Commission approves acquisition by Lufthansa of Air Berlin subsidiary LGW, subject to conditions

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The European Commission has approved under the EU Merger Regulation Lufthansa’s proposed acquisition of certain Air Berlin assets, through the entity Luftfahrtgesellschaft Walter GmbH (‘LGW’). The decision is conditional on Lufthansa’s compliance with commitments to avoid competition distortions.

The Commission decision only concerns Lufthansa’s proposed acquisition of LGW. This is because Lufthansa decided to drop the rest of the initially proposed transaction, i.e. its acquisition of NIKI Luftfahrt GmbH (‘NIKI’), during the course of the Commission’s merger review process.

Commissioner Margrethe Vestager, in charge of competition policy, said: “Our job is to make sure that mergers do not make European consumers worse off.Lufthansa has put forward improved remedies that make sure the effects of its LGW acquisition on competition are limited. In particular, at Düsseldorf airport, Lufthansa’s slot portfolio would only increase by 1% – half of all the slots would be held by Lufthansa’s competitors. This addresses our competition concerns, so we approved the proposed acquisition today under EU merger rules.”

Following several years of financial difficulties, Air Berlin, Germany’s second largest airline, filed for insolvency in August 2017. Air Berlin’s insolvency administrator then launched a sale of Air Berlin assets through a bidding process, with a deadline to submit binding bids by 15 September 2017.

Air Berlin’s insolvency administrator received a number of bids for various parts of Air Berlin. On 25 September 2017, the insolvency administrator announced their decision to continue negotiations exclusively with Lufthansa, Germany’s largest airline, for most of Air Berlin’s assets, including LGW and NIKI. They thereby rejected the other bids (except for easyJet’s, where negotiations continued separately for Air Berlin’s Berlin Tegel operations).

On 12 October 2017 Air Berlin entered into a sale and purchase agreement with Lufthansa to acquire:

-leisure air carrier NIKI with its aircraft, crew and slots (i.e. the permission to land and take-off at a specific date and time at an airport);

-regional air carrier LGW, which (prior to Air Berlin’s insolvency proceedings) was primarily providing feeder traffic for Air Berlin’s short- and long-haul operations at Berlin and Düsseldorf airports; and

-a collection of additional Air Berlin aircraft, crew and slots at several EU airports, in particular in Austria, Germany and Switzerland. These assets were transferred to LGW.

This sale and purchase agreement also gave Lufthansa the option to drop NIKI from the scope of the acquisition. Lufthansa chose to exercise that option on 13 December 2017, leading to NIKI filing for insolvency on the same day. The insolvency administrator has since launched a sales process for NIKI, which is ongoing.

The Commission’s merger investigation on LGW

The initial transaction was notified to the Commission on 31 October 2017.

Following Lufthansa’s decision to drop NIKI, the Commission limited its investigation to the impact of the remaining part of the transaction (i.e. the acquisition of LGW, including additional Air Berlin aircraft, crew and slots) on competition. In particular, the Commission assessed whether the slot portfolio to be acquired by Lufthansa at different airports would allow it to prevent competitors from entering or expanding their presence in the markets for passenger air travel to and from these airports.

Control over a large portfolio of slots at congested airports can result in higher barriers to entry for airlines that want to operate to and from those airports. This in turn could result in higher fares or less choice for passengers.

The Commission’s investigation found that the increase in Lufthansa’s slot portfolio at Düsseldorf airport, through the acquisition of LGW, was likely to adversely affect passengers in terms of fares and/or choice of services. The Commission therefore concluded that the acquisition of LGW by Lufthansa would raise competition concerns at Düsseldorf airport.

No concerns were identified at the other airports where Lufthansa acquired slots because either these airports were not as highly congested, or the size of Lufthansa’s slot portfolio after the acquisition did not create competition issues, or the increment brought about by the transaction was low.

The remedies to address competition concerns regarding LGW

To address the competition concerns identified by the Commission with regard to the acquisition of LGW, Lufthansa offered a set of commitments. The Commission consulted with market participants on the commitments to allow them to submit their views.

Taking into account these market views, Lufthansa then submitted an improved set of commitments. In this final set of commitments, Lufthansa committed to amend its sale and purchase agreement with Air Berlin to reduce its acquisition of slots at Düsseldorf airport. More precisely, Lufthansa would limit the transfer of slots at Düsseldorf airport for the summer season to the number of slots used by two aircraft.

Thanks to these commitments, Lufthansa’s slot holding at Düsseldorf airport would only increase by 1%, compared to a scenario without the transaction. 50% of slots at Düsseldorf airport will be held by Lufthansa’s competitors. This means that the effects of Lufthansa’s acquisition of LGW would be limited.

The final commitments address the competition concerns identified by the Commission regarding Lufthansa’s acquisition of LGW. The Commission therefore concluded that the proposed transaction, as modified by the final commitments, would no longer raise competition concerns. This decision is conditional upon full compliance with the commitments.

Today’s decision under EU merger rules is without prejudice to the application of the EU Slots Regulation.

Separately, the Commission on 12 December approved the proposed acquisition of parts of Air Berlin by easyJet. The Commission decision enables easyJet to grow its presence at Berlin airports and start competing on new routes to the benefit of consumers.

Background on the part of the transaction abandoned by Lufthansa

Lufthansa’s planned acquisition of NIKI posed serious risks that European consumers would face reduced choice and higher prices, long-term. The Commission informedthe insolvency administrator of likely competition concerns already during the sales process.

The activities of Lufthansa and NIKI overlapped on around 130 routes. As a result of the takeover, competition would have been very limited on around 70 of these 130 routes, and on around 50 of those routes Lufthansa would have had a quasi-monopoly for the supply of seats to tour operators and passengers.

The Commission assesses transactions as they are notified. In merger cases, if there are competition concerns, it is the responsibility of the parties to propose remedies that address these concerns in full. If adequate remedies are put on the table, the Commission allows the transaction to go forward.

Lufthansa only submitted limited remedies to address the competition concerns raised by its proposed acquisition of NIKI. These were not sufficient to avoid harm to consumers and competition. This was also the feedback when the Commission asked market participants about the proposed remedies.

Instead of submitting adequate remedies to address the Commission’s concerns, Lufthansa decided to exercise its pre-negotiated right to drop NIKI from the scope of the transaction.

On the same day, NIKI filed a petition for the opening of insolvency proceedings with the court of Berlin-Charlottenburg in Germany. The insolvency administrator has since launched a sales process for NIKI, which is ongoing.

The Commission’s derogation decision of 27 October 2017

Under the EU Merger Regulation, companies have the obligation not to implement a notifiable transaction before it has been declared compatible with the common market (Article 7(1) of the EU Merger Regulation). This serves to avoid that competition could be harmed beyond repair before the Commission has taken its decision. At the same time, EU merger rules enable the Commission to give a temporary approval for certain parts of a transaction (on the basis of Article 7(3) of the Merger Regulation) in a way that does not harm effective competition, and in order to avoid negative effects for consumers.

On 27 October 2017, upon Lufthansa’s request, the Commission took such a derogation decision. As a result, 49 out of the 57 planes within the scope of the original transaction could be operated whilst the merger review was ongoing (separately, Lufthansa also sought to acquire a number of additional planes outside the scope of the notified transaction).

Thus, the derogation decision helped prevent additional flight cancellations to the detriment of consumers and helped avoid more staff layoffs, whilst the merger review was ongoing. It also helped prevent that third parties would repossess the planes leased to Air Berlin, including those operated by NIKI.

The derogation decision set clear conditions to avoid any adverse effect on Air Berlin's assets, if Lufthansa abandoned its acquisition project, or if NIKI and LGW entered into insolvency proceedings. The decision notably contains clear conditions that make sure the assets can still be acquired in part or in full by a purchaser other than Lufthansa.

Companies and products

Lufthansa is the holding company of Lufthansa Group which is headquartered in Cologne, Germany. Lufthansa's passenger air transport business includes Lufthansa Passenger Airlines, Swiss International Airlines, Brussels Airlines, Austrian Airlines, Air Dolomiti, Eurowings, Germanwings, Edelweiss Air and SunExpress. It operates hubs in Frankfurt, Munich, Brussels, Zurich and Vienna.

The Air Berlin assets that Lufthansa proposes to acquire consist of aircraft and crew of both LGW and Air Berlin, and slots at several EU airports, notably in Germany, Austria and Switzerland.

Merger control rules and procedures

The Commission has the duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds (see Article 1 of the Merger Regulation) and to prevent concentrations that would significantly impede competition in the European Economic Area or any substantial part of it.

The vast majority of notified mergers do not pose competition problems and are cleared after a routine review. From the moment a transaction is notified, the Commission generally has a total of 25 working days to decide whether to grant approval (Phase I) or to start an in-depth investigation (Phase II). If commitments are proposed in Phase I, the Commission has 10 additional working days, bringing the total duration of a Phase I case to 35 working days.