EUROPEAN COMMISSION
Competition

CASE AT.40558
CASE AT.40570

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7(2) Regulation (EC) 773/2004

Date: 02/07/2021

EUROPEAN COMMISSION

Brussels, 2.7.2021
C(2021) 4964 final

RYANAIR
Ryanair Dublin Office
Airside Business Park
Swords
Co. Dublin
Ireland

Subject: **Case AT.40558 – Terminals at Warsaw Airport**
Case AT.40570 – PPL/Modlin airport
Commission decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Madam,

(1) I am writing to you in connection with your complaints against Przedsiebiorstwo Panstwowe „Porty Lotnicze" ("PPL") registered under numbers AT.40558 and AT.40570. I regret to inform you that the European Commission (the "Commission") has decided to reject your complaint against PPL, pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.[1]

1. THE COMPLAINT

1.1. Procedure

1.1.1. Main exchanges and meetings in this case

(2) By letter dated 14 September 2017, co-signed with Norwegian Air Shuttle ASA (hereinafter the "First Complaint", registered under number AT.40558), and by letter dated 22 December 2017 (hereinafter the "Second Complaint", registered under number AT.40570), you requested the Commission to launch investigations into PPL's alleged conduct at Warsaw airports, namely Warsaw Chopin Airport ("WAW") and Warsaw Modlin Airport ("WMI") (the First

[1] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

Complaint and the Second Complaint are jointly referred to as "the Complaints").

(3) You provided additional information on both complaints jointly on a number of occasions (detailed in sections 1.5 and 1.6 below). On 2 March 2018, a representative of Warsaw Modlin airport's ("WMI") management met the services of DG Competition in Brussels to provide further clarifications on the Second Complaint.

(4) By letter of 31 October 2018, the Commission informed you of its provisional assessment and its intention to reject your complaints pursuant to Article 7(1) of Regulation (EC) No 773/2004. In response, you made additional observations in your letter of 11 December 2018, which built upon and expanded the allegations made in the Second Complaint.[2]

(5) Following your letter of 11 December 2018, you have provided further clarifications and additional information linked to your initial complaints on several occasions, including during meetings and conference calls with DG Competition.

(6) In particular, on 13 March 2019, you provided further clarifications at a meeting with the services of DG Competition in Brussels, together with a representative of WMI's management. Following this meeting, you provided additional information by letters dated 10 and 23 May 2019, including two witness statements. You also provided additional information in writing on 23 July 2019, 12 August 2019, 27 October 2019 and 8 November 2019.

(7) On 14 November 2019, you held a conference call with the services of DG Competition. On 26 November 2019, you provided further clarifications concerning the Second Complaint. On 13 December 2019, you had another meeting with the services of DG Competition in Brussels. On 19 December 2019, 24 February 2020, 5 October 2020 and 29 March 2021, you provided further clarifications on the Second Complaint.

(8) The clarifications and the additional information you have provided relate to your intitial allegations and do not lead to a different assessment of your complaints than the one expressed by the Commission in its letter letter of 31 October 2018 by which the Commission informed you of its intention to reject your complaints pursuant to Article 7(1) of Regulation (EC) No 773/2004.

1.1.2. The alleged violation of Article 106 TFEU by the Republic of Poland

(9) In your complaints, you alleged, in addition to an infringement of Articles 101 and 102 TFEU by PPL, an infringement of Article 106(1) TFEU, in conjunction with Article 101 or 102 TFEU, by the Republic of Poland. By letter of 31 October 2018, the Commission informed you that it does not intend to conduct an in-depth investigation into your claims concerning the breach of Article 106(1) TFEU, in conjunction with Article 101 or 102 TFEU, by the

---

[2] The time time-limit for submitting observations on the Commission's letter of 31 October 2018 expired four weeks from the date of receipt of that letter. At your request, the Commission extended the deadline to 11 December 2018.

Republic of Poland, as there is only a very limited likelihood of establishing any such alleged infringement. As mentioned in the Commission's letter of 31 October 2018, the complaints based on Article 106 TFEU in conjunction with Articles 101 and/or 102 TFEU, unlike complaints against undertakings, are not subject to the procedure set out in Regulations No 1/2003 and No 773/2004.[3] In particular, the Commission's refusal to act under Article 106 TFEU following the filing of a complaint by an individual against a Member State does not constitute a challengeable act since, the Commission not being obliged to bring proceedings within the meaning of that provision, individuals cannot require it to take a position in a specific sense.[4] In the area covered by Article 106 TFEU, the Commission enjoys a wide discretion, both in relation to the proceedings which it considers necessary to bring and in relation to the means appropriate for that purpose.[5]

1.2. Relevant parties

(10) According to the complaints, PPL is a State-owned undertaking that owns 100% of the airport manager of Warsaw Chopin airport ("WAW"), almost 30% of the airport manager of WMI, and 100% of the airport manager of Radom airport ("RDO").

(11) According to the complaints, PPL controls WMI, in particular through its veto rights over WMI's major investment decisions. The other large shareholders of WMI are the Military Property Agency, an executive agency supervised by the Minister of National Defence, and the region of Mazowieckie. Each of these three shareholders owns approximately one third of the shares.[6]

1.3. Relevant airports

(12) According to the complaints, WAW and WMI are currently the only two airports that serve the catchment area of the Warsaw area. WAW is Poland's largest airport and handled approximately 16 million passengers in 2017, which is the latest figure you have provided. WAW is located close to Warsaw city centre. WAW's maximum capacity is approximately 22 million passengers per year ("mppa"). LOT, the Polish legacy air carrier, uses approximately half of WAW's capacity, according to the information that you provided.

(13) According to the complaints, WAW, which is a coordinated airport within the meaning of the Slot Regulation,[7] is subject to severe capacity constraints.

---

[3] Commission Notice on the handling of complaints, point 6, second indent.

[4] C-141/02 P *Commission* v *max.mobil,*EU:C:2005:98, paragraphs 69 and 70, and T-567/10 *Vivendi* v *Commission*,EU:T:2011:528, paragraph 16.

[5] C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission,*EU:C:1997:71; C-48/90 and C-66/90 *Netherlands and Others* v *Commission,* EU:C:1992:63, paragraph 27; and T-416/13 *Stanleybet*,EU:T:2014:567, para 21.

[6] The region of Mazowieckie: 35,20%, the Military Property Agency: 32,04%, PPL: 28,28%. The remaining 4,48% of shares belong to the municipality of Nowy Dwór Mazowiecki.

[7] Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ L 14, 22.1.1993.

Airlines need to obtain slots to take off or land in a given airport. The Slot coordinator for WAW[8] would have rejected almost 20% of all slot requests for summer 2020. On the other hand, according to the complaints, WAW is subject to significant, ongoing investment projects initiated by PPL and its capacity is expected to increase within a few years.[9]

(14) WMI currently handles approximately 3 million passengers per year. Ryanair is the only airline operating at WMI. WMI is located less than 50 kilometres from Warsaw. According to the complaints, Ryanair intends to increase traffic at WMI in view of the growing demand, but WMI faces capacity constraints. Addressing the capacity constraints at WMI requires expanding the existing terminal. This would enable to increase traffic to 3.5-5 mppa. Further expansion would enable 6 mppa in the medium term, and 12 mppa in the longer term.

(15) According to the complaints, RDO airport is located over 100 kilometres from Warsaw's city centre and currently does not have a motorway or high-speed rail connection to Warsaw. RDO is not yet open to commercial traffic. According to the complaint, RDO would not adequately serve Warsaw but, once it is open after a general refurbishment, it will most likely be considered to be within the same catchment area as WAW and WMI.

(16) According to the complaints, PPL announced that it planned to introduce traffic distribution rules ("TDRs"; see next paragraph) to keep long-haul and connecting flights (such as those operated by LOT) at WAW while other traffic (such as Ryanair's flights) would be allocated to RDO. According to the complaints, future capacity increases at WAW would coincide with the introduction of TDRs at Warsaw airports and therefore benefit LOT.

(17) TDRs distribute air traffic between two or more airports that serve the same urban area. Free access to the market is the underlying principle of European aviation regulation. In principle, air carriers themselves must decide from which airport they offer their services. Regulation (EC) No 1008/2008 allows Member States to regulate the distribution of air traffic between airports to the extent that TDRs satisfy certain criteria, such as notably the fact that airports serve the same city and are served by adequate transport infrastructure, or the fact that the TDRs do not discriminate on the grounds of the air carriers' nationality or identity or by destination.[10] Member States must notify TDRs to the Commission, which verifies that they comply with Regulation (EC) No 1008/2008. As of the date of this decision, TDRs for Warsaw airports have not been yet notified to the Commission.

---

8 ACL International.

9 According to your letter of 2 February 2018, PPL would intend to increase WAW's capacity from 38 to 50 flights per hour.

10 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, OJ L 293, 31.10.2008.

1.4. Relevant markets

(18) According to the complaints, the relevant markets are the (upstream) market for the provision of airport infrastructure services to airlines in the Warsaw area and the (downstream) market for the provision of air transport services to and from the Warsaw area. The complaints allege that PPL is dominant (and has a monopoly) on the upstream market for the provision of airport infrastructure services to airlines at Warsaw.

(19) For the purpose of the assessment of the complaints, the Commission proceeds on the basis of the above definition of the markets and assessment of dominance.

1.5. Allegations regarding WAW (First Complaint)

(20) In the First Complaint, you allege that PPL has abused its "monopoly position" by reallocating Ryanair's flights from "terminal stands" to "remote stands" at WAW. You claim that such reallocation, which was introduced in July 2017, would have caused operational inefficiencies, in particular significant delays caused by longer turnaround times, and would have concerned only low-cost carriers, whereas legacy carriers, such as LOT, would have remained at the "terminal stands".

(21) You explain that PPL would have justified the reallocation of stands based on safety concerns. In particular, PPL would have claimed that the change in stand allocations had the purpose of minimizing the risk resulting from significant vehicle traffic at "terminal stands". However, PPL would have refused to allow airlines to view the safety analysis on the grounds of which the reallocation was enacted. Moreover, by allocating Ryanair's aircraft to those "remote stands", PPL would have breached its own stand allocation rules at WAW.

(22) On 16 October 2017, the services of DG Competition sent you, by e-mail, further questions concerning your allegations. In your response dated 30 October 2017, you clarified that the so-called "terminal stands" also require a bus to transport passengers from the terminal to the aircraft, similarly to the "remote stands". You also claimed that Ryanair's average turnaround time is 49 minutes at "remote stands" versus 45 minutes at "terminal stands", while Ryanair's target turnaround time at WAW is 30 minutes.

(23) By letters dated 2 and 14 February 2018, you made additional observations regarding PPL's alleged abuse of monopoly position at WAW.

(24) First, PPL would have intended to introduce new fuelling rules at WAW, preventing the boarding of the aircraft while it is being fuelled and further extending turnaround times. Although PPL has claimed that such new rules are implemented for safety reasons, you consider that their purpose would be to obstruct low-cost carriers' operations.

(25) Second, PPL would have extended its night curfew since September 2017 by forbidding operations of commercial flights from 11.30 p.m. to 5.30 a.m. This extension would have caused significant damage to low-cost carriers because they had to rearrange their network schedule. You concluded that the reallocation of Ryanair's flight to "remote stands", the new fuelling rules and

the extension of the night curfew frustrate low-cost carriers' ability to operate at WAW and favour LOT.

(26) Following the Commission's letter of 31 October 2018 informing you of its intention to reject the complaint, you had the opportunity to make additional observations. In your letter of 11 December 2018, you stated that you upheld the allegations contained in the First Complaint. However, you did not respond to the preliminary assessment of the First Complaint expressed in the Commission's letter of 31 October 2018 within the prescribed time-limit.

(27) On 10 May 2019, you sent a written statement, in support of the allegation that the rules introduced by PPL frustrate low-cost carriers' ability to operate at WAW and favour LOT. This statement was […]. According to this written statement, in some instances, PPL exerted pressure on WAS to ensure that WAS actively hindered operations of some specific airlines. One example involved PPL allegedly requiring WAS to strictly enforce a minimum turnaround time of 45 minutes at WAW, which would be, in your view, almost twice as long as the turnaround of efficient low-cost carriers.

1.6. Allegations regarding WMI (Second Complaint)

1.6.1. Allegation of infringement of Article 102 TFEU

1.6.1.1. Non-extension of the terminal in WMI

(28) In the Second Complaint, you mainly allege that PPL has abused its dominant position by blocking, through its veto powers as a shareholder of WMI, investments required for the expansion of WMI, in particular for an extension of the terminal at WMI.

(29) By letter dated 2 February 2018, you added further arguments, based on some information extracted from press articles, to substantiate your allegations concerning PPL's overall anticompetitive strategy. In response to the Commission's letter of 31 October 2018 informing you of its intention to reject the complaint, you provided new legal arguments in your observations of 11 December 2018 and in subsequent letters, notably regarding PPL's control over WMI and why the conduct consisting in the alleged blocking of investments would, in your view, constitute an abuse of dominant position.

(30) You allege that, back in 2015, PPL concluded that the best solution to satisfy long-term airport capacity needs in Warsaw on a sustainable basis was further development of WMI. However, after the new government came into power in Poland in November 2015, PPL allegedly changed its strategy. According to your observations, PPL is reportedly going to invest in RDO even though RDO would be less suitable than WMI to serve Warsaw and even though WMI would have the potential to grow. You allege that PPL is also planning to invest in WAW.

(31) According to you, PPL's conduct, namely blocking investments required for the expansion of WMI, is not consistent with the conduct of a rational shareholder and is simply designed to protect WAW and LOT from competition. Therefore, PPL's conduct produces effects on the upstream and downstream relevant markets, restricting the supply of airport infrastructure

services to Ryanair and favouring LOT's passenger transport business, respectively.

(32) In this respect, first, you state that, by blocking investments at WMI through its controlling shareholding while investing at WAW and RDO, PPL is marginalising WMI to the benefit of WAW and RDO, and forecloses WMI in the upstream market for the provision of airport infrastructure services. In your view, PPL's blocking of further investments in WMI is not driven by "a lack of profitability", but by PPL's conflict of interest as both the 100% owner of WAW and a shareholder in WMI. In your view, there is no objective justification for PPL's abusive conduct vis-à-vis WMI, and PPL is willing to forego additional profits from investing in WMI so as to maximise its profits from both WAW and RDO in the longer term.[11]

(33) In support of this argument, you claim that while *"PPL is WMI's 'founding shareholder' – and, as a result, no 'notifiable merger event' was triggered in the present case", "[t]he only reason PPL holds a stake in WMI is to block the airport's growth, and, as a result, significantly weaken its position on the Upstream Market"* for airport infrastructure services. In your view, *"PPL's anticompetitive conduct began with it taking a controlling stake in what was already then likely to become the only other (in addition to WAW) licenced commercial airport in the Upstream Market"*.[12]

(34) Second, you claim that by blocking investments at WMI, PPL also undermines low-cost carriers' operations at Warsaw to the benefit of LOT, thereby anti-competitively leveraging its dominant position onto the downstream market for the provision of air travel services to and from Warsaw. In this respect, you claim that PPL and LOT, which are both State-owned enterprises, are not independent from each other because neither company enjoys autonomy from the Polish government in deciding on strategy, business plans or budget, and because the State can determine their commercial conduct by imposing or facilitating coordination.

(35) In your view, blocking investments at WMI undermines low-cost carriers' operations at Warsaw because WMI is a crucially important player on the market since (a) WMI was designed as a low-cost airport and therefore better suits low-cost carriers' requirements than WAW; and (b) there would be no alternative for low-cost carriers in view of the rules, such as (i) stand re-allocation and fuelling restrictions mentioned in the First Complaint, and (ii) capacity constraints at WAW, since future capacity increase at WAW would coincide with the planned introduction of TDRs to redirect low-cost carriers to RDO.

(36) To support your argument that PPL's conduct of blocking investments at WMI infringes Article 102 TFEU through anti-competitive conduct on the upstream and downstream markets, you refer to four theories of harm, namely: strategic

---

[11] Your letter of 11 December 2018, page 12.

[12] Your memo of 24 February 2020, pages 7-8.

underinvestment,[13] self-preferencing,[14] killer acquisitions and common ownership[15] and the use of regulatory procedures to exclude competitors.[16] In your view, stopping the allegedly anti-competitive conduct requires ordering PPL to vote in favour of capacity expansion at WMI. Moreover, in your view, "*ending PPL's monopoly would most likely lead to significant pro-competitive effects*".[17]

(37) On 10 May 2019, you provided a written statement […] (see paragraph (27) above). According to this written statement, supporting the allegation described in paragraph (30) above, PPL would have concluded at that time, i.e. immediately before 2016, that the best solution to address the capacity constraints at WAW was further development of WMI and that the development of RDO was not a viable alternative. Moreover, according to the written statement, the current Polish government's support for RDO is not based on substantive arguments but is purely due to political factors.

(38) On 8 July 2019, DG Competition asked you to provide further information regarding discussions among WMI's shareholders about the possible extension of WMI. By e-mails of 23 July 2019, 12 August 2019 and 27 October 2019, you explained in essence that, according to PPL, the investment required to expand WMI would not comply with State aid rules as set out in Articles 107 to 109 TFEU. However, you contest the study, ordered by PPL,[18] that concludes that the investment would not comply with the State aid rules. You explain that, according to the region of Mazowieckie, i.e. another shareholder of WMI, such investment would comply with State aid rules.

(39) On 5 October 2020, in an e-mail to DG Competition, you alleged that PPL was obstructing WMI's access to a pre-arranged financing facility necessary for the airport's liquidity being in danger, due to rapid loss of revenues caused by the COVID-19 pandemic's impact on air traffic. You also alleged that PPL refused to discuss with the region of Mazowieckie about a potential disposal of PPL's shareholding. Moreover, you alleged that PPL was publicly discrediting WMI and promoting its own investment in RDO. Among others, as explained in

---

[13] For this theory of harm, you rely on the Commission decisions in case AT.39315 *ENI* and case AT.39316 *Gaz de France*.

[14] For this theory of harm, you rely on, among others, the Commission decision in case AT.39740 *Google Shopping*.

[15] For this theory of harm, you rely on, among others, the Court judgment concerning Philip Morris (judgment of 17 November 1987 in joined cases 142/84 and 156/84 *BAT and Reynolds*, EU:C:1987:490), the Commission decision concerning Gillette (decision of 10 November 1992, Cases No IV/33.440 *Warner-Lambert/Gillette* and No IV/33.486 *BIC/Gillette*), EU merger decisions including case M.7932 *Dow/DuPont*, and the UK decisions concerning *BAA* and *Ryanair/Aer Lingus*.

[16] For this theory of harm, you rely on, among others, the judgment of the Court of Justice of 6 December 2012 in case C-457/10 P *AstraZeneca*, EU:C:2012:770.

[17] Your memo of 24 February 2020, page 8. It is presumed that your statement refers to the upstream market for the provision of airport infrastructure services to airlines in the Warsaw area.

[18] Ryanair's email of 12 August 2019 mentioning a study by Ernst & Young instructed by PPL to conduct due diligence of WMI.

WMI's management board's press statement,[19] PPL was sponsoring press interviews with an economics professor (a chairman of the Supervisory Board at one of PPL's subsidiaries) who was spreading, in WMI's view, false information about WMI's financial situation and was arguing against further investments in WMI.

(40) On 29 March 2021, you provided a press article[20] which, according to you, confirms that PPL continues to obstruct any investments in WMI in the interest of LOT and RDO as well as in the interest of the planned new cental Polish airport ("CPK") near Baranow, around 40 km west of Warsaw.

1.6.1.2. Disclosure of a commercial agreement

(41) In your e-mail of 8 November 2019, you also argued that PPL requested WMI to provide details of a commercial agreement concluded between WMI and Laudamotion in relation to the latter's launch of operation from WMI as reported in the media. The reported operation actually concerns Malta Air even though it is planned to be fulfilled operationally by Laudamotion. This means Malta Air is WMI's customer in this situation.

(42) You alleged that PPL's demand is an example of PPL using its position as WMI's shareholder to obtain commercially sensitive information about WMI, which would be problematic given that PPL would be synonymous with WAW, WMI's direct competitor, and PPL would be closely connected to LOT. However, you confirm that neither Laudamotion nor Malta Air – both Ryanair Group airlines – have entered into any agreement with WMI.

1.6.2. Allegation of infringement of Article 101 TFEU

(43) In the context of the Second Complaint, by letter dated 3 May 2018, you also informed DG Competition of PPL's intention to gain access to Ryanair's agreement with WMI, allegedly in order to disclose it to LOT with the support of the Polish government. From your perspective, this would constitute a potential breach of Article 101 TFEU since this information, if sent to LOT, would reduce strategic uncertainty in the market.

(44) In this respect, you claim that, on 26 April 2018, WMI sent a letter to Ryanair explaining that WMI's shareholders, upon the request of PPL, ordered WMI's management board to undergo a due diligence audit and to request Ryanair's consent to giving the auditor access to the contents of the Airport Service Agreement between WMI and Ryanair. On 8 May 2018, Ryanair responded to WMI that it refused to give permission to share the contents of this agreement and reminded WMI of their obligation to adhere to the confidentiality clause of this same agreement.

(45) Following the Commission's letter of 31 October 2018 informing you of its intention to reject the complaint, you had the opportunity to make additional

---

[19] Cited in the provided press article: "The management of the Modlin airport denies false press publications. What is going on?" of 17 September 2020, published by www.legio24.pl (https://www.legio24.pl/zarzad-lotniska-w-modlinie-zaprzecza-falszywym-publikacj-prasowym-o-co-chodzi/).

[20] https://www.pasazer.com/news/44890/wygaszanie,lotniska,w modlinie html.

observations on this point. In your letter of 11 December 2018, you did not respond to the arguments that the Commission raised regarding this alleged infringement of Article 101 TFEU.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

(46) The Commission is unable to pursue every alleged infringement of EU competition law that is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.[21]

(47) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration whether, based on the information available, it seems likely that further investigation will ultimately result in the finding of an infringement.

(48) Moreover, it is inherent to the complaints procedure that the obligation to substantiate the allegations lies with the complainant, while the Commission retains discretion as to whether to pursue the allegation in the light of its right to set enforcement priorities.[22] In the *EFIM* judgment, the Court of Justice held that *"a complaint must contain precise information about the facts, from which one may infer that there is an infringement of Articles 101 and/or 102 TFEU"*.[23] Furthermore, the Commission is not required, when considering a complaint, to take into account facts that have not been brought to its notice by the complainant.[24]

(49) The Commission may also take into account whether a national court or national competition authority might be well placed to examine the allegations made.

(50) Finally, it should be recalled that the Commission is not obliged to make a final finding as to the existence or non-existence of the alleged infringement and may therefore reject a complaint *"even if it had become persuaded that the practices concerned constituted an infringement"*.[25]

3. ASSESSMENT OF YOUR COMPLAINTS

(51) After an assessment of your submissions, and based on the reasons set out below, the Commission concludes that your submissions do not lead to a different assessment of the complaints compared to the Article 7(1) letter of 31

---

21 OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

22 C-56/12 P *EFIM*,EU:C:2013:575, para. 72; T-712/14 *CEAHR*,EU:T:2017:748, para. 39.

23 C-56/12 P *EFIM*,EU:C:2013:575, para. 71.

24 T-70/15 *Trajektna luka Split*, EU:T:2016:592, para. 63.

25 T-5/93 *Tremblay*,EU:T:1995:12, para. 61; T-114/92 *BEMIM*,EU:T:1995:11, para. 63.

October 2018. Accordingly, the Commission does not intend to conduct an in-depth investigation of this case.

3.1. The likelihood of establishing the existence of an infringement

3.1.1. First Complaint, regarding WAW

(52) In this section, the Commission assesses the First Complaint as described in section 1.5. You seem to allege that PPL's behaviour infringes Article 102(c) TFEU, which prohibits dominant undertakings from applying dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage.

(53) The Court of Justice has held that for Article 102(c) TFEU to apply there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to others.[26]

(54) The Court of Justice has also held that the mere presence of an immediate disadvantage affecting operators who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not mean that competition is distorted or is capable of being distorted. It is only if the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners that the discrimination between trade partners which are in a competitive relationship may be regarded as abusive.[27] The Court of Justice further noted that whether discriminatory behaviour produces or is capable of producing a competitive disadvantage for the purposes of subparagraph (c) of the second paragraph of Article 102 TFEU, it is necessary to examine all the relevant circumstances of the case. [28]

(55) As regards the allegations in the First Complaint of 14 September 2017, given that both "terminal stands" and "remote stands" require buses to transport passengers, the evidence put forward is not sufficient to conclude that the limited additional turnaround time (an average of 49 minutes at "remote stands" versus an average of 45 minutes at "terminal stands", according to you)[29] and the alleged ensuing unquantified increase in costs for Ryanair would amount to the application of dissimilar conditions to equivalent transactions. The evidence in the Commission's possession is not sufficient to conclude that an average turnaround time of 49 minutes is, in practice, longer than for other airlines present at WAW, and consequently if Ryanair is being discriminated by this turnaround time compared to other airlines.

---

[26] C-95/04 P *British Airways v Commission*,EU:C:2007:166, para. 144.

[27] C-525/16 *MEO*,EU:C:2018:270, paras. 26-27.

[28] *MEO*, para. 28.

[29] You submit that Ryanair's target turnaround time at WAW is of 30 minutes.

(56) Similarly, even if the alleged discrimination were to be proven (*quod non*), there is also insufficient evidence to conclude that such discrimination 'produces or is capable of producing a competitive disadvantage' for Ryanair.[30]

(57) Therefore, in this respect, based on the elements in the Commission's possession, the likelihood of establishing an infringement of Article 102 TFEU appears limited. As regards the statement submitted on 10 May 2019 according to which PPL allegedly exerted pressure on WAS to hinder operations of some airlines, for instance by requiring WAS to strictly enforce a minimum turnaround time of 45 minutes at WAW (see paragraph (25)), the Commission wishes to recall that it is entirely permissible for it to assess the probative value of evidence independently[31] and that in any event, such statement, in itself, does not constitute evidence sufficient for the Commission to infer the existence of abusive conduct.

(58) As explained in paragraph (48), the obligation to substantiate the allegations lies with the complainant, while the Commission retains discretion as to whether to pursue the case in the light of enforcement priorities. Moreover, as noted above, you do not explain how the alleged enforcement of a minimum turnaround time of 45 minutes at WAW would constitute a difference in treatment leading to a distortion of competition. Neither do you explain how a minimum turnaround time of 45 minutes would discriminate Ryanair against other airlines operating to/from WAW.

(59) As regards the allegations in the additional submission of 14 February 2018, both the new fuelling rules and the night flying restrictions seem to be applicable to every type of carrier. Therefore there is no specific reason to consider them as an indication of a discriminatory policy. Accordingly, the likelihood of establishing the existence of an infringement of Article 102 TFEU in this regard also appears limited.

(60) In view of the foregoing assessment, the Commission considers that, based on the information that you provided, the likelihood of establishing the existence of an infringement of Article 102 TFEU based on the First Complaint appears limited.

3.1.2. Second Complaint, regarding WMI

(61) In this section, the Commission assesses the Second Complaint as described in section 1.6.

3.1.2.1. Allegation of infringement of Article 102 TFEU (blocking investments in expansion of the terminal in WMI)

(62) In your view, by blocking investments required for the expansion of WMI, PPL would foreclose WMI, thus abusing its dominant position on the market

---

[30] *MEO*, para. 28 and 31.

[31] Case T-515/18 *Fakro v Commission*, EU:T:2020:620, para. 130, Case T-699/14 *Topps Europe v Commission*, EU:T:2017:2, para. 52.

for the provision of airport infrastructure services in the Warsaw area (the upstream market). Moreover, in your view, PPL is also committing an abuse by leveraging its dominant position onto the market for provision of air passenger services to and from Warsaw (the downstream market) to the benefit of LOT.

(63) At the outset, the Commission notes that, if PPL controls WMI as you allege,[32] WMI, WAW and RDO are part of the same undertaking as PPL and therefore alleged exclusionary behaviour on the part of PPL aiming at favouring one airport over another does not, as such, amount to a restriction of competition. Already on this basis, it seems that there is a limited likelihood of finding an infringement regarding the allegation of foreclosure of WMI in the upstream market for the provision of airport infrastructure services.

(64) Nevertheless, the Commission will assess below the four theories of harm presented in your Second Complaint and the supplements as regards both allegations of anti-competitive foreclosure of WMI in the upstream market for the provision of airport infrastructure services and of anti-competitive leveraging of PPL's dominant position onto the downstream market for the provision of air passenger services to and from Warsaw.

(i) Strategic underinvestment

(65) According to you, by blocking investments in WMI, PPL is leveraging its dominant position from the upstream market to the downstream market. In your view, PPL's conduct is similar to the strategic underinvestment practices that the Commission investigated in cases AT.39315 *ENI* and AT.39316 *Gaz de France*. In both these cases, the Commission expressed concerns that refusals to invest in essential upstream infrastructure may amount to an abuse of dominant position. Ultimately, the Commission did not conclude that there were infringements and adopted commitment decisions.

(66) The *ENI* and *Gaz de France* cases are not comparable to the present case, for the reasons outlined below.[33]

(67) First, the Commission considers that for a refusal to invest in an asset to be considered abusive under Article 102 TFEU, this asset would in principle have to be indispensable. Based on the information in the Commission's possession, there are insufficient grounds to conclude that the expansion of WMI airport could be considered indispensable for Ryanair to provide air transport services to and from Warsaw.

(68) The indispensability condition would be met if there were no other viable methods available to Ryanair for serving Warsaw, or if there were technical, legal or even economic obstacles making it impossible or unreasonably difficult for Ryanair to do so.[34] The mere fact that WMI was designed as a

---

[32] Your memo dated 10 May 2019, page 2 ("*PPL's veto over investments necessary to increase WMI's capacity does – in itself – confer control over WMI on PPL*").

[33] Moreover, there were other factors in *ENI* and *Gaz de France* that are not present here, such as the regulatory duty to deal and the fact that customers were ready to co-finance the investment.

[34] C-7/97 *Bronner,* EU:C:1998:569, from paragraph 43.

low-cost airport is not sufficient indication of the existence of indispensability as such.

(69) Based on the information available in the Second Complaint, it seems that you consider that Ryanair cannot operate in WAW due to the discriminatory conduct of PPL at WAW as described in the First Complaint. However, as explained in paragraphs (52) to (60), based on the First Complaint, the information in the Commission's possession is not sufficient to conclude on the existence of such discrimination and therefore the likelihood of establishing the existence of an abuse under Article 102 TFEU in relation to PPL's alleged practice at WAW appears limited.

(70) To the Commission's knowledge, WAW is a "coordinated" airport, i.e. an airport where airlines' demand for slots exceeds the airport's slot capacity for significant periods. In a coordinated airport, all airlines must have a slot authorised by a Slot Coordinator in order to land or take off at the airport[35]. However, the fact that WAW is a coordinated airport does not mean as such that Ryanair cannot obtain slots to land or take off at WAW. In this respect, you have not shown that Ryanair could not obtain such slots at WAW.

(71) Moreover, according to the Second Complaint, it can be expected that capacity at WAW will expand in the coming years. You allege that this capacity increase would benefit LOT because TDRs would require low-cost carriers to move to RDO. However, these TDRs have not been adopted yet and will have to be approved by the Commission pursuant to the criteria set out in Regulation (EC) No 1008/2008, such as notably the fact that airports serve the same city and are served by adequate transport infrastructure, and the requirement that the TDRs do not discriminate among carriers. The Second Complaint does not explain how these rules, yet to be adopted, would favour LOT and it would be premature to speculate on their impact before knowing the actual rules that will apply (if TDRs are adopted at all).

(72) In those circumstances, also the fact that WAW would allegedly be less suitable than WMI for Ryanair does not seem sufficient to indicate the existence of WMI's indispensability as such.

(73) Within the coming years, Ryanair may also have the possibility to operate at the new RDO airport, which is currently undergoing refurbishment. The Commission notes that, while RDO is located further to Warsaw than WMI, it is not located further than some other airports used by Ryanair to serve capitals of other Member States (e.g. Paris Beauvais airport or Stockholm Skavsta airport). Furthermore, the fact that RDO would allegedly be less suitable for Ryanair than WMI, notably due its longer distance from the city of Warsaw also does not seem sufficient to indicate that WMI could be considered as indispensabile as such.

(74) Secondly, in the present case, you allege that PPL is leveraging its dominant position on the upstream market to benefit LOT on the downstream market. However, there is insufficient evidence to suggest that PPL's conduct is

---

[35] WAW is a coordinated airport within the meaning of Regulation (EEC) No 95/93 on common rules for the allocation of slots at EU airports, OJ L 014 22.1.1993, p. 1.

intended to or even has the effect of benefiting LOT, nor is there any evidence that PPL is trying to protect LOT's downstream profits to the detriment of its own profits on the upstream market.

(75) Moreover, the Second Complaint does not provide sufficient indication that the Polish State has imposed or facilitated coordination between PPL and LOT regarding the matters raised in the Second Complaint. The fact that the CEOs of PPL and LOT hold interviews and press conferences together, and the fact that they view "Turkish Airlines as an example of successful collaboration between State-owned entities" is not sufficient to support the argument that PPL's and LOT's conducts are coordinated.[36]

(76) Thirdly, the Second Complaint does not provide sufficient indications that PPL's conduct would be different from that of a rational shareholder. In essence, you object to the fact that PPL invests in WAW and RDO rather than WMI. You also argue that PPL is not investing in WMI in order to maximise its profits from both WAW and RDO in the longer term (see paragraph (32)).

(77) However, the information that you have provided does not suggest that investing in WAW and RDO rather than WMI does not have an objective justification. On the contrary, in view of PPL's allegations regarding the incompatibility of the investment in WMI with State aid rules (see paragraph (38)), it cannot be excluded that PPL's conduct may be objectively justified.[37] Moreover, PPL's alleged aim to maximise its profits in the longer term and in aggregate – that is, taking account of the three airports that it allegedly controls in the WAW area – does not appear to be anti-competitive as such. You do not explain why PPL would have the obligation, under EU competition law, to increase investments and potentially profits at one of the three airports that it purportedly controls, to the detriment of the long-term aggregate profit deriving from all three airports. Moreover, the fact that one shareholder may find it attractive to invest in WMI – on private investor terms – does not mean that another shareholder should find it attractive as well, or that such shareholder has a duty to invest.

(78) Moreover, you have not provided any evidence of PPL's involvement in the CPK project, i.e. the creation of a new Polish central airport located near Baranow, 40 km from Warsaw, which is in its initial, preliminary planning phase.

(79) Indeed the Commission notes that there can be other plausible reasons for PLL's decision not to invest in WMI. Among several reasons, there can be concerns about the profitability of further investments. In this regard, the Commission notes that currently WMI strongly depends on one customer, i.e. Ryanair, which uses almost all of the airport's capacity and additionally benefits from significant discounts on airport charges.[38]

---

[36] Your submissions of 10 May 2019 and 19 December 2019.

[37] At the time of adopting the present decision, the required investment has not been yet notified to the Commission under State aid rules, so it would be premature to take a view on this point at this stage.

[38] The schedule of charges, introduced at WMI in 2013, provides for discounts on passenger fees depending on the total number of passengers (to and from WMI) served by a company in a given year. The passenger

(80) As regards the written statement, […], which you submitted on 10 May 2019, […] before 2016 PPL was of the view that the development of WMI was the best solution and that the development of RDO was not a viable alternative (see paragraph (37)), the Commission notes that PPL's alleged change of strategy does not appear anti-competitive as such and may be explained by other reasons.

(ii) Self-preferencing

(81) You argue that PPL's alleged leveraging of its dominant position on the upstream market, with the objective of giving an unfair competitive advantage to LOT, which operates on the downstream market, is similar to the conduct found abusive under Article 102 TFEU in case AT.39740 *Google Shopping*. In that case, the Commission found that Google had abused its dominance as a search engine (i.e. on the upstream market) by giving an illegal advantage to another Google product, its comparison shopping service (i.e. on the downstream market).

(82) The Commission's preliminary assessment, however, is that the present case is not comparable to the *Google Shopping* case, for the reasons outlined below.

(83) First, there is insufficient evidence to suggest that PPL and LOT belong to a single vertically integrated undertaking or that they act in a manner which is coordinated by the state. In particular, the claim that PPL and LOT have one decision-making centre is not supported by sufficient evidence. The fact that both firms are owned by the State and that both ultimately report to the Prime Minister even if it were to be proven (*quod non*), is not sufficient to show that a single decision-making centre actually exercises effective control over both firms. While the Commission notes that both companies are wholly owned by the State Treasury, it is equally true that PPL is supervised by the Minister of Transport while LOT is supervised by the Minister of State Assets. Additionally, LOT is part of the Polish Aviation Group, while PPL is not.[39]

(84) Secondly, as discussed in paragraph (74), there is insufficient evidence to suggest that PPL's conduct on the upstream market is intended to or even has an effect of benefiting LOT on the downstream market, or is coordinated by PPL and LOT.

---

standard fee is set up at PLN 40 (i.e. around EUR 9). However, if a company serves between 50 001 – 100 000 passengers per year (total to and from WMI) in a given year, it pays PLN 36 per each departing passenger. If it serves between 100 001 – 300 000, it pays PLN 32 etc. The highest discount is granted to companies serving above 3 million passengers at WMI. In such a case, the passenger fee is reduced to PLN 5 (around EUR. 1.15). To the Commission's understanding, based on public traffic statistics for WMI, the only one customer providing scheduled regular passenger connections to/from WMI, i.e. Ryanair Group, has paid (at least since 2016) no more than PLN 6 per departing passenger at WMI (around EUR 1.36).

[39] The Commission takes a similar view in part B, point II, point 1.7 of the Commission Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, Official Journal C 95, 16.04.2008, pages 1- 48.

(iii) Killer acquisition/common ownership

(85) In your view, PPL's conduct also involves many elements of established theories of harm concerning "killer acquisitions" and "common ownership". In this respect, you refer to cases in which the EU Courts or the Commission found that (1) using a shareholding to influence the commercial strategy of a competitor and weakening its competitive position may amount to an abuse of dominance[40] and that (2) *"common shareholding of competitors reduces incentives to compete, as the benefits of competing aggressively to one firm come at the expense of firms that belong to the same investors' portfolio"*.[41]

(86) As for the "killer acquisition" theory of harm, to the Commission's knowledge and as you stated, PPL was a founding shareholder of WMI.[42] Moreover, PPL seems to have had joint control of WMI since its founding, as you note. Indeed, PPL's participation in the creation of WMI (i.e. another competitor on the market for the provision of the upstream airport services), as a founding shareholder, could rather be seen as pro-competitive. By contrast, a "killer acquisition" would rather concern a scenario where competitor A already exists and exerts competition on competitor B, but is then acquired by competitor B.

(87) As for the "common ownership" theory of harm, you do not explain how the behaviour would infringe Article 102 TFEU on this basis. Your only argument in this respect is that "*if it were not for PPL's ownership of both WAW and WMI, PPL's anti-competitive leveraging strategy would be significantly more difficult (if not impossible) to implement*". However, this is not sufficient to show or even to define a "common ownership" infringement, and indeed it suggests that the alleged infringement is "anti-competitive leveraging" rather than the common ownership in itself. The cursory references to the *Dow/DuPont* merger case, the UK *Ryanair/Aer Lingus* case, and the UK *BAA* case – a UK "market investigation" case which is not comparable to the EU antitrust rules – are insufficient to support the argument that common shareholding in itself is an infringement in the present situation.

(iv) Use of regulatory procedures to exclude competitors

(88) In your complaint, you rely on the *AstraZeneca* judgment in which the Court of Justice found that using a regulatory procedure to exclude competitors is abusive under Article 102 TFEU unless there is a legitimate reason or objective justification.[43]

(89) However, your allegations do not refer to PPL participating in any regulatory procedure. In other words, you do not explain why the *AstraZeneca* case would be relevant for the present case. Moreover, as explained above, there can be

---

[40] See footnote 3.

[41] Commission case M.7932 *Dow/DuPont*, Annex 5, cited in your memo of 24 February 2020, page 8.

[42] Your memo of 24 February 2020, page 8. PPL's control of WMI was never subject to Polish or EU merger control.

[43] C-457/10 P *AstraZeneca*, EU:C:2012:770.

objective justifications for PPL's unwillingness to make further investments in WMI (see paragraphs (76) to (80)).

3.1.2.2. Allegation of infringement of Article 102 TFEU (disclosure of a commercial agreement)

(90) You also allege that the request from PPL to WMI to provide details of a commercial agreement concluded between WMI and Laudamotion would be an example of PPL abusing its position as WMI's shareholder.

(91) However, as you mention, neither Laudamotion nor Malta Air, both Ryanair Group airlines, have entered into any agreement with WMI. Therefore, the likelihood of establishing the existence of an infringement of Article 102 TFEU based on these facts appears limited.

3.1.2.3. Conclusion on the Second Complaint

(92) In view of the foregoing assessment, the likelihood of establishing the existence of infringements of Article102 TFEU based on the Second Complaint appears limited.

3.2. National courts and authorities appear to be well-placed to handle the matters raised

(93) In view of the local nature of the market (provision of airport management services in the catchment area of Warsaw) and alleged anti-competitive conduct you are referring to, the Polish Competition Authority (Urząd Ochrony Konkurencji i Konsumentów) would be well-placed to address the concerns that you have raised.

(94) National competition authorities have parallel competence with the European Commission to enforce the EU competition rules and are well-placed to do so in matters relating to their national territory, regardless of the fact that the conduct at issue may affect other national markets because there is a substantial flow of passenger traffic on intra-EU flights to and from WMI or WAW.

(95) In your e-mail of 26 November 2019, you allege that the Polish Competition Authority is not independent of political control and, given the politically sensitive nature of this case, is not well-placed to assess the complaints against PPL. However, you have not provided any indication supporting this allegation.

(96) Furthermore, the Commission's refusal to open an investigation does not have the consequence of depriving Articles 101 and 102 TFEU of any practical effect,[44] in particular considering that it is open to complainants to bring

[44] See case T-480/15, *Agria Polska and Others v Commission,* EU:T:2017:339, paragraph 83 and case C-373/17, *Agria Polska and Others v Commission*, EU:C:2018:756, from paragraphs 76.

actions before the national courts in order to obtain compliance with Articles 101 and 102 TFEU and to assert their rights under those provisions.[45]

4. CONCLUSION

(97) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that, also in the light of your submissions following the Commission's letter of 31 October 2018,there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the complaints pursuant to Article 7(2) of Regulation (EC) No 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

(98) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

(99) The Commission reserves the right to send a copy of this Decision to PPL. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.[46] If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform:[…]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to PPL.

(100) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

Margrethe VESTAGER
Executive Vice-President

---

[45] See case T-480/15, *Agria Polska and Others v Commission,* EU:T:2017:339, paragraphs 80 and 84, and case C-373/17, *Agria Polska and Others v Commission*, EU:C:2018:756, paragraph 83.

[46] See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.