



EUROPEAN COMMISSION
DG Competition

***Case M.9546 - GATEGROUP /
LSG EUROPEAN***

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Waiver of the Commitments

Date: 31/1/2022



EUROPEAN COMMISSION

Brussels, 31.1.2022
C(2022) 463 final

PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

gategroup Holding AG
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Dear Sir/Madam,

**Subject: Case M.9546 – GATEGROUP / LSG EUROPEAN BUSINESS
Commission decision on Gategroup’s request of a waiver under clause 47 of
the Commitments annexed to the Commission decision of 3 April 2020 for a
waiver of the Commitments¹**

- (1) On 26 October 2021, Gategroup Holding AG (“Gategroup”) requested a waiver of the Commitments in relation to the FCO Divestment Businesses.² This Decision presents the Commission's assessment of Gategroup’s request.

1. BACKGROUND

- (2) By decision of 3 April 2020 (“the Clearance Decision”) based on Article 6(1)(b) in connection with Article 6(2) of the Merger Regulation,³ the Commission declared the operation by which Gategroup intended to acquire within the meaning of Article 3(1)(b) of the Merger Regulation sole control over parts of the European business of LSG Lufthansa Services Holding AG (“LSG”) by way of a purchase of shares and selected assets (the “Transaction”) compatible with the internal market and with the

¹ All abbreviations and capitalised terms used in this decision have the meaning as set out in the Commission's decision of 3 April 2020 in Case M.9546 – GATEGROUP / LSG EUROPEAN BUSINESS and the Commitments attached thereto, unless indicated otherwise.

² Gategroup complemented its request by letter of 6 December 2021.

³ OJ L 24, 29.1.2004, p. 1 (the “Merger Regulation”).

EEA Agreement, subject to full compliance with the commitments submitted by the notifying party annexed to the clearance Decision (the “Commitments”).

- (3) The Commitments aimed at eliminating the horizontal effects due to the creation or strengthening of a dominant position in the markets for in-flight catering services at Frankfurt, Munich, Cologne/Bonn, Dusseldorf, Hamburg, Hannover, Berlin Tegel, Brussels, Paris Charles de Gaulle and Rome Fiumicino airports and in the broader geographic areas encompassing (i) Frankfurt, Dusseldorf and Cologne-Bonn airports, (ii) Hamburg and Hannover airports, and (iii) Berlin Tegel, Berlin Schönefeld and Leipzig airports.
- (4) In order to address the competition concerns identified by the Commission, Gategroup committed to divest: (a) Gategroup’s in-flight catering network operations in Germany, including certain customer contracts with low-cost and charter airlines for the provision of services at relevant airports, as well as certain related assets and employees (the “German LCC Network Divestment Business”); (b) Gategroup’s customer contracts at Frankfurt International Airport (“FRA”) and Munich International Airport (“MUC”), including, where applicable and at the option of the Purchaser, certain related assets (that, by way of example, could also include the necessary infrastructure for the operation of the divested business) and employees (the “FRA/MUC Divestment Business”) (the German LCC Network Divestment Business and the FRA/MUC Divestment Business, together “the German Divestment Businesses”); (c) Gategroup’s [...] % shareholding in Newrest Servair Belgium SPRL operating an in-flight catering business in Belgium (the “Belgian Divestment Business”); (d) certain of LSG EU’s customer contracts at Rome Fiumicino Airport (“FCO”) which had a projected revenue of EUR [...] in 2020, including, where applicable and at the option of the Purchaser, certain related assets and employees (the “FCO Divestment Business”); (e) LSG EU’s in-flight catering customer account at Paris Charles de Gaulle (“CDG”) (the “CDG Divestment Business”).
- (5) On 15 June 2020, RSM Corporate Finance LLP was appointed as the Monitoring Trustee.
- (6) On 30 July 2020, the Commission approved Newrest as the purchaser of the Belgian Divestment Business and the CDG Divestment Business. On 15 October 2020, the Commission approved Horizon Star Catering GmbH (now ‘FDAC’⁴) as the purchaser of the German Divestment Businesses. On 26 November 2020, the Commission approved dnata s.r.l. as the purchaser of the FCO Divestment Business. The main transaction closed on 2 December 2020.
- (7) On 23 September 2020 and 23 October 2020, the Commission issued two subsequent decisions pursuant to clause 46 of the Commitments, extending the First Divestiture Period for a total period of two months. Accordingly, the First Divestiture Period expired on 3 December 2020.
- (8) On 26 February 2021, 30 March 2021, 31 May 2021, 30 June 2021 and 29 October 2021, the Commission issued five subsequent decisions pursuant to clause 46 of the

⁴ As of 8 October 2021, Newrest Group Services SAS (“Newrest”), an established in-flight catering provider, holds 60% in and has sole control over FDAC. [Shareholder] and [Shareholder] remain shareholders with [...] % each, via [Details on structure], respectively, in FDAC.

Commitments, extending the Closing Period in respect of the FCO Divestment Business. The last of these decisions granted an extension until 31 January 2021.

- (9) On 15 January 2021, 30 March 2021, 31 May 2021 and 30 June 2021, the Commission issued four subsequent decisions extending the Closing Period in respect of the German Divestment Businesses. The last of these decisions granted an extension until 31 October 2021.
- (10) On 29 October 2021, the Commission issued a decision to modify and partially waive the Commitments in relation to the German Divestment Businesses.
- (11) According to the Commitments, as part of the FCO Divestment Business, Gategroup was required to divest certain customer contracts, which pre-Covid had a projected revenue of EUR [...] in 2020. Due [Details on commercial arrangements with customers], at the time of the Commission's Purchaser Approval of dnata the Commission accepted the replacement of these contracts with the Gategroup customer contracts for [Customer]and [Customer] , which were of similar value. The remaining contracts to be divested as part of the FCO Divestment Business are Gategroup's customer contracts with [List of customers].
- (12) On 27 September 2021, the [Customer arrangements] were transferred to dnata. In addition, the agreement with [Customer] was transferred to dnata on 31 October 2021. [Customer] [Details on customer arrangement] and has issued a new tender for its in-flight catering contract at Rome FCO. [Customer] is [Details on customer] and has not replied to requests by Gategroup to agree to a transfer of its contract to dnata. As [Details on customer], none of the divested contracts has generated any revenue so far.

2. GATEGROUP'S REQUEST FOR A MODIFICATION AND A PARTIAL WAIVER OF THE COMMITMENTS

- (13) On 9 June 2021, Gategroup first requested, pursuant to clause 47 of the Commitments, to waive the Commitments relating to the FCO Divestment Businesses. Subsequently, Gategroup provided several supplemental submissions to the initial waiver request, on 16 June, 16 September and 30 September 2021. On 26 October 2021, Gategroup re-submitted an updated waiver request, based on the claim that the Commitments given to address the Commission's concerns at Rome FCO airport have become obsolete due to a combination of unforeseen events, which took place after the clearance decision on 3 April 2020. On 6 December 2021, Gategroup provided a supplemental submission to this waiver request. In summary, Gategroup argues that the Commitments have become obsolete for two reasons: (i) the loss of Gategroup's market position at FCO due to [Details on customer contracts] and (ii) the severe deterioration of the market situation at FCO leading to a massive and long-term overcapacity, intensifying the competitive situation between the two remaining in-flight catering suppliers.
- (14) Concretely, Gategroup requests a full waiver of the FCO Divestment Business. Alternatively, Gategroup requests a partial waiver and/or modification of the FCO Divestment Business, so that the Commitments would be fulfilled by the effected transfer of [Customer arrangements], as well as the issuance of the [Customer] tender.

3. POSITION OF THE REMEDY TAKER DNATA ON THE COMMITMENTS

- (15) The Commission contacted the purchaser of the FCO Divestment Business, dnata, on 26 November 2021.⁵ Dnata expressed regret that the [Customers] contracts will not be transferred as initially foreseen. Dnata gave reasons why [details of commercial discussions]. On the other hand, dnata welcomed the fact that [Customer] has instead agreed to re-tender its in-flight catering contract at Rome FCO ahead of time. Dnata [...].

4. OPINION OF THE MONITORING TRUSTEE

- (16) On 20 December 2021, RSM Corporate Finance LLP (“the Monitoring Trustee”) submitted its opinion on Gategroup’s request. In the opinion, the Monitoring Trustee stated that the events brought forward by Gategroup (as outlined in Section 2) would justify its request for a waiver of the FCO Divestment Business, as they are outside of Gategroup’s control and constitute unforeseeable and “exceptional” circumstances, therefore justifying the granting of a waiver.

5. ASSESSMENT OF THE REQUEST FOR A MODIFICATION AND PARTIAL WAIVERS OF THE COMMITMENTS

- (17) For the reasons explained below, the Commission considers that the arguments and evidence provided by Gategroup in its request for a waiver of the Commitments meet the conditions set out in clause 47 of the Commitments. While the Commission does not consider that these conditions justify granting the requested full waiver of the Commitments, the Commission is of the view that they justify the granting of the requested partial waiver of the Commitments.

5.1. Legal Test

- (18) Under clause 47 of the Commitments (the "review clause"), the Commission may, *“in response to a reasoned request from the Notifying Parties showing good cause waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in [the] Commitments”*.
- (19) Unlike extensions of divestment periods, which, pursuant to clause 46 of the Commitments, can be granted on the basis of the mere "good cause" shown by Gategroup, a waiver of Commitments under the review clause can only be granted in cases where there are also "exceptional circumstances".
- (20) In this respect, paragraph 73 of the Remedies Notice⁶ states the following specifically as regards divestiture commitments: *“[t]he Commission may grant waivers or accept modifications or substitutions of the commitments only in exceptional circumstances. This will very rarely be relevant for divestiture commitments. As divestiture commitments have to be implemented within a short time-frame after the decision, it is very unlikely that changes of market*

⁵ Minutes of a Commission call with dnata on 26.11.2021.

⁶ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1-27 ('Remedies Notice').

circumstances will have occurred in such a short time-frame and the Commission will normally not accept any modifications under the general review clause."

- (21) Paragraph 74 of the Remedies Notice states that “[a] waiver, modification or substitution of commitments may be more relevant for non-divestiture commitments, such as access commitments, which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption of the Commission decision. Exceptional circumstances justifying a waiver, modification or substitution may, first, be accepted for such commitments if parties show that market circumstances have changed significantly and on a permanent basis. For showing this, a sufficient long time-span, normally at least several years, between the Commission decision and a request by the parties is required.”
- (22) Paragraph 74 of the Remedies Notice also stipulates that “[f]or any waiver, modification or substitution of commitments, the Commission will also take into account the view of third parties and the impact a modification may have on the position of third parties and thereby on the overall effectiveness of the remedy. In this regard, the Commission will also consider whether modifications affect the right already acquired by third parties after implementation of the remedy.”
- (23) Within this framework, a waiver or modification of commitments can be justified when the requesting party demonstrates that the changes in the market (i) are significant, permanent and unforeseeable, and (ii) ensure that the competition concerns laid out in the clearance decision no longer arise and are not likely to arise again.⁷

5.2. Application to the present case

- (24) In the following paragraphs the Commission assesses Gategroup’s waiver request against the above criteria in order to determine whether exceptional circumstances exist, that is to say, it assesses (i) whether the circumstances put forward by Gategroup constitute a significant, permanent and unforeseeable change in market circumstances, (ii) whether those changed circumstances mean that the competition concerns laid out in the Clearance Decision no longer arise and are not likely to arise again even without the waived Commitments, and (iii) the impact of the waiver on third parties.

5.2.1. Significant, permanent and unforeseeable change in the market

- (25) The Commission considers that the circumstances put forward by Gategroup in the present case qualify as a significant, permanent and unforeseeable change in market circumstances leading to the loss of cause to continue procuring some of the Commitments.

5.2.1.1. Significant change in market circumstances

- (26) The Commission notes Gategroup’s submission that the overall aviation and in-flight catering industry has been and continues to be severely affected by the continued COVID-19 pandemic due to travel restrictions and a decrease in the number of

⁷ Commission decision C(2018) 5887 final of 4 September 2018 in case COMP/M.8465 – Vivendi/Telecom Italia, para. 18; Commission decision C(2016) 4964 final of 25 July 2016 in case COMP/M.3770 – Lufthansa/Swiss, para. 20; Commission decision C(2019) 6964 final of 24.09.2019 in Case M.4494 – Evraz/Highveld, para. 23.

passengers. Many airlines have been struggling financially or even declared bankruptcy, with some having ceased operations, while others are flying with significantly reduced schedules. In addition, airlines that are currently flying or planning a ramp-up of their operations have to deal with the regular adjustment of their schedules and uncertainties linked to future travel restrictions that depend on the status of the pandemic and vaccination campaigns as well as measures agreed by and between countries, and this with limited workforce and financial means. Unlike in the passenger air transport industry, where airlines can take up suspended routes with relative ease and within a short timeframe even after a longer suspension, the contracts in the in-flight catering industry normally only last for a limited number of years, normally between one and three years. Therefore, a pandemic such as the COVID-19 crisis may lead to significant changes in market circumstances.

- (27) In addition, one of the most significant changes in market circumstances affecting the in-flight catering market at FCO is largely unrelated to the Covid-19 crisis, namely the cessation of Alitalia's activities and the launch of ITA. Prior to the end of Alitalia's activities, Alitalia constituted by far the largest customer for in-flight catering services at Rome FCO ([Details on Gategroup's business]). ITA, on the other hand, will have a significantly reduced perimeter of activities with respect to aviation, as it was only able to take over less than half of Alitalia's fleet and intends to focus on the most profitable routes only. While the exact scope of ITA's in-flight catering demand is still unclear, this demand will be considerably smaller than the needs of Alitalia.
- (28) The gap left by Alitalia appears to have been filled mainly by low cost carriers (LCCs) such as Ryanair, which was able to increase its share in the Italian market substantially, a trend which can be expected to continue.⁸ This trend in favour of LCCs has also had a profound effect on the in-flight catering market at FCO. As LCCs need substantially less catering services, the result of this development – unforeseeable in March 2020 – led to a stark reduction in volume of the catering market in Italy in general and at Rome FCO, the home base of the now demised Alitalia, in particular.
- (29) These changes in the aviation sector have impacted the in-flight catering market at Rome FCO in several ways.
- (30) According to Gategroup, the market structure at FCO has changed significantly from the situation at the time of the Decision, which has resulted in overcapacities of the remaining in-flight catering providers and a change to a demand-side market.
- (31) Indeed, as reported by the Italian Airport's Association (Assaeroporti), in September 2021, the number of flights from/to FCO was 53,9% lower compared to September 2019, and the number of passengers was even lower: 63,7%.⁹ This reduction is even more so affecting long-haul flights, which make up a relatively larger part of the turnover in the in-flight catering markets.
- (32) The above-mentioned developments in airline travel have had an even more significant consequence for the market size of the in-flight catering market at FCO.

⁸ See: <https://www.flightglobal.com/networks/how-low-cost-carrier-share-is-evolving-in-european-short-haulmarkets/146714.article#:~:text=Ryanair%20has%20cemented%20its%20already,just%20a%2010%25%20seat%20share>

⁹ see: www.assaeroporti.com/statistiche_202109

According to Gategroup's internal estimates, the total size of the market according to 2020 estimates was EUR 81.2 million, whereas the 2021 forecast expected a total market size of EUR 18 million.

- (33) The reduction of the market-size has led to overcapacities for the two remaining in-flight catering suppliers at FCO. For 2021, Gategroup assumed a utilization rate of [...] % for its airside unit, a [...] % utilization rate for its landside unit and only a [...] % utilization rate for the former LSG EU unit, acquired in the Transaction. In addition, according to Gategroup, the only remaining competitor, dnata, is currently also experiencing significant overcapacities, and is considering to move to their second, smaller catering unit, which they had initially foreseen to use for halal-catering only (next to their larger, currently used unit). According to Gategroup estimates, this would mean that even under a best-case recovery scenario, each of dnata and Gategroup (with the former LSG EU facilities) could cover more than the entire in-flight catering demand at FCO over the next 3-4 years.
- (34) Furthermore, Gategroup claims that this structural overcapacity leads to a review and revision of airline's contractual behaviour and relationships with regard to in-flight catering services, where airlines try to leverage the in-flight caterer's overcapacities to use their bargaining power and obtain better pricing and increased flexible conditions for the in-flight catering contracts. This, Gategroup argues, results in additional competitive pressure on the two remaining in-flight caterers at FCO.
- (35) Such a situation (of oversupply and changed customer behaviour) would make it more likely that the remaining two competitors on the market will compete intensely for contracts. In addition, a market situation characterized by oversupply would further ensure that in case a customer would be interested in switching suppliers, there would be an alternative source of supply available. As stated in the Commission's Horizontal Merger Guidelines, such conditions may lead to the existence of countervailing buyer power, which may serve to offset the loss of competitive pressure created by a Transaction.¹⁰ This may even be the case in situations of a highly concentrated market, like the one at hand. As stated in the Horizontal Merger Guidelines, “[e]ven firms with very high market shares may not be in a position, post-merger, to significantly impede effective competition, in particular by acting to an appreciable extent independently of their customers, if the latter possess countervailing buyer power”.
- (36) In addition, several airlines have successfully switched to back-catering for their reduced volumes since the beginning of the Covid-19 pandemic. Not only has this contributed to the shrinking market size at FCO, but it has also further increased the countervailing buyer power of airlines at FCO, thereby further increasing the competitive pressure on the remaining in-flight catering suppliers.
- (37) This, according to Gategroup, has led to a “demand-side market”, which will intensify competition by the remaining suppliers.
- (38) Gategroup has further put forward that given the relatively short duration of in-flight catering contracts, despite the market being a bidding market, these changes may quickly affect market positions of Gategroup and its competitors, given that airlines

¹⁰ Guidelines on the assessment of horizontal mergers under Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004, p.5 (“Horizontal Merger Guidelines”), paragraph 64 & 65.

at FCO will soon (or in the case of [Customers] already are) issue new tenders for their in-flight catering needs.¹¹

- (39) According to the Monitoring Trustee, *“it is the case that the COVID-19 pandemic has materially adversely impacted airlines’ operations and consequently in-flight catering demand at FCO”*¹². At the same time *“if the COVID-19 pandemic is materially contained (albeit the timing of this possibility remains uncertain), it is reasonable to assume that air travel to / from FCO and related in-flight catering demand would recover, albeit to what levels is unknown.”*
- (40) According to the Monitoring Trustee, there remains uncertainty as to the future development of in-flight catering demand at FCO. However, RSM finds that *“i) based on gategroup’s assessment, it is apparent that there may indeed be surplus capacity going forward; and ii) in any event, the customer contracts underpinning the market position of gategroup at FCO has changed since the Clearance Decision, with a number of customer contracts having expired or otherwise no longer being effective, and with further contracts expiring in the near-term”*.
- (41) In conclusion, the Monitoring Trustee states that *“taking into account both the impact of COVID-19 on airlines’ demand for in-flight catering and the status of gategroup’s customer contracts at FCO, it is apparent that the market position at FCO has changed since the Clearance Decision, with further changes likely to occur in the short to medium-term”*.
- (42) In the view of the Commission, the above-mentioned facts demonstrate how significantly market circumstances have changed in the relevant in-flight catering markets at FCO since adoption of the Clearance Decision.

5.2.1.2. Change of market circumstances on a permanent basis

- (43) According to Gategroup, the above-mentioned conditions constitute profound and long-term structural changes to the FCO in-flight catering market, which cause the demand for in-flight catering at FCO to be permanently and significantly reduced, while facilities and suppliers are still available at “historic” volumes.
- (44) Despite the fact that the future-demand and structure of the in-flight catering market at FCO cannot be predicted with certainty, the Commission notes that several of the above-mentioned changes are indeed structural in nature and are likely to persist for the foreseeable future. In particular, the bankruptcy of the largest airline based at Rome FCO, Alitalia, and the apparent concomitant increased business of LCCs are likely to be permanent changes.
- (45) In view of the foregoing, the Commission considers that market circumstances have permanently changed in the relevant in-flight catering markets at FCO since the adoption of the Clearance Decision.

5.2.1.3. Unforeseeability of the change in market circumstances

- (46) For the reasons explained below, the above-mentioned developments were also not foreseeable at the time of the Clearance Decision.

¹¹ Gategroup request for a waiver, submitted on 26 October 2021, p.14.

¹² Report of the Monitoring Trustee, submitted 20 December 2021, p.12.

- (47) With regard to the developments in the aviation sector related to the COVID-19 pandemic, at the time of the Clearance Decision (3 April 2020), while the COVID-19 pandemic had already spread across the world and affected the aviation industry (including in the markets relevant to the FCO Divestment Business), it was nevertheless not apparent that the crisis would continue to affect the aviation industry and as a consequence the in-flight catering market at FCO for the duration and in the magnitude it actually has. The Commission did not have reliable data with regard to the expected recovery of the aviation sector at the time of the Clearance Decision. Moreover, early forecasts may have underestimated the duration of the crisis. For instance, contrary to actual developments, IATA forecasts on the re-opening of air travel markets published on 9 June 2020 assumed that the airline industry would significantly recover by January 2021 (to 64% of Global revenue passenger kilometres), including an assumption that long haul travel would start to resume in the fourth quarter of 2020.¹³ In reality, even in January 2021, industry-wide revenue passenger kilometres were still down by 72%, compared to pre-crisis levels.¹⁴
- (48) The Monitoring Trustee confirms that the continuing impact of the COVID-19 pandemic on airlines' operations and demand for in-flight catering services at FCO constitute an exceptional circumstance that could not have been readily foreseen at the time of the Decision.¹⁵
- (49) In addition, the shift towards a demand-side market at FCO was not foreseeable at the time of the Clearance Decision.
- (50) Furthermore, while Alitalia's financial situation had been in distress for years, it was far from certain whether and if so which solution would be found regarding the then-Italian flag-carrier. The Commission decision finding economic discontinuity between ITA and Alitalia, which cleared the way for Alitalia's cease of operations, was only adopted on 10 September 2021.¹⁶ At the time of the Clearance Decision, it was impossible to foresee any of these developments with a sufficient amount of certainty.
- (51) Lastly, while the trend towards LCCs at Rome FCO did commence before the effects of the COVID-19 pandemic took effect on the aviation sector, the pandemic and the demise of Alitalia, reducing precious long-haul and flag carrier demand for in-flight catering services very significantly, did accelerate the development significantly, which affected the competitive situation at FCO and which was not foreseeable at the time of the Clearance Decision.
- (52) The changes in market circumstances described in section 5.2.1.1. were therefore not foreseeable at the time of the Clearance Decision.

¹³ See: <https://www.iata.org/en/iata-repository/publications/economic-reports/airline-industry-economic-performance-june-2020-presentation/>

¹⁴ See: <https://www.iata.org/en/iata-repository/publications/economic-reports/air-passenger-monthly-analysis---january-2021/>

¹⁵ Report of the Monitoring Trustee, submitted 20 December 2021, p.15.

¹⁶ See: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4665

5.2.1.4. Conclusion

(53) In summary, the changes in market circumstances described in the preceding paragraphs are permanent, significant and were unforeseeable at the time of the Clearance Decision.

5.2.2. *The competition concerns laid out in the Clearance Decision no longer arise and are no longer likely to arise in view of the changed market circumstances even without the waived Commitments, thus supporting the request for a modification and partial waiver of the Commitments.*

(54) The Commission considers that the described changed market circumstances, combined with the Commitments as modified following the request, ensure that the competition concerns laid out in the Clearance Decision (i.e. horizontal effects due to the creation or strengthening of a dominant position in the markets for in-flight catering services at FCO airport) no longer arise and are no longer likely to arise also following a modification of the Commitments.

(55) Firstly, the Commission notes that three out of the five contracts to be divested as part of the FCO Divestment Business have been divested to the remedy-taker.

(56) Secondly, as stated above, the market structure has changed significantly and permanently to a market characterized by oversupply, which could be characterized as a “demand-side”-market. The resulting countervailing buyer power is likely to ensure that the current capacities offered by the remaining players on the market are sufficient to ensure competition in the in-flight catering market at FCO, as both caterers would likely compete for all available contracts.

(57) Thirdly, Gategroup has lost a significant volume of contracts. Its most important customer [Customer] has disappeared and this demand has only partially been substituted with a considerably smaller and likely temporary catering customer, [Customer].

(58) Lastly, Gategroup has taken mitigating measures with regard to its inability to procure the divestment of the [Customer] contract, by [Details on customer arrangement]¹⁷ and thereby giving dnata the chance to win the contract in open competition with Gategroup. In particular, Gategroup convinced [Customer] to re-tender the in-flight catering contract for FCO [Details on customer arrangement], thereby opening up the possibility to bid for this contract to all competitors.

(59) In sum, the Commission therefore concludes that the described changed market circumstances, combined with the Commitments as modified following the request, ensure that the competition concerns laid out in the Clearance Decision no longer arise and are no longer likely to arise.

5.2.3. *The modification and partial waiver of the Commitments would have no significant negative effects on third parties.*

(60) The Commission considers that the partial waiver and modification of the Commitments as requested by Gategroup would have no significant negative effect

¹⁷ Gategroup request for a waiver, submitted on 26 October 2021, p.14.

on third parties, in particular the purchaser of the FCO Divestment Business, for the following reasons.

- (61) With regard to dnata, the [Customer] contract is not likely to generate any turnover for the foreseeable future. A transfer would therefore not provide any benefit to dnata, nor does the fact that it would remain with Gategroup as a consequence of the partial waiver provide any advantage for Gategroup vis-à-vis dnata. In addition, the second contract affected by the partial waiver is the [Customer] contract. While this contract does generate turnover for the holder, it has already been re-tendered by [Customer]. The partial waiver would therefore likely not significantly affect the position of the contract-holder going forward, as the new contract is likely to take effect within the next few months.
- (62) In addition, the waiver does not negatively affect other potential competitors on the FCO in-flight catering market. If anything, the measures taken by Gategroup to mitigate its inability to procure the divestment of the [Customer] contract may in fact benefit potential market-entrants to the in-flight catering market at FCO, as this significant contract likely becomes available to competitors at an earlier stage than it would have been, had the Commitments been fully implemented.

6. CONCLUSION

- (63) In light of the foregoing, the Commission considers that Gategroup has shown that the market conditions since the adoption of the Clearance Decision have significantly and permanently changed, in a way which was not reasonably foreseeable at the time of the adoption of such decision.
- (64) The Commission furthermore considers that, in light of the change in the market circumstances combined with this modification of the Commitments, the competition concerns outlined in the Clearance Decision no longer arise and are no longer likely to arise.
- (65) The Commission concludes that Gategroup's arguments satisfy the requirements of "exceptional circumstances" laid down in clause 47 of the Commitments. While the Commission does not consider that these conditions justify granting the requested full waiver of the Commitments, the Commission is of the view that they justify the granting of the requested partial waiver of the Commitments. The Commission therefore accepts to grant a partial waiver from Gategroup's obligation to comply with the Commitments regarding the divestiture of its contracts with [Customers].

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President