EU Court annuls the Commission rejection of Lufthansa's request to waive merger commitments

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On 16 May 2018, the General Court annulled the Commission's decision rejecting Lufthansa's request for a waiver of commitments it had given when it acquired Swiss in 2005. The Court faulted the Commission for not carrying out a careful examination of Lufthansa's arguments that significant market changes justified a waiver of the commitments. The Commission must now reassess the request.
The case is significant because:

- it is the first time that a decision of this kind was appealed to the General Court, which has now clarified the standard of review that should apply in these cases;
- it is now clear that the Commission enjoys a margin of appreciation when deciding whether past commitments should be waived, but such decision must be based on a careful review of all relevant facts;
- the judgment provides useful guidance on the allocation of the burden of evidence;
- it is the third annulment of Commission merger decisions on procedural grounds in just over a year (the other two being *UPS/TNT* and *Liberty Global/Ziggo*), which shows that the EU Courts are keeping a close eye on the Commission's respect of due process in merger proceedings.

Background

In July 2005, the Commission cleared Lufthansa's acquisition of Swiss, subject to commitments. One of the important findings of the Commission was that Lufthansa's Star Alliance partners did not provide sufficient competition on the merged entity because of a set of bilateral or multilateral agreements.

To obtain a clearance decision, Lufthansa *inter alia* committed, on two problematic routes (Zurich-Stockholm and Zurich-Warsaw), to apply fare reductions that were to be equivalent to any fare reduction on a comparable reference route, as determined by a monitoring trustee.

The commitments contained a review clause providing that Lufthansa could request a waiver, modification or substitution of the commitments:

- if this was justified by exceptional circumstances or a radical change in market conditions; and
- on the basis of a long-term market evolution, in particular, if the Commission found that the contractual relationships between Lufthansa or Swiss and Lufthansa's Star Alliance partners (including SAS) had changed in such a material respect as to remove the competitive concerns.

In late 2013, Lufthansa submitted a request to the Commission seeking a waiver of the fare commitments on the grounds that its joint venture agreement with SAS had been terminated and that competition between Swiss and SAS/LOT had intensified. Lufthansa also claimed that the Commission changed its policy with respect to treatment of alliance partners and that, had the review of the transaction happened today, it would not have resulted in remedies at all.

During the review process, Lufthansa even offered to terminate its Bilateral Alliance Agreement with SAS to ease the Commission's remaining concerns, but refused to make changes to the codeshare agreements between Swiss and SAS and Swiss and LOT, which were entered into after the Commission cleared the transaction.

In July 2016, the Commission rejected Lufthansa's request for a waiver of the commitments, which Lufthansa appealed to the General Court ("GC"). This was the

first time such a decision was appealed to the GC.

The Commission is required to carefully examine applications for waivers of commitments

Standard of review

In merger proceedings, the Commission is generally considered to enjoy a margin of appreciation as regards complex economic assessments necessary to determine the compatibility of a merger with EU rules, and the need for commitments (*see* ECJ's judgment in *Tetra Laval* of 15 February 2005). Given that a decision to reject a commitment waiver had never been appealed before the GC, there was uncertainty as to whether the same standard applied.

In this regard, the GC held that the Commission "*has a certain discretion in the assessment of a waiver request entailing complex economic assessments*", for example, to ascertain whether the market conditions have significantly changed. But, the GC said it must nevertheless verify that the Commission's evidence:

- is factually accurate, reliable and consistent;
- contains all the necessary information to assess a complex situation; and
- is capable of substantiating the conclusions drawn from it.

This standard of review of commitment waivers is thus consistent with that usually applied by the GC in merger control.

Burden of evidence

The case also provides useful insights on the burden of evidence.

The GC held that there was no obligation on the Commission to regularly review long-term commitments of its own motion. Rather, the parties bound by the commitments should make the request. It is also up to them to adduce sufficient evidence to demonstrate that the conditions for waiving the commitments are fulfilled.

If they do so, it is then for the Commission to request more specific information,

make appropriate enquiries and carry out a careful examination of the request to verify, supplement or refute the adduced evidence.

Ultimately, the Commission should base its conclusions on all the relevant information, and it "*cannot limit itself to demanding compelling evidence*" from the parties.

The GC underscored that the Commission's margin of appreciation makes the observance of the relevant legal safeguards of even more fundamental importance.

The Commission failed to rebut Lufthansa's arguments

The GC held that the Commission failed to sufficiently examine various arguments presented by the parties. Specifically:

- The Commission should have examined the significance of the termination of the JV agreement between Lufthansa and SAS – a key element of the contractual relationship between Swiss and SAS.
- The Commission should have assessed the impact of Lufthansa's proposed undertaking, made only orally during the review procedure, to terminate the Bilateral Alliance Agreement with SAS. The Commission argued that this undertaking was never formalised, but the GC held that the Commission should have asked Lufthansa to give concrete expression to its oral commitment, if it considered that necessary for taking it properly into account.
- The Commission should have taken into account the Monitoring Trustee's opinion stating that there was a substantial market change on one of the routes; while the Commission is not bound by these opinions, it should have properly analysed the assessment contained in them, rather than failing to even mention them.
- Lufthansa also complained that the Commission ignored its own change of policy regarding the treatment of alliance partners, and in particular, its own assessment in *Lufthansa/Brussels Airlines* of the exact same agreements. Lufthansa claimed that, had the Commission reviewed *Lufthansa/Swiss* today, it would not have resulted in remedies at all. While the GC underscored that the Commission is free to assess each case

differently, a "*change of policy*", such as the one at stake, ought to have been given more serious consideration, and the Commission erred by providing no answer to Lufthansa's arguments.

- The Commission relied on the new codeshare agreement between Swiss and SAS, entered into in 2006, to argue that the competition between various airlines was still limited. Contrary to Lufthansa's position, the GC held that developments postdating the clearance decision are relevant to determine whether commitments are still necessary. However, the GC said that the Commission failed to concretely explain why this new agreement restricted competition and justified that the commitments be maintained and, instead, relied on "purely speculative" elements.

Consequently, the GC held that the elements relied on by the Commission were not sufficient to justify the rejection of the requested waiver for one of the two routes (Zurich – Stockholm). As regards the other route, as "regrettable" as the Commission's "*failures*" were, the Court found that they were insufficient to justify an annulment of the contested decision.

It is also worth noting that, as the GC made clear, a company asking for review of commitments cannot indirectly challenge the legality of the clearance decision itself, including the commitments. For example, the GC refused to review Lufthansa's argument that fare commitments were, in general, incompatible with the Commission's remedies policy because of their distortive effect on competition, and that the Commission has in recent years routinely rejected them. It nevertheless held that these arguments "*heighten the need for the Commission to undertake a careful and thorough examination of the waiver request*".

Take-aways

Overall, the case is significant because it clarifies the standard of review and the burden of evidence in proceedings concerning the waiving of long-term commitments.

The practical significance of this case for merger proceedings in general should, however, not be overstated: the Commission seldom clears mergers subject to long-term commitments. Thus, proceedings of this kind (request for waivers) are bound to be rare.

But, companies who have in the past offered long-term commitments, or companies offering behavioural commitments in fast-moving markets, should definitely keep this judgment in mind. Likewise, the Commission will now have to more carefully review requests for waivers of commitments.
