Roma Fiumicino airport, Frankfurt airport, Helsinki-Vantaa airport, Keflavik International airport, Munich airport, Naples International airport, Palma de Mallorca airport, Stuttgart airport, Tel Aviv Ben Gurion airport, Vienna International airport, Zurich airport, Berlin Tegel airport.

These are for Summer IATA Season: Stockholm Arlanda airport, Paris Charles-de-Gaulle airport, Copenhagen Kastrup airport, Catania Fontanarossa airport, Duesseldorf airport, Göteborg-Landvetter airport, Roma Fiumicino airport, Frankfurt airport, Helsinki-Vantaa airport, Keflavik International airport, Munich airport, Naples International airport, Palma de Mallorca airport, Stuttgart airport, Tel Aviv Ben Gurion airport, Vienna International airport, Zurich airport, Berlin Tegel airport.

<sup>71</sup> Form CO, Annex 12a "Slot Holding Berlin Airports" and easyJet's reply to Request for information 3, question 1.

<sup>72</sup> In Summer IATA Season, Berlin Schoenefeld airport is open 24/24 while Berlin Tegel airport is open between 4.00 UTC and 20:59 UTC. For better comparison, the two Berlin airports are considered as open between 3.00 UTC and 21:59 UTC. It is noteworthy that the number of slots used at Berlin Schoenefeld airport outside these hour bands is negligible.

**Table 1a – Slot holding of easyJet and the Target – Winter<sup>73</sup>**

Airport	Average slot holding			Highest slot holding		
	easyJet	Target	Combined	easyJet	Target	Combined
Berlin Tegel and Berlin Schoenefeld	[5-10]%	[10-20]%	[10-20]%	[5-10]%	[20-30]%	[30-40]%

- (120) In Winter 2017/2018 IATA Season, easyJet estimates that its share in slot holding post-Transaction at Berlin airports would be below 20% on average during the airports' opening hours<sup>74</sup> with a gross increment of [10-20]%. By analogy with paragraph 25 of the Non-Horizontal Merger Guidelines, according to which a combined market share post-transaction below 30% is indicative of a non-problematic transaction, the level of easyJet's slot holding post-Transaction is unlikely to give rise to competition concerns.
- (121) easyJet's highest share would occur on Fridays during the hour band 15:00-15:59 UTC, when it would reach [30-40]% with a gross increment of [20-30]%. This hour band does not correspond to the most congested hour band at Berlin airports (see paragraph 113 below). easyJet's average slot holding at peak times (see paragraph 125 below) would fall to [20-30]%.

*Congestion*

- (122) In Summer 2017 IATA Season, the average congestion rate during the Berlin airports' opening hours amounted to 54%.<sup>75</sup> The Berlin airports reached their highest congestion level during the hour band 10:00-10:59 UTC with a congestion rate of 73%.
- (123) In Winter 2016/2017 IATA Season, the average congestion rate during the Berlin airports' opening hours amounted to 46%.<sup>76</sup> The Berlin airports reached their highest congestion level during the hour band 8:00-8:59 UTC with a congestion rate of 62%.
- (124) As a consequence, although the two Berlin airports are coordinated, the actual level of congestion indicates that there are still available slots for entry or

<sup>73</sup> Form CO, Annex 12a "Slot Holding Berlin Airports" and easyJet's reply to Request for information 3, question 1.

<sup>74</sup> In Winter IATA Season, Berlin Schoenefeld airport is open 24/24 while Berlin Tegel airport is open between 5.00 UTC and 21:59 UTC. For better comparison, the two Berlin airports are considered as open between 4.00 UTC and 22:59 UTC. It is noteworthy that the number of slots used at Berlin Schoenefeld airport outside these hour bands is negligible.

<sup>75</sup> In Summer IATA Season, Berlin Schoenefeld airport is open 24/24 while Berlin Tegel airport is open between 4.00 UTC and 20:59 UTC. For better comparison, the two Berlin airports are considered as open between 3.00 UTC and 21:59 UTC. It is noteworthy that the number of slots used at Berlin Schoenefeld airport outside these hour bands is negligible.

<sup>76</sup> In Winter IATA Season, Berlin Schoenefeld airport is open 24/24 while Berlin Tegel airport is open between 5.00 UTC and 21:59 UTC. For better comparison, the two Berlin airports are considered as open between 4.00 UTC and 22:59 UTC. It is noteworthy that the number of slots used at Berlin Schoenefeld airport outside these hour bands is negligible.

expansion at the airports, corresponding to, on average, 46% in summer and 54% in winter of available airport capacity.

*Conclusion*

- (125) Given (i) easyJet's limited slot holding position at Berlin airports post-Transaction (below 25% on average and below 40% at peak times), and (ii) the available slot capacity at Berlin airports, easyJet would likely not have post-Transaction a sufficient degree of market power to influence or control access of other carriers to the market for the provision of passenger air transport services.
- (126) The Commission thus concludes that easyJet would likely not have the ability to foreclose competitors' access to the markets for the provision of passenger air transport services from and to Berlin airports.

### 5.2.3.2. Destination airports

#### *Slot holding and increment brought about by the Transaction*

**Table 2 – Slot holding of easyJet and the Target – Summer<sup>77</sup>**

Airport	Average slot holding			Highest slot holding		
	easyJet	Target	Combined	easyJet	Target	Combined
Stockholm Arlanda	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% Hour band 8:00-8:59
Paris Charles-de-Gaulle	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 16:00-16:59
Copenhagen Kastrup	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10] % Hour band 19:00-19:59
Catania Fontanarossa	[5-10]%	[0-5]%	[5-10]%	[10-20]%	[0-5]%	[10-20]% Hour band 19:00-19:59
Duesseldorf	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]% Hour band 6:00-6:59
Göteborg-Landvetter	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]% Hour band 17:00-17:59
Roma Fiumicino	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 17:00-17:59
Frankfurt	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% Hour band 16:00-16:59
Helsinki-Vantaa	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% Hour band 16:00-16:59
Keflavik International <sup>78</sup>	[0-5]%	[0-5]%	[5-10]%	n/a	n/a	n/a
Munich	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 14:00-14:59
Naples International	[10-20]%	[0-5]%	[10-20]%	[20-30]%	[0-5]%	[20-30]% Hour band 8:00-8:59
Palma de Mallorca	[0-5]%	[0-5]%	[0-5]%	[10-20]%	[0-5]%	[10-20]% Hour band 7:00-7:59
Stuttgart	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 18:00-19:59
Tel Aviv Ben Gurion	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 9:00-9:59
Vienna International	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]% Hour band 19:00-19:59
Zurich	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]% Hour band 8:00-8:59

(127) In Summer 2018 IATA Season, easyJet estimates that its share in slot holding post-Transaction at each destination airport would be below 15% on average

<sup>77</sup> Form CO, Annex 12c "Slot Holding at the Level 3 Destination Airports", easyJet's replies to Request for information 4, question 2 and to Request for Information 6, question 1.

<sup>78</sup> Shares expressed in terms of seat capacity as no data on the number of slot available has been disclosed to the Parties.

during the relevant airport's opening hours<sup>79</sup> with a gross increment inferior to 2%.

- (128) easyJet's highest share during any specific hour band at each of the destination airports would reach no more than [20-30]% with a gross increment below 3%.
- (129) By analogy with paragraph 25 of the Non-Horizontal Merger Guidelines, according to which a combined market share post-transaction below 30% is indicative of a non-problematic transaction, the level of easyJet's slot holding post-Transaction is unlikely to give rise to competition concerns.
- (130) As described in section 4.1.4.3, airport substitutability could be relevant for nine airports at which easyJet would be transferred slots.<sup>80</sup> However, for six of these airports (Stockholm Arlanda, Göteborg-Landvetter, Frankfurt, Munich, Roma Fiumicino and Vienna), easyJet does not operate at the airports located in the same catchment area.
- (131) For the three remaining airports (Duesseldorf, Paris Charles-de-Gaulle and Catania Fontanarossa), the gross increment would be below 1% (it must be noted that the gross increment would equal [0-5]% at Duesseldorf airport but easyJet did not operate at Duesseldorf pre-Transaction). Therefore, as the gross increment would be diluted if the other airports located in the same catchment area were taken into account, the competitive analysis does not change even when taking into account airport substitutability.

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<sup>79</sup> In Summer IATA Season, Berlin Schoenefeld airport is open 24/24 while Berlin Tegel airport is open between 4.00 UTC and 20:59 UTC. For better comparison, the Berlin airports are considered as open between 3.00 UTC and 21:59 UTC. It is noteworthy that the number of slots used at Berlin Schoenefeld airport outside these hour bands is negligible.

<sup>80</sup> Stockholm Arlanda, Paris Charles-de-Gaulle, Catania Fontanarossa, Duesseldorf, Vienna International, Göteborg-Landvetter, Roma Fiumicino, Frankfurt and Munich.

**Table 2a – Slot holding of easyJet and the Target – Winter<sup>81</sup>**

Airport	Average slot holding			Highest slot holding		
	easyJet	Target	Combined	easyJet	Target	Combined
Stockholm Arlanda	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% Hour band 18:00-18:59
Paris Charles-de-Gaulle	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 19:00-19:59
Copenhagen Kastrup	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 19:00-19:59
Catania Fontanarossa	[0-5]%	[0-5]%	[0-5]%	[10-20]%	[0-5]%	[10-20]% Hour band 19:00-19:59
Duesseldorf	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% Hour band 19:00-19:59
Roma Fiumicino	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 19:00-19:59
Frankfurt	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% Hour band 16:00-16:59
Helsinki-Vantaa	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% Hour band 17:00-17:59
Keflavik International <sup>82</sup>	[10-20]%	[0-5]%	[10-20]%	n/a	n/a	n/a
Munich	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]% Hour band 19:00-19:59
Naples International	[5-10]%	[0-5]%	[5-10]%	[10-20]%	[0-5]%	[10-20]% Hour band 18:00-18:59
Palma de Mallorca	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]% 8:00-8:59
Stuttgart	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[5-10]% Hour band 18:00-18:59
Tel Aviv Ben Gurion	[0-5]%	[0-5]%	[0-5]%	[10-20]%	[0-5]%	[10-20]% Hour band 10:00-10:59
Vienna International	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 19:00-19:59
Zurich	[0-5]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[5-10]% Hour band 8:00-8:59

(132) In Winter 2017/2018 IATA Season, easyJet estimates that its share post-Transaction at each destination airport would be below 15% on average during the airports' opening hours<sup>83</sup> with a gross increment inferior to 2%.

(133) easyJet's highest share during any specific hour band at each of the destination airports would reach no more than [10-20]% with a gross increment below 5%.

<sup>81</sup> Form CO, Annex 12c "Slot Holding at the Level 3 Destination Airports", easyJet's replies to Request for information 4, question 2 and to Request for Information 6, question 1.

<sup>82</sup> Shares expressed in terms of seat capacity as no data on the number of slot available has been disclosed to the Parties.

<sup>83</sup> In Summer IATA Season, Berlin Schoenefeld airport is open 24/24 while Berlin Tegel airport is open between 4.00 UTC and 20:59 UTC. For better comparison, Berlin airport would be considered open between 3.00 UTC and 21:59 UTC. It is noteworthy that number of slots used in Berlin Schoenefeld airport outside these hour bands is negligible.

- (134) By analogy with paragraph 25 of the Non-Horizontal Merger Guidelines, according to which a combined market share post-transaction below 30% is indicative of a non-problematic transaction, the level of easyJet's slot holding post-Transaction is unlikely to give rise to competition concerns.
- (135) As described in section 4.1.4.3, airport substitutability could be relevant for eight airports at which easyJet would be transferred slots.<sup>84</sup> However, for five of these airports (Stockholm Arlanda, Frankfurt, Munich, Roma Fiumicino and Vienna), easyJet does not operate at the airports located in the same catchment area.
- (136) For the three remaining airports (Duesseldorf, Paris Charles-de-Gaulle and Catania Fontanarossa) the gross increment is below 1% (it must be noted that the gross increment would equal [0-5]% at Duesseldorf airport but easyJet did not operate at Duesseldorf pre-Transaction). Therefore, as the gross increment would be diluted if the other airports located in the same catchment area were taken into account, the competitive analysis does not change even when taking into account airport substitutability.

#### *Conclusion*

- (137) Given easyJet's limited slot holding position at destination airports post-Transaction (below 15% on average and below 16% at any times, including peak times), easyJet would likely not have post-Transaction a sufficient degree of market power to influence or control access of other carriers to the market for the provision of passenger air transport services.
- (138) Considering also the available slot capacity at destination airports, the Commission concludes that easyJet would likely not have the ability to foreclose competitors' access to the markets for the provision of passenger air transport services from and to those airports.

#### *5.2.4. Conclusion*

- (139) In light of the above, given easyJet's slot holding at Berlin airports and at the relevant destination airports post-Transaction, the Commission considers that easyJet would likely not have the ability to foreclose competitors' access to the markets for the provision of passenger air transport services.
- (140) Nevertheless, considering the specific impact of the Transaction on easyJet's position at Berlin airports, the Commission will briefly assess whether easyJet would have the incentive to implement a foreclosure strategy at Berlin airports and what the overall impact of such strategy on effective competition on the market for passenger air transport from or to Berlin would be.

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<sup>84</sup> Stockholm Arlanda, Paris Charles-de-Gaulle, Catania Fontanarossa, Duesseldorf, Vienna International, Roma Fiumicino, Frankfurt and Munich.

### **5.3. Incentive of easyJet to foreclose access to the markets for the provision of passenger air transport services**

#### *5.3.1. Conditions*

- (141) The incentive to foreclose depends on the degree to which foreclosure would be profitable.<sup>85</sup>
- (142) A dominant carrier at a relevant airport would in principle have a strong incentive to pursue a foreclosure strategy, as any new service or expansion by another carrier would be likely to introduce or increase competition on one of the dominant carrier's route. Such dominant carrier would have a greater incentive than any other carrier at the airport to keep slots out of reach of other carriers. The incentive to foreclosure would also grow with the increased size of the slot portfolio it would control at the airport.
- (143) Therefore, the Commission needs to analyse (i) the relative capacity constraints faced by the merged entity and its competitors; (ii) the importance of slots as an input in the passenger air transport markets; and (iii) the market shares of the merged entity in the relevant passenger air transport markets.<sup>86</sup>
- (144) In its assessment of the likely incentives of the merged firm, the Commission may take into account the type of strategies adopted on the market in the past or the content of internal strategic documents. In addition, the Commission has to examine the factors liable to reduce, or even eliminate, those incentives, including the applicable regulatory framework.<sup>87</sup>
- (145) In the specific framework of its assessment of easyJet's incentives to foreclose other air carriers' access to Berlin airports, the Commission will take account of easyJet's fleet deployed to Berlin airports and its share of the market for passenger air transport at Berlin airports.<sup>88</sup>
- (146) The Commission will also assess whether easyJet's past conduct or internal documents show any indications of practices aimed at preventing entry or expansion by other carriers at airports, such as "slot hoarding", "slot babysitting",<sup>89</sup> or use of its "slot shuffling power"<sup>90</sup> to engage into exclusionary conduct.

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<sup>85</sup> Non-Horizontal Merger Guidelines, paragraph 40.

<sup>86</sup> The greater the market shares of the merged entity downstream, the higher the incentive (Non-Horizontal Merger Guidelines, paragraphs 42-43).

<sup>87</sup> Non-Horizontal Merger Guidelines, paragraphs 45-46.

<sup>88</sup> The factor related to the importance of slot holding and access to infrastructure at Berlin airports has already been assessed in section 5.2.1.

<sup>89</sup> "Slot hoarding" involves the operation of small aircraft and/or low load factors in order to keep slots rather than lose them under the "use-it-or-lose-it" principle described in section 4.1.2. "Slot babysitting" involves the transfer of slots to non-competing airlines, such as partner airlines within an alliance before shifting them to uses that are more profitable.

<sup>90</sup> "Slot shuffling power" refers to the ability move a flight to a timing close to the timing envisaged by a new entrant.

### 5.3.2. Assessment for Berlin airports

- (147) The Target's slots, together with the acquisition of 25 Airbus A320 aircraft and the recruitment of the corresponding crew, on the market, would enable easyJet to start operating from and to Berlin Tegel airport.
- (148) First, in terms of capacity constraints, easyJet had, prior to the Transaction, no capacity deployed at Berlin Tegel airport and no share of the market for passenger air transport from or to Berlin Tegel airport. The 25 aircraft to be deployed to Berlin Tegel airport represent approximately twice the fleet of the second largest airline, the Lufthansa Group, at the airport.<sup>91</sup>
- (149) While easyJet would deploy a large fleet at Berlin airports to use the slots in its flight operations, other air carriers would still have, as indicated in section 5.3.1, access to a sufficient number of slots to also deploy additional aircraft at Berlin airports.<sup>92</sup>
- (150) Second, in terms of the importance of slots, the Commission has indicated in section 5.2.1 that slots are essential for air carriers to operate their services to or from a given airport. With regard to the impact of the regulatory framework on easyJet's incentive, the Commission has acknowledged that the current system of slot allocation has not a sufficiently strong deterrent effect against the anticompetitive use of slots.<sup>93</sup>
- (151) Third, in terms of market shares, if the number of Air Berlin's seats and passengers generated by the use of slots at the airport are notionally allocated to the Target, easyJet would acquire, through the Transaction, respectively [30-40]% and [30-40]% of the total seat capacity at Berlin Tegel airport in Winter IATA Season and Summer IATA Season and, respectively, [30-40]% and [40-50]% of the total number of passengers at Berlin Tegel airport in Winter IATA Season and Summer IATA Season.<sup>94</sup> This is comparable with Lufthansa's presence at Berlin Tegel airport, which has a [30-40]% share of flights and [30-40]% share of capacity at Berlin Tegel airport.<sup>95</sup> Therefore, those market shares would likely not be sufficient to give an incentive to easyJet to engage in a foreclosure strategy.

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<sup>91</sup> In November 2017, the Lufthansa Group had 14 aircraft positioned overnight at Berlin Tegel airport (see Berlin airports manager's reply to Q5 – Questionnaire to Airport Managers, question 2).

<sup>92</sup> The potential shortage in other resources needed to operate on routes from or to Berlin airports, notably crew, would not be caused by the Transaction, which mainly involves the transfer of slots.

<sup>93</sup> See recital (4) of the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (COM/2011/827 final of 01 December 2011): "*[T]he allocation and use of slots could be made more effective by introducing market mechanisms, by ensuring that the unused slots are made available to interested operators as soon as possible and in a transparent manner, and by reinforcing the underlying principles of the system with regard to the allocation, management and use of the slots. At the same time, although the historical slots meet the need for stability in schedules for the airlines, during the future assessment of the application of this Regulation, a gradual introduction of other market mechanisms could be envisaged, such as withdrawing and auctioning historical slots.*"

<sup>94</sup> easyJet's reply to Request for information 4, question 3.

<sup>95</sup> Form CO, paragraph 197.

- (152) Taking account of Berlin Tegel and Berlin Schoenefeld airports together,<sup>96</sup> easyJet would have, post-Transaction, respectively [30-40]% and [30-40]% of the total seat capacity at Berlin airports in Winter IATA Season and Summer IATA Season and, respectively, [30-40]% and [40-50]% of the total number of passengers at Berlin airports in Winter IATA Season and Summer IATA Season.<sup>97</sup>
- (153) In addition, the Commission notes that it has not found material evidence during its market investigation that easyJet has previously engaged in any foreclosure strategy or that the reinforcement of easyJet's position at Berlin airports had, as an objective or consequence, to prevent the entry or expansion of competitors through exclusionary practices such as slot hoarding or slot shuffling.
- (154) In view of the above, the Commission considers that, even taking into account the high importance of slots as an input in the passenger air transport markets, on balance, easyJet is unlikely to have the incentive to foreclose access to the markets for the provision of passenger air transport services to or from any relevant airport.

#### **5.4. Overall effect on competition for passenger air transport**

##### *5.4.1. Conditions for anticompetitive effects of easyJet's hypothetical foreclosure strategy*

- (155) First, significant harm to effective competition normally requires that the foreclosed air carriers play a sufficiently importance role in the competitive process on the passenger air transport markets. The higher the proportion of carriers which would be foreclosed on these markets, the more likely the merger can be expected to result in a significant price increase in the passenger air transport markets and, therefore, to significantly impede effective competition therein.<sup>98</sup>
- (156) Second, effective competition may be significantly impeded by raising barriers to entry to potential competitors.
- (157) On that basis, the Commission will assess whether the entry of easyJet at Berlin Tegel airport and the reinforcement of its position at Berlin airports may lead to disadvantage for its rivals, to deter their entry or expansion and consequently to result in less effective competition for passenger air transport from or to the Berlin airports.

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<sup>96</sup> At Berlin Schoenefeld airport, which is not impacted by the Transaction, easyJet's seat capacity of [number of seats] is currently comparable to that of Ryanair (number 2) (Form CO, paragraph 148 and easyJet's reply to Request for information 4, question 3).

<sup>97</sup> easyJet's reply to Request for information 4, question 3.

<sup>98</sup> Non-Horizontal Merger Guidelines, paragraph 48.

#### 5.4.2. Assessment for the Berlin airports

- (158) easyJet submits that slot restrictions at Berlin airports do not represent a barrier to entering Berlin routes, expanding on Berlin routes or shifting capacity between routes.<sup>99</sup>
- (159) The results of the market investigation do not fully support easyJet's claim. Indeed, a number of competitors underline that the Transaction will worsen the slot situation at Berlin Tegel airport and make entry or expansion more difficult.<sup>100</sup> Some competitors also indicate that the Transaction may hamper their plans to enter or expand Berlin routes in Summer 2018 IATA Season<sup>101</sup> or have a negative impact on their access to Berlin Tegel airport infrastructure, on their network from the airport or on their expansion plans at the airport.<sup>102</sup>
- (160) In addition, a number of competitors indicate that the Transaction would prevent them from benefitting from the advantages of holding a large portfolio of slots. Such advantages include operational flexibility and efficiency through swapping slots within their own operations, as well as bargaining power and volume discounts on the services provided by airport managers and ground handling companies.<sup>103</sup> As a consequence, those respondents claim that the Transaction would have a detrimental effect on the efficient operations of easyJet's competitors.
- (161) The Commission notes that, when slot holding at a given airport is very fragmented and slots are allocated to a very large number of small air carriers, the latter are unable to translate these slots into a viable alternative to dominant air carriers.<sup>104</sup>
- (162) However, post-Transaction, easyJet will continue to face the strong competition of the Lufthansa Group at Berlin Tegel airport and of Ryanair at Berlin Schoenefeld airport. Considering the shares of flights touching Berlin operated by the Lufthansa Group and Ryanair pre-Transaction (respectively 20% and 12% in Summer 2017 IATA Season),<sup>105</sup> the latter would have a sufficiently large slot portfolio to enable them to react to any anti-competitive behaviour by easyJet. It is therefore unlikely that the Transaction will result in a lessening of the competition by those air carriers.

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<sup>99</sup> Form CO, paragraph 181.

<sup>100</sup> Replies to Q1 – Questionnaire to Competitors, questions 16 and 16.1.

<sup>101</sup> Replies to Q1 – Questionnaire to Competitors, questions 14.2 and 14.2.1. For example: *"Without the transaction, former AB slots would have been available to all competitors applying after the cessation of AB operations. [The competitor] applied early enough and would have had good opportunities without the transaction. If easyJet takes over the AB operation as planned, it will be unlikely to obtain the slots."*

<sup>102</sup> Replies to Q1 – Questionnaire to Competitors, question 17.

<sup>103</sup> See replies to Q1 – Questionnaire to Competitors, questions 18.1, 18.2 and 18.3.

<sup>104</sup> See paragraph 27 of the Explanatory Memorandum to the Commission Proposal for a Regulation of the European Parliament and of the Council on common rules for the allocation of slots at European Union airports (COM/2011/827 final of 01 December 2011).

<sup>105</sup> Form CO, paragraph 200.

## **5.5. Conclusion**

- (163) In light of the above, in particular easyJet's lack of ability to foreclose access of its competitors to the market for the provision of passenger air transport services at any relevant airports and the strong position of Lufthansa and Ryanair at the Berlin airports, which is not affected by the Transaction, the Commission concludes that the Transaction does not raise serious doubts as concerns the markets for passenger air transport from or to any airport, under any plausible market definition.

## **6. CONCLUSION**

- (164) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This Decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission*

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