Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

16 May 2018 *

(Competition – Concentrations – Air transport market – Decision declaring a concentration compatible with the internal market subject to certain commitments – Request for a waiver of part of the obligations forming the subject matter of the commitments – Proportionality – Legitimate expectations – Principle of good administration – Misuse of powers)

In Case T-712/16,

Deutsche Lufthansa AG, established in Cologne (Germany), represented by S. Völcker, lawyer,

applicant,

v

European Commission, represented by A. Biolan, H. Leupold and I. Zaloguin, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2016) 4964 final of 25 July 2016 rejecting the applicant's request for a waiver of certain commitments rendered binding by the Commission Decision of 4 July 2005 approving the merger in Case COMP/M.3770 –– Lufthansa/Swiss,

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis, President, S. Papasavvas (Rapporteur) and O. Spineanu-Matei, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 14 September 2017,

gives the following

Judgment

Background to the dispute

1 The applicant, Deutsche Lufthansa AG ('Lufthansa' or 'the applicant'), is the largest German airline. It is a joint founder member of Star Alliance, the largest global airline alliance.

* Language of the case: English.

2 In addition to the Star Alliance Agreement, Lufthansa concluded with Scandinavian Airlines System ('SAS') a bilateral alliance agreement on 11 May 1995 ('the Bilateral Alliance Agreement') and, on 1 July 1995, a codesharing agreement, a marketing and sales agreement and a bilateral joint venture agreement ('the JV Agreement').

3 Similarly, in addition to the Star Alliance agreement, Lufthansa concluded the following agreements with Polskie Linie Lotnicze LOT S.A. ('LOT'): (i) on 1 June 2002, a reciprocal codeshare agreement, (ii) on 25 August 2003, a special prorate agreement; (iii) on 26 September 2003, a strategic cooperation agreement; (iv) on 15 June 2004, an incentive programme framework agreement; and (v) on 1 October 2003, the Miles and More cooperation agreement.

Decision authorising the concentration between Lufthansa and Swiss International Air Lines Ltd

4 By decision of 4 July 2005 (Case COMP/M.3770 — Lufthansa/Swiss; 'the 2005 Decision'), adopted under Article 6(1)(b) and (2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), the Commission of the European Communities declared that the concentration ('the transaction') whereby Lufthansa acquired control of the airline Swiss International Air Lines Ltd ('Swiss') was compatible with the internal market, the Agreement on the European Economic Area (EEA) and the Agreement between the European Community and the Swiss Confederation on Air Transport, subject to certain conditions and obligations.

5 In examining the transaction, the Commission, first, reviewed overlaps between the services operated by the two airlines. Second, it examined the extent to which the acquisition of Swiss by Lufthansa would also eliminate effective competition between Swiss and other airlines which were not part of the Lufthansa Group but were partners of Star Alliance and, moreover, were linked by a set of bilateral or multilateral agreements, namely SAS, LOT, Austrian Airlines, British Midland Limited ('BMI'), United Airlines and Air Canada.

6 In view of the various cooperation agreements mentioned in paragraphs 2 and 3 above, and taking into account the likely future accession of Swiss to Star Alliance, the Commission concluded that SAS and LOT had little incentive to compete with Swiss once the transaction had taken place.

7 Consequently, SAS's and LOT's market shares were added to those of Lufthansa in the Commission's competitive assessment of the transaction, giving rise to two overlaps on the Zurich-Stockholm ('ZRH-STO') and Zurich-Warsaw ('ZRH-WAW') routes. Since only Swiss and the Star Alliance partners — SAS on the ZRH-STO route and LOT on the ZRH-WAW route — were operating on those routes and the airports of Zurich (Switzerland) and Stockholm (Sweden) were congested, the Commission concluded that there were serious doubts as to the compatibility of the transaction with the internal market for both those routes.

8 In order to dispel those serious doubts, Lufthansa and Swiss (together 'the parties') put forward, on 13 June 2005, a proposal containing commitments concerning slots, in particular for the ZRH-STO and ZRH-WAW routes.

9 Following the observations of interested third parties, the parties, on 27 June 2005, supplemented the commitments concerning slots with commitments relating to fares ('the fare commitments'), set out in Clause 11.1 of the commitments submitted by the parties, which provide that the merged entity will apply, each time it reduces a published fare on a comparable reference route, an equivalent reduction (in percentage) to the corresponding fares on the ZRH-STO and ZRH-WAW routes. The clause stipulates that that obligation will cease once a new air service provider has begun operations on those routes.

10 The commitments submitted by the parties ('the commitments') provide for the appointment of a trustee responsible for monitoring compliance with the commitments by the parties, with supervision by the Commission ('the Trustee').

11 The commitments also contain review clauses 15.1 and 15.2, ('review clause 15.1' and 'review clause 15.2' respectively), which are worded as follows:

> '15.1 The Commission may, in response to a request from the Merged Entity justified by exceptional circumstances or a radical change in market conditions, such as the operation of a Competitive Air Service on a particular Identified European or Long-Haul City Pair, waive, modify, or substitute any one or more of the undertakings in these Commitments.
>
> 15.2 At the request of the Merged Entity, all the Commitments submitted herein may be reviewed, waived or modified by the Commission based on long-term market evolution. In particular, the Commission shall waive the obligation to make slots available to the extent that it finds that the contractual relationships underlying the Commission's finding of reduced incentives for competition between the merged entity in the [2005] Decision and the respective Lufthansa alliance carriers have changed in such a material respect as to remove the concerns identified by the Commission.'

Contested decision

12 On 4 November 2013, the parties submitted a request to the Commission seeking a waiver of the fare commitments and, if possible, also a waiver of the slot commitments and other ancillary access remedies applicable to the ZRH-STO and ZRH-WAW routes. The present action concerns solely the request for a waiver of the fare commitments applicable to the ZRH-STO and ZRH-WAW routes ('the waiver request').

13 The waiver request was based on three grounds, namely (i) the termination of the JV Agreement, (ii) the Commission's change of policy with respect to the treatment of alliance partners in the context of merger review and the Commission's assessment in this regard in Decision C(2009) 4608 final of 22 June 2009 declaring a concentration to be compatible with the common market and the EEA Agreement (Case COMP/M.5335, Lufthansa/SN Airholding) ('the Lufthansa/Brussels Airlines Decision') and (iii) the existence of competition between Swiss and SAS/LOT.

14 On 14 February 2014, Lufthansa answered the Commission's questions of 22 November 2013, and on 27 April 2014 it answered the additional questions of 26 February 2014.

15 At a meeting on 12 September 2014, Lufthansa offered to terminate the Bilateral Alliance Agreement if that would allow the Commission to grant the waiver request in relation to the ZRH-STO route. On 16 October 2014, Lufthansa supplemented its waiver request with a further submission. On 26 January 2015, it answered a question from the Commission by email and on 18 May 2015 it informed the Commission of a proposal to modify its fare structure.

16 On 5 March 2015, the Commission informed Lufthansa that the requested waiver could be granted if Lufthansa made certain modifications to its codeshare agreements with SAS and LOT. Lufthansa replied, by email of 28 April 2015, that it did not propose to make such modifications.

17 On 29 June 2015, Lufthansa answered the Commission's questions of 22 May 2015.

18 On 22 October 2015, the Commission informed the parties that it intended to reject the waiver request. The parties submitted observations on 20 and 24 November 2015.

19 The Trustee provided comments on Lufthansa's waiver request on 27 June 2014 and 3 May 2016.

20 By Decision C(2016) 4964 final of 25 July 2016, the Commission rejected Lufthansa's request for a waiver of certain commitments rendered binding by the 2005 Decision ('the contested decision').

21 As regards the parties' request for a waiver under the second sentence of review clause 15.2, based on a change in the cooperation agreements concluded by Lufthansa, the Commission considered that the termination of the JV Agreement between Lufthansa and SAS for traffic between Germany and Scandinavia did not suffice to eliminate the concerns set out in the 2005 Decision for the ZRH-STO route and that the fact that there had been no entry by a new carrier might also in itself be regarded as sufficient reason to justify the maintenance of the fare commitments (recital 68 of the contested decision). The contested decision also stated that, if the parties were in fact to terminate the Bilateral Alliance Agreement, review clause 15.2 might, in principle and subject to a separate Commission decision, trigger a review of the commitments relating to the ZRH-STO route: the point was made, however, that termination of the Bilateral Alliance Agreement would merely trigger review clause 15.2, which would not in itself suffice to conclude that the waiver requested by the parties should actually be granted (recital 69 of the contested decision).

22 As regards the parties' request for a waiver under the first sentence of review clause 15.2, based on a change in the Commission's policy on the assessment of the role of alliance partners in merger reviews since the 2005 Decision, it is explained that each transaction is assessed on its own merits (recital 77 of the contested decision), that the Commission has not, as a matter of policy, excluded the relationships between alliance partners from its purview, nor the impact of those relationships on their alliance partners' incentive to compete after the merger (recital 79 of the contested decision), that the commitments submitted in the case at hand require a long-term market evolution and that the parties have failed to prove such an evolution (recitals 82 and 83 of the contested decision).

23 Moreover, the Commission emphasised that even if the conditions for requesting a waiver of the commitments on the ZRH-STO and ZRH-WAW routes were considered to be fulfilled, account had to be taken, in assessing the waiver request, of the codeshare agreements concluded by Swiss with Lufthansa's partners, SAS (2006) and LOT (2007) (recitals 95 and 96 of the contested decision). Because of the possible impact of those codeshare agreements on competition on each of the two routes, the Commission considered that the agreements were relevant for the assessment of the transaction and concluded that the existence of the agreements showed that the degree of cooperation between Lufthansa and SAS and LOT had not decreased (recitals 99 and 100 of the contested decision). The Commission thus concluded that there were insufficient grounds to grant the requested waiver. It stated that since no new competing airline had entered the market, and no other exceptional circumstance or radical change in market conditions had occurred, the conditions set out in review clause 15.1 for waiving the commitments were not fulfilled (recital 108 of the contested decision). It further stated that the parties had failed to demonstrate that the conditions for reviewing, waiving or modifying the commitments pursuant to review clause 15.2 had been fulfilled (recital 109 of the contested decision).

24 The Commission based that conclusion on five reasons formulated as follows:

> '111. First, the termination of the JV Agreement with SAS does not affect the existing contractual basis for further cooperation that was considered in the [2005] Decision and would thus be insufficient to trigger a review pursuant to [Review] Clause 15.2.
>
> 112. Second, even if the termination of the JV Agreement were hypothetically considered relevant in the present case, the competitive situation on both routes would still raise serious doubts as to the compatibility of the merger with the internal market … so that the conditions of [Review] Clause 15.2 would not be met. Indeed, on both ZRH-STO and ZRH-WAW, only two carriers operate and they are engaged in … parallel hub-to-hub free-flow codeshare agreements.

113. Third, on the ZRH-WAW route, no contractual change has occurred since the [2005] Decision.

114. Fourth, the acceptance by the Commission of structural commitments, as opposed to behavioural fare commitments, in certain recent airline cases concerning routes and markets that are not subject to the present Decision cannot be considered as a substantial change in the market or otherwise warrant the requested waiver. Similarly, the mere fact that fare commitments were not considered in certain recent airline merger cases may not constitute a reason for waiving fare commitments in the present case.

115. Fifth, the alleged change in the Commission's treatment of alliance partners would not amount to a long term market evolution within the meaning of [Review] Clause 15.2 of the Commitments.

116. Overall, the Commission concludes that the requested waiver of the Commitments does not meet the conditions of [Review] Clauses 15.1 and 15.2 (first and second sentences) … Nor would it improve the overall effectiveness of the Commitments. Therefore, the Commission has decided to reject Lufthansa's request for a partial waiver of the Commitments …'

Procedure and forms of order sought

25 By application lodged at the Registry of the General Court on 5 October 2016, the applicant brought the present action.

26 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

27 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

28 Acting on a proposal of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure of the General Court, put written questions to Lufthansa and the Commission. They replied to those questions within the periods prescribed.

29 Lufthansa and the Commission presented oral argument and their replies to oral questions put by the Court at the hearing on 14 September 2017.

Law

30 In support of its action, the applicant puts forward three pleas in law. The first plea alleges application of an incorrect legal standard in the assessment of the waiver request, manifest errors of assessment and breach of the principles of proportionality and the protection of legitimate expectations. The second plea alleges breach of the principle of good administration. The third plea alleges misuse of powers.

Preliminary observations

31 The commitments that the parties enter into in order to dispel the serious doubts raised by a concentration and to render it compatible with the internal market generally contain a review clause stipulating the conditions under which the Commission, on a request from the merged entity, will be able to grant an extension of time limits or waive, amend or substitute those commitments. As is clear from paragraph 74 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p. 1) ('the Remedies Notice'), the waiver or amendment of commitments is of particular relevance in the case of behavioural 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 merger decision that made the commitments binding. In its rejoinder, the Commission, referring to Decision C(2011) 2981 final of 3 May 2011 (Case No IV/M.950 –– Hoffmann — La Roche/Boehringer Mannheim), has submitted, moreover, that commitments may be amended or waived even in the absence of a review clause, if they become obsolete or disproportionate owing to subsequent exceptional developments. The purpose of commitments is in fact to remedy the competition problems identified in the decision authorising the concentration; accordingly, the commitments might have to be amended, or the need for them might disappear, depending on how the market situation develops. In the present action, the applicant relies, however, solely on the claim that the requested waiver should have been granted to it on the basis of review clauses 15.1 and 15.2 set out in the commitments.

32 Before considering the various pleas and arguments which the applicant has raised against the contested decision, it is necessary (i) to determine the margin of assessment available to the Commission in the examination of a request that commitments be waived and the review that must be carried out by the General Court of the decisions taken by the Commission in that regard and (ii) to clarify certain aspects of the procedure for examining such a request.

33 According to settled case-law, the substantive rules of Regulation No 139/2004 confer on the Commission a certain discretion, especially with respect to assessments of an economic nature (see, by analogy, judgments of 31 March 1998, *France and Others* v *Commission*, C-68/94 and C-30/95, EU:C:1998:148, paragraph 223; of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 38; and of 18 December 2007, *Cementbouw Handel & Industrie* v *Commission*, C-202/06 P, EU:C:2007:814, paragraph 53).

34 The same is true for the assessment not only of (i) the compatibility of a concentration, but also of (ii) the need for commitments to be given in order to dispel the serious doubts raised by a concentration (see, to that effect, judgments of 30 September 2003, *ARD* v *Commission*, T-158/00, EU:T:2003:246, paragraph 328, and of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraph 128), and (iii) the implementation of such commitments (see, to that effect, judgment of 3 April 2003, *Petrolessence and SG 2R* v *Commission*, T-342/00, EU:T:2003:97, paragraphs 102 and 103).

35 As regards, more particularly, a request for a waiver of commitments rendered binding by a decision declaring a concentration compatible with the internal market, the first point to make is that, although the appraisal of a concentration requires predictions as to future developments that become more difficult and uncertain the longer the relevant time horizon is, the assessment of a request for a waiver of commitments does not necessarily give rise to the same difficulties of prospective analysis. Depending on the case, assessment of a request of this kind will rather require ascertaining whether the conditions laid down by the review clause which, generally, attaches to the commitments are fulfilled or evaluating, in retrospect, whether the assumptions made at the time when the concentration was authorised have proved to be correct or whether the serious doubts raised by the concentration still persist.

36 Next, it must be observed that, as the applicant submits, the examination of a waiver request is not subject to the strict time limits that are set for examination of a concentration. Indeed, there is no provision which lays down periods within which the procedure for examining such a request or certain stages of that procedure have to be completed or which, more generally, regulates or organises that procedure.

37 Nevertheless, as is the case of the other decisions relating to concentrations, the appraisal of a waiver request entails sometimes complex economic assessments in order, in particular, to ascertain whether market circumstances, more generally, have changed significantly and on a permanent basis, so that the commitments are no longer necessary for the purpose of overcoming the competition problems identified in the merger decision that made the commitments binding.

38 It must therefore be held that the Commission also has a certain discretion in the assessment of a waiver request entailing complex economic assessments.

39 Consequently, review by the General Court of the exercise of that discretion must take account of the margin of assessment implicit in the provisions of an economic nature which form part of the rules on concentrations (judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 38). However, that does not mean that the General Court must refrain from reviewing the Commission's interpretation of information of an economic nature. The General Court must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 39).

40 The Commission has contended that the case-law formulated in the judgment of 15 February 2005, *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87), is irrelevant in the present case because the case in which the Court of Justice established it did not concern the review of commitments made binding in a merger decision. Contrary to that contention, that case-law is relevant here: it is very general and has, moreover, been applied in, inter alia, the various types of disputes arising from the application of Regulation No 139/2004. Furthermore, according to settled case-law, where the institutions have a discretion, observance of the safeguards provided by the EU legal order in administrative procedures is of even more fundamental importance. Those safeguards include, in particular, the duty of the Commission to examine, carefully and impartially, all the relevant aspects of the individual case as well as the right of the person concerned to make his views known and to have sufficient reasons given for the decision that is challenged (see, to that effect, judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, and of 20 March 2002, *ABB Asea Brown Boveri* v *Commission*, T-31/99, EU:T:2002:77, paragraph 99).

41 It follows from the foregoing that, although the Commission has a certain discretion in the assessment of a waiver request, it is nonetheless obliged to carry out a careful examination of that request, to conduct, if necessary, an investigation, to make the appropriate enquiries and to base its conclusions on all the relevant information.

42 As regards the appropriate legal standard for the assessment of a waiver request, the Commission, recalling that the retroactive withdrawal of a lawful administrative act which has conferred individual rights or similar benefits is contrary to the general principles of law (judgment of 20 November 2002, *Lagardère and Canal+* v *Commission*, T-251/00, EU:T:2002:278, paragraph 139), argues that lawful merger decisions which confer rights or similar benefits, such as the 2005 Decision, can be modified or revoked only in certain narrowly defined exceptional circumstances. That argument cannot be accepted. A decision concerning a request for the waiver of commitments does not presuppose withdrawal of the decision authorising the merger, which has made those commitments binding, and does not comprise such a withdrawal. Its purpose is to ascertain whether the conditions laid down in

the review clause forming part of the commitments are met or, as the case may be, whether the competition concerns identified in the decision authorising the merger subject to the commitments have ceased to exist.

43 It must nevertheless be made clear that, as the 2005 Decision has become final, the applicant cannot, in the context of these proceedings, indirectly challenge the legality of that decision, including in so far as it concerns the commitments.

44 Moreover, as regards the applicant's argument that the Commission is always under a duty to review regularly, even on its own initiative, whether the remedies are still justified, it is irrelevant in the present case, since the applicant made a request for waiver of the commitments.

45 Lastly, it must be stated that it is the parties bound by the commitments who must adduce sufficient evidence to demonstrate that the conditions for waiving the commitments are fulfilled. However, where those parties do provide evidence that is such as to establish that the conditions laid down in the review clauses of the commitments are fulfilled, it is for the Commission to show how the evidence is insufficient or unreliable and, if necessary, carry out an investigation to verify, supplement or refute the evidence adduced by those parties.

46 The applicant's pleas and arguments must be examined in the light of all those considerations.

First plea, alleging application of an incorrect legal standard, manifest errors of assessment and breach of the principles of proportionality and the protection of legitimate expectations

47 The first plea is divided into five parts. The first part alleges application of an incorrect legal standard in the assessment of the waiver request and breach of the principles of proportionality and the protection of legitimate expectations. The second part alleges manifest errors in the assessment of Lufthansa's alliance agreements. The third part alleges failure by the Commission to take into account that competition between Swiss, on the one hand, and SAS and LOT, on the other, constitutes 'long-term market evolution'. The fourth part alleges that the Commission failed to take into account the change of its policy with respect to the treatment of alliance partners. The fifth part alleges that the Commission failed to have due regard to its general merger policy with regard to pricing remedies.

48 The Court will examine, first of all, the first part, next, the second and fourth parts together, then the third part and, finally, the fifth part. It will draw a conclusion on the overall assessment of the plea following the examination of its various parts.

First part, alleging application of an incorrect legal standard in the assessment of the waiver request and breach of the principles of proportionality and the protection of legitimate expectations.

49 The applicant maintains, in essence, that the contested decision is based on an incorrect legal standard inasmuch as the Commission does not have unlimited discretion in the assessment of waiver requests. It submits that, in the light of the principles expounded in the judgment of 15 February 2005, *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87) and of the principles of proportionality and the protection of legitimate expectations, the Commission is under a heightened duty to examine carefully the long-term commitments and to carry out an investigation.

50 In the first place, inasmuch as the applicant –– as it confirmed at the hearing –– complains in this part of the plea that the Commission breached its duty to carefully examine the waiver request, to conduct, if necessary, an investigation and to base its conclusions on all the relevant information

which must be taken into account, the line of argument developed in support of this part does not stand alone. The Court will therefore examine it in conjunction with the substantive complaints put forward in the other parts of the first plea.

51 In the second place, the applicant argues that commitments which impose restrictions in perpetuity on price setting are incompatible with the principle of proportionality and with a system of undistorted competition and that they must for this reason be regularly reviewed by the Commission.

52 That argument must be rejected. Apart from the fact that the obligations at issue are not imposed in perpetuity but are merely of unspecified duration, it must be stated that, as the 2005 Decision has become final, the applicant cannot challenge the legality of the commitments in the present proceedings, as has been stated in paragraph 43 above.

53 Moreover, as the Commission points out, review clauses 15.1 and 15.2 give expression to the principle of proportionality inasmuch as they allow, under exceptional circumstances, the waiver, modification or substitution of the commitments if it is demonstrated that the latter are no longer necessary or proportionate: however, the mere fact that the commitments have been in force for a number of years does not mean that the serious doubts that they addressed have disappeared and that the commitments are no longer justified.

54 Finally, as is apparent from paragraph 44 above, it is not for the Commission regularly to review long-term commitments of its own motion; rather it is for the parties bound by those commitments to make a request that they be waived or modified and to establish that the conditions laid down for such waiver or modification are fulfilled.

55 In the third place, as regards the principle of the protection of legitimate expectations, the applicant argues that the Commission insisted upon the fare commitments, that it (the applicant) accepted them only reluctantly in return for the inclusion of review clause 15.2 and that it thus had a legitimate expectation that the Commission would in fact waive the commitments and conduct a bona fide review if the requirements of the review clause were met.

56 That line of argument cannot succeed. First, it is based on an incorrect premiss. As follows from, inter alia, recital 30 and Article 6(2) of Regulation No 139/2004, it is the undertakings concerned by a merger which may offer commitments in order to render the merger compatible with the internal market and the Commission may not impose commitments on those undertakings. Second, the argument is irrelevant since the legality of the commitments rendered binding by the 2005 Decision may no longer be challenged. Moreover, it does not appear from the file that the Commission gave precise assurances concerning the waiver of the commitments. Finally, it should be noted that the review clause does not in itself give the applicant a guarantee that its waiver request will automatically be granted, given that the commitments may be waived only if the conditions provided for that purpose are actually fulfilled.

57 It follows that the first part of the plea must be rejected, except in so far as concerns the complaint based on the Commission's breach of its duty to carefully examine the waiver request, to conduct, if necessary, an investigation and to base its conclusions on all the relevant information which must be taken into account: that complaint will be examined in the context of the other parts of the first plea.

Second and fourth parts, alleging manifest error of assessment of Lufthansa's alliance agreements in the light of the second sentence of review clause 15.2 and failure on the Commission's part to take into account the change in its policy with respect to the treatment of alliance partners

58 The applicant submits, in essence, that the Commission made a manifest error of assessment, that it failed to take account of relevant matters, that it relied on unfounded speculation and failed to consider the waiver request in good faith, by concluding that the changes in the alliance agreements between Lufthansa and SAS were not sufficient for the fare commitment on the ZRH-STO route to be waived. It argues in this regard, in the first place, that the contested decision ignores the Commission's own assessment in the Lufthansa/Brussels Airlines Decision of the same agreements concluded by Lufthansa with SAS (and other Star Alliance partners), in the second place, that the Commission failed to take account of changes in its policy with regard to the treatment of alliance partners, in the third place, that the codeshare agreement examined in Commission Decision C(2012) 2320 of 30 March 2012 (Case COMP/M.6447 — IAG/bmi) ('the IAG/bmi Decision') is not relevant in the present case and, in the fourth place, that the codeshare agreement between Swiss and SAS does not provide for the forms of cooperation on which the treatment of Lufthansa's partners in the 2005 Decision is based.

– *Preliminary observations*

59 As a preliminary point, it should be noted that the second sentence of review clause 15.2 makes an express reference only to waiver of the obligation to make slots available and not to the obligation relating to fares. However, that situation came about because, as can be seen from paragraph 9 above, the fare commitments were introduced only at the last moment during the remedies negotiations at a time when the second sentence of review clause 15.2 had already been agreed on. As the applicant claims, without being contradicted by the Commission, the fact that the review clause was not amended so as to reflect the addition of the fare commitments was accidental rather than deliberate. Accordingly, the second sentence of review clause 15.2 must be construed as applying not only to the slot commitments but also to the fare commitments. That interpretation applies a fortiori since the fare commitments are an unusual obligation that is particularly restrictive of the parties' freedom to conduct their business: it therefore appears all the more important and justified to provide for the possibility of bringing it to an end. Indeed, the Commission expressly confirmed at the hearing that it was not challenging that interpretation of the second sentence of review clause 15.2.

60 It should also be noted that, although the first sentence of review clause 15.2, which corresponds to a standard review clause, provides that the Commission may waive or modify the commitments in the case of long-term market evolution, the second sentence of that clause indicates that the Commission shall waive the commitments in the event of the contractual relationships having changed. The wording of that second sentence, which is admittedly cast in more mandatory terms, does not mean however –– as the applicant claims –– that any change in contractual relationships will automatically require the Commission to waive the commitments. In fact, the waiver of commitments under the second sentence of review clause 15.2 requires that the contractual relationships, which underpin the Commission's finding of reduced incentives for competition, have changed in such a way as to remove the concerns identified in the 2005 Decision.

61 It should be recalled in this regard that the fare commitment at issue was given in order to address the serious doubts arising as a result of overlapping activities not between the parties to the merger but rather between Swiss and SAS, which was not part of the Lufthansa group but was a Star Alliance partner and was additionally linked to Lufthansa by a series of bilateral agreements (see paragraph 2 and paragraphs 5 to 8 above). The Commission concluded, in recital 22 of the 2005 Decision, that, in view of the extensive cooperation resulting from the bilateral agreements concluded with Lufthansa, the Star Alliance partners, 'Austrian, bmi, SAS and United Airlines[,] [could] not be considered as competitors of Lufthansa' and '[had] little or no incentive to compete post-merger with Swiss'.

62 It must be stated that the reasoning in this regard is cursory, the 2005 Decision merely stating, without analysing the various agreements, that the bilateral agreements concluded by Lufthansa with the airlines mentioned in paragraph 61 above provide for 'a global joint pricing policy, joint network and flight planning, a joint hub system organisation and a single market strategy' and 'thus provide the legal basis for a global integration of the companies' networks and commercial policies' because 'the scope of and rationale for these agreements go beyond the bundle of routes between Germany and their respective home countries'. The last sentence of recital 22 of the 2005 Decision states that 'the same reasoning applies to LOT and Air Canada, whose agreements with Lufthansa foresee at least joint networking and joint pricing beyond their home countries'.

63 The 2005 Decision thus contains no analysis or individual assessment of the various bilateral agreements entered into by Lufthansa with SAS, nor any statement of the reasons why those agreements have an impact on competition between SAS and Swiss on routes other than those covered by the said agreements: it is therefore not clear from the 2005 Decision what the impact of the termination of any of those agreements would be. The fact remains that the finding that the Star Alliance partners, such as SAS and LOT, cannot be regarded as Lufthansa's competitors and have little, or even no, incentive to compete with Swiss post-merger is based on a series of agreements that result in very extensive cooperation. Consequently, the amendment or removal of the agreements bringing about that high degree of integration appears to be capable of removing the competition problems identified in the 2005 Decision and, by the same token, capable of justifying the waiver of the commitments.

64 The complaints and arguments relating to the changes in the contractual relationships between Lufthansa and SAS must be examined in the light of those observations.

– *Contractual changes as between Lufthansa and SAS*

65 In support of their waiver request, the parties have maintained, inter alia, that the termination, on 1 June 2013, of the JV Agreement and of all other cooperation between Lufthansa and SAS going beyond standard code-sharing amounted to a change in contractual relationships for the purposes of review clause 15.2, such as to justify waiver of the fare commitment on the ZRH-STO route. The Commission acknowledges, in recitals 39 and 40 of the contested decision, that termination of the JV Agreement did indeed constitute a change in the contractual relationship between Lufthansa and SAS in force at the time of the adoption of the 2005 Decision. In his report of 27 June 2014, the Trustee concluded that termination of the JV Agreement was 'a substantial market change' for the purposes of review clause 15.2, since it brought to an end the joint operational policy of the two companies, which included pricing and network planning between Lufthansa and SAS.

66 It should be noted in this regard that, although the Commission is not bound by the Trustee's Opinion, it is nevertheless required, in principle, to take it into account, particularly since the Commission itself asked the Trustee for an opinion, the first time on 16 June 2014 and the second time on 5 April 2016. In recitals 30 to 46 of the contested decision, which set out the Commission's appraisal of the termination of the JV Agreement, the Commission not only fails to analyse the assessment contained in those opinions, but also fails even to mention them. In addition, the summary, in recitals 27 and 29 of the contested decision, does not accurately reflect the Opinions of the Trustee as lodged by the Commission as annexes to the defence. First, contrary to what is stated in recital 27 of the contested decision, the Trustee, in his Opinion of 27 June 2014, did not consider that the question whether the substantial market change arising from termination of the JV Agreement between Lufthansa and SAS concerning the ZRH-STO route would justify a waiver of the commitments exceeded his mandate. Rather, he considered that it was the question whether the Commission had, in the 2005 Decision, based its appraisal in respect of the relationship between Lufthansa and LOT on its legal practice at the time or on an assumption, as regards the ZRH-WAW route, which would go beyond that mandate. Second, whilst, according to recital 29 of the contested

decision, on 3 May 2016, the Trustee amended his initial Opinion and stated that he had not become aware of any exceptional circumstances within the meaning of review clause 15.1 on either the ZRH-STO or the ZRH-WAW routes, it should be pointed out that the document of 3 May 2016 comprised not the Trustee's second Opinion but answers to a series of questions relating to review clause 15.1 and not to review clause 15.2. On the contrary, in his second Opinion, which is dated 13 April 2016, the Trustee –– as the Commission has expressly stated in its defence –– essentially reiterated the previous conclusions of 27 June 2014 and clarified that business tariffs on the two routes had also fallen significantly after the introduction of new tariffs. Nor did the Commission examine in the contested decision the significance and impact of termination of the JV Agreement, although it was a key element of the cooperation between Swiss and SAS.

67 In recital 43 of the contested decision, it is stated in that regard that, as the assessment in the 2005 decision is based not only on the JV Agreement but also on a comprehensive evaluation of the cooperation between Lufthansa and SAS, and as the 1995 Bilateral Alliance Agreement making that cooperation possible is still in place, the mere termination of the JV Agreement for traffic between Germany and Scandinavia does not justify a conclusion that the current contractual relationships between the two undertakings have changed in such a material respect as to remove the concerns set out in the 2005 Decision for the ZRH-STO route. The continuation of the 1995 Bilateral Alliance Agreement thus appears to be the reason for rejecting the waiver request.

68 Recital 48 of the contested decision further explains in this regard that, since the 1995 Bilateral Alliance Agreement provides the basis for all other bilateral agreements between the two companies, its termination, seen in conjunction with the termination of the JV Agreement, in principle might amount to a material change in the contractual relationship assessed in the 2005 Decision.

69 As is expressly stated in recitals 4, 32 and 47 of the contested decision, Lufthansa offered, in the course of the administrative procedure, to terminate the Bilateral Alliance Agreement if that would allow the Commission to grant the waiver request on the ZRH-STO route.

70 The Commission, therefore, could not legitimately consider, in recital 43 of the contested decision, that termination of the JV Agreement did not justify a conclusion that the contractual relationships had changed in a material respect owing to the fact that the Bilateral Alliance Agreement was still in place.

71 The Commission argues in this regard that the Bilateral Alliance Agreement was never terminated and that Lufthansa's suggestion that the agreement could be terminated never amounted to a formal commitment. It therefore takes the view that the contested decision could not have been based on Lufthansa's non-binding oral suggestion that it might terminate the Bilateral Alliance Agreement.

72 That argument cannot be accepted. As the applicant has argued and as is clear from recitals 4, 32 and 47 of the contested decision, the latter is based on the assumption that Lufthansa would terminate that agreement, if that were sufficient for the Commission to waive the fare commitments. Furthermore, it was for the Commission, should it have considered it necessary, to ask Lufthansa, in the administrative procedure, to give concrete expression to that commitment on such terms as the Commission deemed appropriate.

73 It follows that, in failing to examine the impact of termination of the JV Agreement, either on its own or in conjunction with the undertaking also to terminate the Bilateral Alliance Agreement, the Commission did not take into account all the relevant elements for the assessment of the waiver request based on a change in the contractual relationships between Lufthansa and SAS.

74 The point should be made, however, that, according to other recitals of the contested decision, rejection of the request is based on reasons other than the fact that the Bilateral Alliance Agreement was not actually terminated.

75 Thus, in the conclusion of the part of the contested decision that deals with contractual changes (recitals 68 to 70), the Commission, after noting that it was not sufficient to terminate the JV Agreement, stated that 'there [had been] no change in the competitive conditions on the ZRH-WAW route where the cooperation between Lufthansa and LOT seem[ed] to have been much lighter than on the ZRH-STO route', on the basis of which it concluded, in turn, that the fare commitments on the ZRH-WAW route should be maintained and, consequently, that those on the ZRH-STO route should be maintained as well. That ground of justification must be rejected because it is advanced on the basis of merely hypothetical considerations, is not supported by any concrete examination of the relevant information relating to each of the routes and is based on a somewhat circular argument inasmuch as the comparison between the two routes justifies the rejection of the request for the first route, which in turn justifies the rejection of the request for the second route. Moreover, the Commission stated, in recital 68 of the contested decision, that the lack of entry of a new carrier could in itself also be seen as justifying the maintenance of the fare commitments on the ZRH-STO route and the ZRH-WAW route. The last-mentioned ground of justification is incorrect. The entry of a new carrier on the ZRH-STO route or the ZRH-WAW route is not a precondition for waiver of the commitments under the review clauses; rather it is a separate, additional ground, which automatically terminates the fare commitments under Clause 11.1 of the commitments.

76 It follows, however, from recitals 49, 70, 95 and 112 of the contested decision that the Commission took the view that the termination of the JV Agreement and the offer also to terminate the Bilateral Alliance Agreement were not sufficient owing, in particular, to the fact that the codeshare agreement had been concluded between Swiss and SAS in 2006. Furthermore, according to recital 95 of the contested decision, 'even if the conditions for requesting a waiver of the commitments in the two routes were considered fulfilled', account would still have to be taken, in the assessment of the waiver request, of the introduction of that codeshare agreement. The importance that the Commission attached to that agreement can be seen, lastly, from recitals 5 and 104 of the contested decision. Those recitals state that, on 5 March 2015, the Commission informed the applicant that the waiver could be granted if it made certain amendments to the codeshare agreement between Swiss and SAS –– namely limiting its scope to connecting passengers: that proposal was not subject to any reservation or conditional upon the Bilateral Alliance Agreement being terminated or an investigation being carried out.

77 Although the reasoning in the contested decision is at the least confused, consideration should nonetheless be given to whether the Commission was entitled to conclude that the termination of the JV Agreement in conjunction with the offer to terminate the Bilateral Alliance Agreement was not sufficient to grant the waiver request on account of the codeshare agreement that Swiss had entered into with SAS in 2006.

78 The applicant advances two sets of arguments on this point, the first concerning the Commission's assessment of the same agreements in the Lufthansa/Brussels Airlines Decision and an alleged change of policy with regard to the treatment of alliance partners and the second concerning the codeshare agreement entered into between Swiss and SAS.

– The Lufthansa/Brussels Airlines Decision and the alleged change in the Commission's policy with regard to the treatment of alliance partners

79 The applicant complains that the Commission ignored its own assessment of the same agreements concluded by Lufthansa with SAS (and other Star Alliance partners) in the Lufthansa/Brussels Airlines Decision. The applicant maintains, more generally, that, since the Lufthansa/Brussels Airlines Decision, the Commission has changed its policy with respect to the treatment of alliance partners, with the result that, if the Lufthansa/Swiss merger were notified today, the ZRH-STO and ZRH-WAW routes would not be considered to be affected markets and the commitments would not be necessary to obtain authorisation for the transaction.

80 It should be pointed out that the complaints set out in paragraph 79 above, unlike the complaints relating to contractual changes in the strict sense and to the codeshare agreement between Swiss and SAS, have been put forward by the applicant in order to challenge the Commission's assessment both with regard to the ZRH-STO route and with regard to the ZRH-WAW route.

81 The Commission submits, first, that every concentration is assessed individually in the light of the factual and legal circumstances specific to that transaction. The applicant cannot therefore rely on alleged differences in the Commission's assessment by comparison with other cases.

82 The Commission further submits that the contested decision is not at odds with the assessment made in the Lufthansa/Brussels Airlines Decision and that its approach regarding the assessment of relationships between the parties to a merger and third parties in the aviation sector has not materially changed since the 2005 Decision was adopted. In any event, there can, in its view, be no question of a long-term market evolution or –– a fortiori –– a change in the underlying agreements between Lufthansa and its alliance partners.

83 In that regard, it is necessary to start by recalling that, according to settled case-law, when the Commission takes a decision on the compatibility of a concentration with the internal market on the basis of a notification and a file pertaining to that transaction, an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical (judgments of 14 December 2005, *General Electric* v *Commission*, T-210/01, EU:T:2005:456, paragraph 118, and of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraph 142). In accordance with that case-law neither the Commission nor, a fortiori, the General Court is bound by the findings of fact and the economic assessments made in previous decisions.

84 However, in the present case the applicant's argument cannot be rejected on the basis of the case-law cited in paragraph 83 above.

85 First, the applicant does not invoke a mere difference of assessment as between the contested decision and another decision, but rather a change of policy inasmuch as it is alleged that the Commission no longer takes into account alliance partners in the determination of affected markets.

86 Second, the applicant relies on the analysis of the same agreements between the same parties, in the same context and on the same issue, which the Commission carried out in the Lufthansa/Brussels Airlines Decision, of which the applicant was also an addressee.

87 Although a possible difference in the analysis in the Lufthansa/Brussels Airlines Decision and that of the contested decision, or an alleged change in the Commission's policy, do not in themselves give grounds for a finding of illegality in respect of the contested decision, they do, however, require it to be ascertained whether, at the very least, the Commission carried out a thorough examination of the applicant's argument that alliance partners are no longer taken into account in the determination of affected markets.

88 In addition, as has been explained in paragraph 13 above, the assessment made in the Lufthansa/Brussels Airlines Decision and the change in the Commission's policy with respect to the treatment of alliance partners were, specifically, one of the three grounds –– together with the termination of the JV Agreement and the existence of competition between Swiss and SAS/LOT –– on which the waiver request was based. It is apparent from the documents before the Court that the question was, moreover, central to discussions throughout the administrative procedure.

89 It should also be observed that the alleged change in the Commission's policy with respect to alliance partners was examined in an entire section of the contested decision (recitals 71 to 83) and that the reasoning in that decision is based, inter alia, on that evaluation, which may therefore be challenged by the applicant.

90 Accordingly, the applicant's argument concerning the Lufthansa/Brussels Airlines Decision and the subsequent change in the Commission's policy with regard to alliance partners cannot be rejected on the ground that previous decisions do not form the relevant legal framework. Consequently, the argument must be examined.

91 In the first place, the Court notes in this regard that the Commission fails in the contested decision to answer the argument concerning the Lufthansa/Brussels Airlines Decision, even though that argument is set out in recitals 73 and 74 of the contested decision. That omission is particularly significant given that it relates to a matter forming one of the main grounds for the waiver request and that, in its letter of 20 November 2015, the applicant pointed to the obvious importance of a (re)evaluation by the Commission of the agreements concluded by Lufthansa with SAS and LOT that had been examined in the Lufthansa/Brussels Airlines Decision.

92 Similarly, the matters raised by the Commission in its written submissions before the Court do not explain the difference in assessment between the contested decision and the Lufthansa/Brussels Airlines Decision, as those matters in fact arise in both cases.

93 The Commission merely asserts that, in the Lufthansa/Brussels Airlines Decision, it concluded that no merger-specific spillover effects would be expected because Lufthansa's cooperation agreements with, inter alia, SAS and LOT were likely not to be extended to the other merging party. However, as the applicant points out, the same is true of the present case, since it concerns the same cooperation agreements with the same parties and since it is undisputed that those agreements do not contain a clause providing for automatic extension without renegotiation and since the cooperation agreements between Lufthansa and SAS/LOT have not in fact been extended to Swiss. The Commission reiterates that it considered that Swiss would become a subsidiary of Lufthansa and would join the Star Alliance. On that point too, there is barely any difference, as Brussels Airlines also because a subsidiary of Lufthansa and joined the Star Alliance.

94 In the second place, so far as concerns the change of policy with regard to the treatment of alliance partners, the Commission refers, in the contested decision, to the IAG/bmi Decision to show that it did not exclude, as a matter of principle, from its purview either the relationships between alliance partners or the impact of those relationships on those partners' incentive to compete with one another after the merger.

95 However, as the applicant submits, the Commission had expressly stated, in recital 160 of the IAG/bmi Decision, that 'in line with the Commission's earlier decisions, IAG's alliance partners [had] not [been] considered for the determination of affected markets'.

96 The Commission also argues in the contested decision and in its pleadings before the Court that, in the IAG/bmi Decision, existing codeshare relationships between one of the parties and third parties were taken into account in the assessment of competition. However, as the applicant has submitted and the Commission has acknowledged in its pleadings before the Court, the relevant overlap in that case in fact concerned the parties to the merger themselves, namely bmi and British Airways (the latter in its capacity as a marketing carrier selling tickets on Royal Jordanian's flights) and not bmi and Royal Jordanian (which was British Airways alliance partner). As the applicant submits, the IAG/bmi Decision represents a standard merger analysis rather than an application of the line of analysis developed in the 2005 Decision, according to which independent alliance partners must be taken into account in market definition.

97 Moreover, the applicant –– during the administrative procedure and before the Court –– drew attention to the fact that in Commission Decision C(2009) 6690 final of 28 August 2009 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.5440 — Lufthansa/Austrian Airlines), the Commission had taken the same approach as in the Lufthansa/Brussels Airlines Decision and had thus not examined route overlaps that resulted solely from overlaps between flights operated by Austrian Airlines and flights operated by Star Alliance partners, including LOT and SAS. Similarly, so the applicant argues, in Decision C(2010) 5008 of 14 July 2010 (Case No COMP/M.5747 — Iberia/British Airways), the Commission did not examine route overlaps that resulted solely from flights operated by Iberia and British Airways' alliance partners. The Court finds that no answer has been provided by the Commission in this regard, either in the contested decision, which nevertheless sets out the applicant's argument, or in the Commission's pleadings before the Court.

– *The codeshare agreement between Swiss and SAS*

98 As a preliminary point, the Court notes that, although Swiss concluded codeshare agreements with both SAS (2006) and LOT (2007), the applicant has, in its application, expressly contested only the Commission's assessment on this matter with regard to the ZRH-STO route and has not raised a complaint about the assessment of the codeshare agreement between Swiss and LOT concerning the ZRH-WAW route.

99 The codeshare agreement between Swiss and SAS was entered into in 2006. Thus, in the 2005 Decision rendering the commitments binding, the Commission did not take that agreement into account in reaching the view that, in the light of the various cooperation agreements between Lufthansa and SAS, the latter had little incentive to compete with Swiss after the merger.

100 Contrary to the applicant's submission, that fact alone does not give grounds for holding that the codeshare agreement between Swiss and SAS cannot be taken into account in the examination of the waiver request.

101 It is true that review clause 15.2 refers to a change in the agreements underlying the Commission's finding of reduced incentives for competition. However, the codeshare agreement in the present case might nonetheless be relevant for the overall assessment of whether the contractual relationships have changed in such a respect as to remove the competition concerns that were identified in the 2005 Decision and justified the commitments.

102 A purely formal reading of review clause 15.2, whereby account is taken only of modifications of the agreements that existed at the time of adoption of the 2005 Decision, would in fact amount, as is explained in recital 103 of the contested decision, to allowing the parties to circumvent the commitments by replacing the old cooperation agreements with new cooperation agreements.

103 Consideration should therefore be given to whether the codeshare agreement between Swiss and SAS has sufficiently close links with the contractual relationships and competition problems addressed in the 2005 Decision.

104 The Court notes in that regard that, as the applicant maintains and the Commission acknowledges, the codeshare agreement and the cooperation agreements are different in scope, content and contracting parties.

105 Thus, the Bilateral Alliance Agreement between Lufthansa and SAS covers cooperation between those two airlines as they existed at the time and does not include future affiliates, such as Swiss, whilst the codeshare agreement was concluded in 2006 between Swiss and SAS and covers only the routes operated by Swiss and SAS, and not the routes operated by Lufthansa.

106 The purpose of the Bilateral Alliance Agreement and that of the codeshare agreement are also fundamentally different. As was explained in recital 22 of the 2005 Decision, the cooperation agreements concluded by Lufthansa –– and, amongst those, in particular the Bilateral Alliance Agreement which provided the basis for the cooperation –– provided for a 'global joint pricing policy, joint network and flight planning, a joint hub system organisation and a single market[ing] strategy' and 'thus provide[d] the legal basis for a global integration of the companies' networks and commercial policies'. By contrast, the codeshare agreement is a standard air-transport industry agreement under which Swiss, in addition to selling tickets on Swiss-operated flights, can also sell tickets under its own designator (that is to say, as 'marketing carrier') on flights operated by SAS, and vice versa.

107 As the applicant maintains, without being contradicted by the Commission, there is thus no 'joint pricing' under the codeshare agreement. There is likewise no 'joint network and flight planning' under that agreement –– each carrier is free to schedule its own flights. The codeshare agreement makes no provision for 'joint hub system organisation' –– each carrier operates its own hub according to its own priorities. Lastly, there is no 'single marketing strategy' under the codeshare agreement –– each carrier sells its own tickets through its own channels.

108 The Commission nevertheless submits that the codeshare agreement and the Bilateral Alliance Agreement both form an integral part of the broader contractual relationship underlying the assessment of the ZRH-STO route and are therefore relevant for the applicability of review clause 15.2.

109 Assuming that the codeshare agreement may be considered relevant for the applicability of review clause 15.2, it remains necessary to verify whether that agreement is such as to establish that SAS cannot be regarded as a competitor of Swiss or, at the least, to restrict competition between Swiss and SAS.

110 The Court notes in that regard that the Commission, in the contested decision, does not undertake a concrete analysis of the codeshare agreement and does not even mention elements that might establish that that agreement restricted competition between Swiss and SAS, but limits itself to hypothetical considerations. Thus recital 99 of the contested decision states:

'As to the possible impact of such codeshare agreements on competition on each of the two routes, the Commission considers that these existing codeshare agreements are relevant for the assessment of the merger. Should a similar transaction be notified today, the codeshare agreements between Swiss, SAS and LOT may raise competition concerns and the parties may have to offer commitments to remove those concerns …'

111 Before the Court, the Commission asserts that the set-up of codeshare agreements shows that, in general, the parties exert a limited competitive constraint on each other. It maintains in that regard that, in parallel codeshare agreements, such as in the present case, the two code-sharing airlines are unlikely to accept that one of them sells codeshare seats on the other one's flights at lower fares, in view of the reduction in revenue that would result.

112 The Court finds that, again, those matters are purely speculative and are not the result of a specific analysis of the codeshare agreement in the present case and its effects. Furthermore, as the Commission acknowledges, Swiss and SAS have agreed to accept bookings taken by the other party and the fares charged by the other party for those bookings. Similarly, the applicant submits on this point, without being contradicted by the Commission, that operating carriers frequently offer lower fares for their own-operated flights than they offer for flights operated by the codeshare partner, as they bear the risk of unsold seats, whereas the marketing carrier gains at best a small commission from selling a seat on another carrier's flight.

113 It should further be noted that the matters put forward by the Commission, even if established, are in any event only capable of showing that there is a low level of competition between the marketing carrier and the operating carrier, but not that the effect of the codeshare agreement is to restrict competition between the two companies for flights that they operate themselves. In other words, although the codeshare agreement perhaps gives rise to only a low level of competition for the sale of codeshare tickets, the Commission has, however, put forward nothing that can establish that the effect of that agreement is to reduce competition between the flights operated by each of the two companies. Even though the Commission claims to have found that the prices offered by the operating carrier were almost identical to prices offered by the marketing carrier for codeshare seats on the same flight, the applicant relies, without being contradicted, on price differentiation among flights operated by different carriers on the same day. It is the competition between the flights operated by Swiss and SAS respectively which is more significant in the assessment of whether there is competition between the two airlines.

114 Lastly, the Commission accepted, before the Court, that it had not evaluated in detail the impact of the codeshare agreement between Swiss and SAS on competition between these two companies on the ZRH-STO route. The Commission contends, in that regard, that it was not obliged to examine the matters put forward by the applicant on the ground that the latter had not proved that contractual relationships had changed in such a way as to remove the competition concerns identified in the 2005 Decision. However, an examination of the impact of the codeshare agreement on competition on the route in question was needed precisely to determine whether, and to what extent, that agreement was liable to restrict or remove competition between Swiss and SAS.

115 It follows from the foregoing that, although the codeshare agreement may certainly be taken into account, neither the elements identified in the contested decision, nor even the arguments put forward by the Commission in its pleadings before the Court, justify rejection of the waiver request, so far as concerns the fare commitments relating to the ZRH-STO route.

Third part, alleging that the Commission failed to take account of the fact that competition between Swiss and SAS/LOT constitutes 'long-term market evolution' within the meaning of the first sentence of review clause 15.2

116 The applicant takes issue with the Commission for having failed to consider whether evidence of continued competition between Swiss and SAS/LOT establishes 'long-term market evolution', when that is specifically mentioned as a ground for waiver in the first sentence of review clause 15.2.

117 The applicant submits in this regard that prices on the ZRH-STO and ZRH-WAW routes are significantly lower than those charged in 2005, that passenger numbers on those routes have doubled and that the parties presented evidence that Swiss's prices for Swiss-operated flights are different from those charged by LOT for seats on LOT-operated flights.

118 As a preliminary point, it should be noted (i) that 'long-term market evolution' is a separate ground for waiver, which is specifically mentioned in the first sentence of review clause 15.2, and (ii) that the Commission does not deny that competition between Swiss and SAS/LOT may be regarded as long-term market evolution. That being so, this argument was wrongly rejected, in recital 53 of the contested decision, on the ground that 'given that the preconditions for granting the waiver request are not met, the question of price developments does not need to be discussed in this Decision'. That error is, however, irrelevant since, in recitals 54 to 59 of the contested decision, price developments and the degree of competition were nevertheless discussed 'for the sake of completeness'.

119 In that regard, whilst admitting that the graphs provided by the applicant and Swiss do in fact appear to indicate a certain degree of price differentiation among flights operated by different carriers on the same day, the Commission took the view, in the contested decision, that it nevertheless remained unclear how reliable that analysis was and that further analysis would therefore have to be carried out.

120 As the Commission has argued, it is indeed for the merged entity requesting a waiver of commitments to provide evidence showing that the conditions for waiving the commitments are fulfilled and the Commission cannot be required to carry out a new market investigation for each waiver request. However, the Commission has investigating powers and effective investigative tools and, if it considered that the evidence put forward by the parties was not sufficiently reliable or relevant or that it needed to be supplemented by other information, it was its responsibility to require more specific information or to carry out an investigation in that regard. That is a fortiori the case given that, in its response of 20 November 2015, Lufthansa had already stressed that the Commission could not simply content itself with claiming that 'the actual degree of price competition on the two routes … can be left open'.

121 The parties, relying on the Trustee's conclusions, also argued that the doubling in the number of passengers and the very significant reduction in fares between 2005 and 2014 were evidence of the high level of competition between Swiss and LOT/SAS.

122 In the contested decision, the Commission merely stated in that regard that the parties had not adduced any compelling evidence that those price reductions had been caused by competition between Swiss and LOT and that they could also be attributed to the decline in fuel prices or to the effect of the fare commitments.

123 As has been stated above, the Commission cannot limit itself to demanding compelling evidence –– without, moreover, specifying what that evidence should consist in –– but must establish the inaccuracy of the evidence put forward by the parties, make enquiries or conduct, if necessary, an investigation in order to supplement that evidence or show that it is not conclusive.

124 It should also be noted that the Commission confirmed at the hearing that it was not disputing the applicant's claim that 17 out of 32 fare reductions on the ZRH-STO route and 4 out of 13 such reductions on the ZRH-WAW route were voluntary, that is to say, not required by the remedies.

125 It follows from the foregoing that the Commission failed to fulfil its duty carefully to examine all the relevant information, to make enquiries or to conduct the necessary investigations in order to determine whether there was competition between Swiss and SAS/LOT.

Fifth part, alleging failure to comply with the general merger policy with regard to pricing remedies

126 The applicant maintains that the Commission has ignored the fact that fare commitments are incompatible with its remedies policy as set out in paragraph 18 of the Remedies Notice and confirmed by its practice. It observes that in recent years, moreover, the Commission has routinely rejected fare commitments proposed by the parties.

127 The applicant explains that fare commitments have a potentially twofold distortive effect on competition: first, passengers on benchmark routes are deprived of the benefits of price reductions that Swiss might consider were it not for the additional costs caused by the corresponding price reductions required on the overlap routes, and, second, artificially lower fares on the overlap routes may prevent market entry by a competing airline.

128 The applicant takes issue with the Commission for not evaluating those points but merely noting that the ZRH-STO and ZRH-WAW routes were low-traffic ('thin') routes which no airline had entered in spite of the slot remedies.

129 In that regard, concerning, first, the argument that fare commitments are incompatible with the Commission's remedies policy, the Court reiterates at the outset that the applicant cannot, in the context of these proceedings, challenge the legality of commitments rendered binding by the 2005 Decision, which has become final.

130 Next, as the Commission correctly observes, the Remedies Notice does not exclude fare commitments but points out that such commitments will generally not eliminate competition concerns resulting from horizontal overlaps and that those types of remedies can only exceptionally be accepted if they are supplemented with effective implementation and monitoring mechanisms and if they do not risk leading to distorting effects on competition.

131 Finally, since all concentrations are assessed individually and in the light of the applicable factual and legal circumstances (see, to that effect, judgment of 13 May 2015, *Niki Luftfahrt* v *Commission*, T-162/10, EU:T:2015:283, paragraphs 142 and 144), the fact that commitments have been refused in some, or even most, cases does not prevent them being accepted in a particular situation provided that they serve to resolve the competition problems identified.

132 As regards, secondly, the argument that the fare commitments are liable to create distortions both on the benchmark routes and on the overlap routes, the Court finds that the Commission has put forward nothing capable of refuting that argument, either in the contested decision or before the Court, merely contending that it is speculative. Furthermore, the obligation to pass on to the ZRH-STO and ZRH-WAW routes fare reductions introduced on the benchmark routes could deter third-party airlines from operating on those routes. Far from resolving the market's structural problem which they are supposed to address, the fare commitments might thus instead make their indefinite continuation necessary.

133 However, it is not a question in the present case of assessing the legality of the commitments rendered binding by the 2005 Decision, which has become final, but rather of determining whether the conditions for waiving those commitments are fulfilled.

134 In that regard, the argument concerning distortion of competition, if made out, cannot be taken to entail a substantial market change for the purposes of the first sentence of review clause 15.2, or a change in contractual relationships for the purposes of the second sentence of review clause 15.2, and, more generally, does not establish that the competition problems identified in the 2005 Decision, which underpin the commitments, no longer exist.

135 Nonetheless, although the argument concerning the risk of distortion of competition does not establish that the conditions laid down by review clause 15.2 for a waiver of the commitments are fulfilled, it does, on the other hand, heighten the need for the Commission to undertake a careful and thorough examination of the waiver request and to determine whether the commitments continue to be necessary or appropriate.

Conclusion concerning the first plea

136 It follows from the foregoing that the Commission has not taken into account or carefully examined the arguments concerning the Lufthansa/Brussels Airlines Decision, a change of policy with regard to alliance partners and the existence of competition between Swiss and SAS/LOT.

137 However regrettable those failures may be, they nonetheless cannot be considered sufficient –– in the absence of any change in the contractual relationships between Swiss and LOT, in the light of which the fare commitments were made binding by the 2005 Decision –– to cause the contested decision to be annulled so far as the ZRH-WAW route is concerned.

138 As regards the ZRH-STO route, attention must be drawn not only to the failure to carry out a proper examination of the matters mentioned in paragraph 136 and the termination of the JV Agreement between Lufthansa and SAS, but also to the fact that the Commission (i) did not take into account either the applicant's undertaking also to terminate the Bilateral Alliance Agreement between Lufthansa and SAS or the Trustee's Opinion concluding that there was a substantial market change on the ZRH-STO route and (ii) did not undertake an adequate analysis of the impact of the codeshare agreement on competition between Swiss and SAS. Consequently, it must be found that the Commission made a manifest error of assessment inasmuch as it failed to take into account all the relevant information and that the matters relied on in the contested decision are not capable of justifying the rejection of the waiver request relating to the ZRH-STO route (see, to that effect, judgment of 15 February 2005, *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2005:87, paragraph 39).

139 Accordingly, the contested decision must be annulled in so far as it concerns the ZRH-STO route and there is no need to consider the other pleas and arguments put forward by the applicant. However, those other pleas and arguments must be examined in so far as they relate to the legality of the contested decision as regards the ZRH-WAW route.

Second plea: alleging breach of the principle of good administration

140 The applicant maintains that the Commission has breached its duty to examine carefully and impartially all relevant elements of the case and has therefore breached the principle of good administration referred to in Article 41(1) of the Charter of Fundamental Rights of the European Union.

141 The applicant argues in this regard that the Commission ignored the legal arguments that it put forward and resorted to assumptions and speculation concerning competition on the routes concerned rather than conducting a serious investigation of the facts. In addition, the Commission failed to conduct its own investigation of price developments and the level of competition, or even to engage with the Trustee in a meaningful way, preferring instead to assume that codeshare agreements restricted competition.

142 Lufthansa maintains that the same refusal to undertake a careful examination of its arguments is also apparent from the Commission's persistent repetition of unconvincing legal arguments which Lufthansa had already addressed during the administrative procedure.

143 It must be borne in mind that, under Article 41(1) of the Charter of Fundamental Rights, 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union'.

144 In so far as the applicant complains that the Commission failed to take into account all the elements relevant for substantiating its assessment, that complaint has been examined in the context of the first plea.

145 As regards the complaint that the Commission clearly revealed its bias against seriously considering the waiver request by ignoring the legal arguments put forward by Lufthansa, the mere fact that the Commission disputed and rejected Lufthansa's arguments does not in itself prove that the Commission was biased with regard to the waiver request. Similarly, the fact that the Commission

repeated allegedly unconvincing legal arguments, which Lufthansa considers it had already addressed during the administrative procedure, may rather reflect a difference of assessment but does not demonstrate, as such and on its own, a refusal to examine the waiver request impartially.

146 Nor are there grounds for maintaining that the Commission failed to consider the waiver request at all since, as is clear from paragraphs 14 to 19 above, it addressed a number of requests for information to Lufthansa and held various meetings with it during the administrative procedure.

147 Accordingly, the second plea must be rejected.

Third plea, alleging misuse of powers

148 The applicant maintains that the Commission used the waiver procedure as leverage to force Swiss to terminate a contractual arrangement that had no clear nexus to the transaction. The Commission is seeking to evade the procedures for investigating and sanctioning possible infringements of Article 101 TFEU under Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), with regard to the codeshare agreement between Swiss and LOT concluded in 2007. The applicant submits that it is apparent, in particular from recital 104 of the contested decision, that that codeshare agreement and its potential anticompetitive effects are the main reason why the Commission rejected the waiver request.

149 The applicant submits that the Commission is thus attempting to evade the obligation, first, to adduce actual proof of the alleged anticompetitive effects of Swiss's codeshare agreement and, second, to adopt a decision that would be subject to judicial review. The applicant observes, in that regard, that in February 2011 the Commission opened a proceeding, on its own initiative, against codeshare agreements covering hub-to-hub routes concluded between Lufthansa and Turkish Airlines, and between Brussels Airlines and TAP Air Portugal, but that after investigating those cases as a matter of priority for five and a half years, the Commission had still not reached any conclusion.

150 The Court recalls in this regard that it is settled case-law that a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence to have been taken solely, or at the very least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case (see judgment of 16 April 2013, *Spain and Italy* v *Council*, C-274/11 and C-295/11, EU:C:2013:240, paragraph 33 and the case-law cited).

151 The Court finds that the applicant has not produced objective, relevant and consistent evidence establishing that the Commission had used the waiver procedure as leverage, with the sole or principal aim of forcing Swiss to terminate the codeshare agreement with LOT so as to evade the procedures for investigating and sanctioning infringements of Article 101 TFEU.

152 First of all, the procedure was not instigated by the Commission but rather at the applicant's request.

153 Furthermore, although it is apparent from the file that the Commission takes the view that the codeshare agreement at issue gives rise to competition problems in the present case and that, as follows in particular from recitals 5, 49, 69 and 95 of the contested decision, the main reason for rejection of the waiver request was the maintenance of that agreement or failure to modify it, that nonetheless does not permit the inference that the Commission misused its powers.

154 As has been stated in paragraphs 101 to 103 above, the Commission was justified in taking into account the codeshare agreement between Swiss and LOT in its assessment of the waiver request. That agreement is an integral part of the broader contractual relationship underlying the assessment

of competition on the ZRH-WAW route. The Commission had found in the 2005 Decision that, in view of the series of cooperation agreements entered into with Lufthansa, LOT had little incentive to compete with Swiss. The codeshare agreement is thus likely to be relevant for the purposes of assessing competition on that route, irrespective of whether or not that agreement can ultimately justify rejection of the request.

155 It should also be stated that the Commission did not require the applicant to terminate the codeshare agreement but merely suggested, with a view to facilitating the grant of the waiver, that the parties might terminate the agreement or, at the least, limit it to 'behind and beyond' routes and thereby reduce the degree of cooperation between the merged entity and LOT.

156 Accordingly, the elements put forward by the applicant cannot be held to amount to objective, relevant and consistent evidence of a misuse of powers and the third plea must be rejected.

157 It follows from all the foregoing considerations that the contested decision must be annulled in so far as it concerns the ZRH-STO route and that the action must be dismissed as to the remainder.

Costs

158 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

159 In view of the circumstances of the present case, the Court decides that each party will bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls, in so far as it concerns the Zurich-Stockholm route, Commission Decision C(2016) 4964 final of 25 July 2016 rejecting Deutsche Lufthansa AG's request for a waiver of certain commitments rendered binding by the Commission decision of 4 July 2005 approving the merger in Case COMP/M.3770 –– Lufthansa/Swiss;**

2. **Dismisses the action as to the remainder;**

3. **Orders each party to bear its own costs.**

Berardis Papasavvas Spineanu-Matei

Delivered in open court in Luxembourg on 16 May 2018.

E. Coulon
Registrar

G. Berardis
President

Table of contents

Background to the dispute 1

Decision authorising the concentration between Lufthansa and Swiss International Air Lines Ltd 2

Contested decision 3

Procedure and forms of order sought 5

Law 5

Preliminary observations 6

First plea, alleging application of an incorrect legal standard, manifest errors of assessment and breach of the principles of proportionality and the protection of legitimate expectations 8

First part, alleging application of an incorrect legal standard in the assessment of the waiver request and breach of the principles of proportionality and the protection of legitimate expectations. 8

Second and fourth parts, alleging manifest error of assessment of Lufthansa's alliance agreements in the light of the second sentence of review clause 15.2 and failure on the Commission's part to take into account the change in its policy with respect to the treatment of alliance partners 10

– Preliminary observations 10

– Contractual changes as between Lufthansa and SAS 11

– The Lufthansa/Brussels Airlines Decision and the alleged change in the Commission's policy with regard to the treatment of alliance partners 14

– The codeshare agreement between Swiss and SAS 16

Third part, alleging that the Commission failed to take account of the fact that competition between Swiss and SAS/LOT constitutes 'long-term market evolution' within the meaning of the first sentence of review clause 15.2 18

Fifth part, alleging failure to comply with the general merger policy with regard to pricing remedies . 19

Conclusion concerning the first plea 20

Second plea: alleging breach of the principle of good administration 21

Third plea, alleging misuse of powers 22

Costs 23