EUROPEAN COMMISSION

Hearing Officer

Final Report of the Hearing Officer[1]

Olympic / Aegean Airlines

(COMP/M. 5830)

INTRODUCTION

The three Greek groups of companies, Vassilakis, Marfin Investment and Laskaridis (collectively "the Notifying Parties") notified the Commission on 24 June 2010 of their acquisition of joint control by way of purchase of shares over a newly merged company including the businesses of Aegean Airlines S.A. and Olympic Air S.A.

Upon examination of the notification, the Commission concluded that the operation falls within the scope of the Merger Regulation[2] and that the operation raised serious doubts as to its compatibility with the internal market and the Agreement on the European Economic Area. Accordingly, on 30 July 2010, the Commission initiated proceedings and opened a Phase II investigation pursuant to Article 6(1)(c) of the Merger Regulation.

THE PROCEDURE IN PHASE II

A Statement of Objections was sent to the Notifying Parties on 20 October 2010 (the "SO"), in which the Commission set out its preliminary conclusion that the concentration would significantly impede effective competition on the markets for scheduled air transport for passengers on 11 Greek domestic routes and two international routes due to the elimination of actual competition, as well as on five Greek domestic routes due to the elimination of potential competition; furthermore on the market for the attribution of Public Service Obligation ("PSO") routes in Greece and on the market for the provision of ground handling services at Greek airports. The Notifying Parties submitted written comments on the SO within the set time limit on 5 November 2010.

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

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1. 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 report.

Access to the file

After having been given access to the file, the Notifying Parties submitted a request to me on 3 November 2010 for further access to some information found in the file which had been redacted for confidentiality reasons by the information provider (the "requested information"). The Notifying Parties claimed that the requested information might contain information on the entry in the relevant markets of a potential competitor, which would have an impact on the competitive analysis. Upon an assessment of the confidentiality claims made by the information provider, full access was given to the Notifying Parties to some of the requested information. For other parts of the requested information, the information provider agreed to a limited disclosure to the external legal counsel representing the Notifying Parties under a non-disclosure agreement restricting the use of the information so accessible. The Commission in its access to file exercise had already provided the Notifying Parties with access to other information in the file under a similar non-disclosure agreement procedure. Furthermore, regarding the remaining part of the requested information, I found that this constituted business secrets and its disclosure was not necessary to safeguard the Notifying Parties' rights of defence. The decision, based on Article 8 of the Mandate, was communicated to the Notifying Parties on 10 November 2010. The Notifying Parties did not make any further comments on this issue.

Admission of third parties

Requests for admission to the proceedings were received from the following seven third parties: Athens Airways S.A., EKPIZO – the Greek consumers' association, Goldair Handling S.A., Swissport Hellas SUD S.A., Swissport International Ltd, Swissport Hellas S.A., Sky Express S.A. and the Hellenic Airline Pilots Association ("HALPA"). I have admitted all parties except for Swissport International Ltd, Swissport Hellas S.A. and Sky Express S.A. which did not reply to requests for clarifications and additional information.

Pursuant to Article 16 of the Implementing Regulation,[3] the admitted third parties were provided with information on the nature and subject-matter of the proceedings and were invited by the Commission to make observations. The Commission continued to provide them with further information throughout the proceedings.

The Notifying Parties requested that the status of interested third party granted to Athens Airways be withdrawn. They argued that Athens Airways could no longer demonstrate a sufficient interest in the proceedings given that it no longer operated in the Greek domestic market for the air transport of passengers since September 2010. It was responded to the Notifying Parties that the change in Athens Airways' operations did not mean that it no longer had sufficient interest. The Notifying Parties reiterated their request, which was ultimately rejected on the basis that Athens Airways showed sufficient interest in the proceedings, because, at that time, it *prima facie* appeared to be a potential competitor and had actively participated in the proceedings.

Upon examination of their written requests to attend the Oral Hearing, I admitted Athens Airways, EKPIZO, and Swissport Hellas SUD. Goldair Handling did not request attending the Oral Hearing. HALPA did not attend the Oral Hearing because its request to

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[3] Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.04.2004, p. 1-39. This Regulation was amended by Commission Regulation (EC) No 1033/2008, OJ L 279, 22.10.2008, p. 3-12.

be admitted as interested third party was only submitted, and accepted, after the Hearing had already taken place.

The Oral Hearing

In their reply to the SO, the Notifying Parties exercised their right to be heard in an Oral Hearing, which took place on 11 November 2010.

On the side of the Notifying Parties, the Hearing was attended by representatives of Marfin Investment Group and Vassilakis, assisted by their external legal counsel and economic experts. For the Commission, the Oral Hearing was attended by some members of the Cabinet of Vice-President Commissioner Almunia and of the senior management of the Directorate General for Competition, the case team, the Chief Economist Team as well as by representatives from the Legal Service, the Directorate General for Enterprise and Industry and the Directorate General for Mobility and Transport.

Upon request of the Notifying Parties, the Hearing was partly held as an *in camera* session.

The post Oral Hearing phase

Following the Hearing, the Notifying Parties' submitted a first set of commitments on 12 November 2010 which were replaced by a substantially revised package after a State-of-Play meeting with DG Competition. The commitments related to the market for air transport of passengers on four Greek domestic routes where Olympic Air and Aegean Airlines are actual competitors and to the market for attribution of PSO routes in Greece. They consisted of the release of slots and other ancillary measures such as the possibility for new entrant to conclude interlining agreements with the merged entity. The Commission launched a market test in order to gather views on the effectiveness of the submitted commitments and their ability to maintain competition.

On 18 November 2010, the Commission issued a Supplementary Statement of Objections (the "SSO"). In the SSO, the Commission clarified that the transaction would significantly impede effective competition on 10 Greek domestic routes irrespective of the precise market definition and in particular irrespective of whether the market should be further subdivided into time sensitive and non-time sensitive passengers, because the competitive assessment would remain essentially the same even if the market encompassing all passengers were to be considered. It then assessed the competition impact of the notified transaction in essentially the same manner as before in the SO. The Notifying Parties responded on 23 November 2010 without asking for an oral hearing. Instead, the Notifying Parties requested, and were granted, the possibility to make known their views orally in a meeting with DG Competition.

On 6 December 2010, the Commission sent a Letter of Facts ("LoF") to the Notifying Parties. The LoF exclusively deals with the effects of ferry competition on the relevant markets and adds economic analysis in support of the Commission's conclusions set out in the SO and SSO. It concludes that ferry services are only a distant substitute to air travel services.

The Notifying Parties argued that the LoF raised several procedural issues. First, they considered that they did not have sufficient access to the underlying data to meaningfully comment on the economic analysis contained in the LoF. In response, the Commission

organised a data room, with the agreement of the information providers, to grant access to the underlying data to the Notifying Parties' economic advisers under conditions of confidentiality. As I received no further comments in this regard, I consider that this issue was resolved.

Second, the Notifying Parties considered that the LoF contained new material and analysis, so that the Commission should have addressed them in an SSO instead. They also requested to be heard on the LoF at an oral hearing. By letter of 15 December 2010, I rejected the Notifying Parties' request for such hearing. I considered that the LoF contained no new or modified objections, but referred to evidence collected by the Commission before the adoption of the SO which was partially presented in the SO and merely supported the objections already set out in the SO and the SSO. The Notifying Parties could, therefore not rely on any right to an oral hearing on the LoF. Furthermore, while the Commission has a discretion under Article 14(1) of the Implementing Regulation to organise another oral hearing, I came to the conclusion that in this case, this was not justified because the issues covered in the LoF were of a limited scope and the Notifying Parties could fully exercise their right to be heard by submitting written comments on the LoF. The Commission however agreed to a meeting, held on 17 December 2010, with the Notifying Parties to discuss the issues raised in the LoF.

Finally, in their reply to the LoF, the Notifying Parties objected to the issuance of the LoF on day 70 of the Phase II procedure because it infringed their rights of defence and breached their right to due process under Article 6 of the European Convention on Human Rights. They claimed that it is contrary to due process for them to have submitted commitment proposals while the LoF showed that certain competition issues still remained open for the Commission. Furthermore, they argued that the timing of the LoF meant that the Commission could not take into account their reply to the LoF before starting to assess the responses to the market inquiry concerning their latest commitment proposal. However, no specific request was submitted to me in relation to the above objection. I considered, nonetheless, that the objection was not founded and decided that no action was necessary. It has already been pointed out that the LoF did not change any of the existing objections. It could therefore not negatively affect the Notifying Parties' ability to propose commitments to the Commission. Moreover, there was no reason to assume that the Commission would not be able to take into account the Notifying Parties' reply to the LoF and its putative consequences for the latest commitment proposal. Indeed, pursuant to Article 18(1) of the Merger Regulation, it is until the consultation of the Advisory Committee that the parties have a right to make known their views on the objections of the Commission, and the latter is obliged to take into account any comment submitted to it until then. Finally, when assessing alleged infringements of the right of defence and due process, it is necessary to take into account the necessity for speed, which characterises the general scheme of the Merger Regulation.[4] It is therefore often unavoidable that the necessary procedural steps overlap and cannot be rigidly kept separate.

Further commitments and market testing

Following the preliminary results of the first market test, the Notifying Parties presented the Commission a new set of commitments on 29 November 2010 which were subsequently modified on 6 December 2010. These commitments further extended the

4 See Case T-210/01, *General Electric v Commission* [2005] ECR II-5575, paragraph 702.

scope of the commitments to cover all 9 domestic routes for which actual competition concerns were maintained and also included non-discriminatory access to ground handling and maintenance, repair and overhaul services at Athens Airport or at any destination airport for the relevant identified city pairs. The Commission launched a second market test on 6 December 2010 and afterwards informed the Notifying Parties of the outcome in a State-of-Play meeting.

I was not asked to examine the objectivity of the two market inquiries conducted by the Commission to assess the competition impact of the commitment packages proposed by the Notifying Parties.[5] No such issue therefore seems to have arisen in this respect.

THE DRAFT DECISION

The draft final decision prohibiting the proposed concentration does not maintain all the objections which were set out in the SO. Some objections have been dropped, in particular those relating to air passenger transport on the two international routes and on several domestic routes.[6] The competition concerns included in the SO relating to the Greek markets for the attribution of PSO routes and the provision of ground-handling services were also dropped.

As regards the Athens-Alexandroupolis route, the SO had reached the preliminary conclusion that the proposed concentration would lead to an impediment of *actual* competition between Aegean Airlines and Olympic Air. However, information available at a late stage of proceedings revealed that Olympic Air would not operate this route in the summer season 2011. Notably on this basis, the Commission concluded that no impediment of *actual* competition would arise out of the proposed concentration on this route. The draft decision submitted to the Advisory Committee however concluded that the proposed concentration would lead to an impediment of *potential* competition between Aegean Airlines and Olympic Air. This, I considered would breach the Notifying Parties' right to be heard, since they had not been afforded the opportunity to make known their views on this modified objection. I informed Vice-President Commissioner Almunia, the Advisory Committee and relevant Commission services accordingly. Subsequently, the Commission decided not to uphold this modified objection in the final draft decision.

The draft final decision thus only maintains the objections concerning the impediment of effective *actual* competition on the markets for air passenger transport on nine domestic routes[7] as well as the impediment of *potential* competition on one domestic route.[8] On these objections, the Commission has fully afforded the Notifying Parties the right to be heard.

CONCLUSION

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5 Article 14 of the Mandate.

6 Athens-Mykonos and Athens-Alexandroupolis as regards the impediment of *actual* competition alleged in the SO, and Athens-Limnos, Athens-Kavala, Athens-Kefallonia, and Athens-Ioannina as regards the impediment of *potential* competition alleged in the SO.

7 The routes are: Athens-Thessaloniki, Athens-Herakleion, Athens-Chania, Athens-Rhodes, Athens-Santorini, Athens-Mytilini, Athens-Chios, Athens-Kos and Athens-Samos.

8 The concerned route is Athens-Corfou.

I consider, therefore, that the right to be heard of all participants has been fully respected in this case.

Brussels, 19 January 2011

(signed)

Michael ALBERS