

**FOR PUBLICATION**

**DECISION**

In the administrative proceedings

against

Deutsche Lufthansa AG, Cologne

- party concerned -

Authorised representative

Rechtsanwälte Wilmer, Cutler & Pickering, Quack  
Friedrichstrasse 95  
10117 Berlin

on account of the abuse of a dominant position under Section 19 of the ARC, the 9<sup>th</sup> Decision Division of the Bundeskartellamt decided the following on 18 February 2002:

1. Under Section 32 of the ARC, in conjunction with Section 19 (1), (4) sentence 1 no. 1 of the ARC Deutsche Lufthansa AG, Cologne (Lufthansa) is prohibited from demanding a price (including passenger charges) for a one-way ticket per passenger on the Frankfurt-Berlin/Tegel route (in both directions) which is not at least 35 € above that of its competitor Germania Fluggesellschaft mbH, Berlin (Germania) on this route (one

way, including passenger charges). So far as Lufthansa and/or Germania offer a ticket for an outward and return flight (RT), half of the RT price is to be taken as the price for a one-way journey.

If Germania raises its price for a one-way ticket including passenger charges from currently 99 € Lufthansa will nonetheless not have to demand a price which is higher than 134 € (one-way, including passenger charges). Lufthansa's obligation to demand higher prices than Germania on the said route is no longer applicable if and so long as Germania demands a price (one-way, including passenger charges) of 134 € or more.

2. The obligation under 1. does not apply to Lufthansa prices which are subject to restrictions such as the absence of a re-booking possibility and/or a minimum stay (at least 2 days or Sunday rule) and/or the restriction of flights to weekends.
3. This decision is valid for a period of 2 years from its issuance (Section 36 (2) 1 of the German Law on Administrative Proceedings, "Verwaltungsverfahrensgesetz, VwVfG").
4. The Bundeskastellamt reserves the right to revoke this decision (Section 36 (2) 3 of the VwVfG).
5. The immediate enforcement of this decision is ordered in compliance with Section 65 (1) and (2) of the ARC, in conjunction with Section 64 (1) 2 of the ARC.
6. A fee will be set separately.

## **R e a s o n s :**

### **A.**

1. According to a petition filed by Germania, this airline started operating scheduled flights between Frankfurt and Berlin-Tegel, which were initially offered at 99.00 € for a one-way, flexible economy ticket, without substantial restrictions (including passenger charges).

2. An outward and return flight was to cost 198 €. Lufthansa reacted to this offer by introducing new cheap tariffs to supplement its fully-flexible RT tariffs (round trip, outward and return journey) in the economy class on the Berlin-Frankfurt route of then 485 €. On 9 November 2001 Lufthansa in turn submitted its two one-way tariffs on the Berlin-Frankfurt route (88 €) and Frankfurt-Berlin route (66 €) to the Federal Office of Freight Transport in Cologne (TGL) (tariff group for air traffic), which, with charges added, amounted to a total price of 200 € or 100 € for a one-way journey.

On 1 January 2002 Lufthansa replaced its tariffs averaging 100 € per journey with a new tariff (M-Fly-OW, i.e. Economy Flight One-Way). Accordingly a Berlin to Frankfurt flight now costs 105.11 € (including passenger charges) and a Frankfurt to Berlin flight 105.31 €.

Currently an outward and return flight with Lufthansa at 210.42 € is only obtainable by booking an outward and return flight separately and not as a RT ticket. Both tariffs can be booked without the typical restrictions with which flexible business and economy tariffs are differentiated from budget tariffs, which specially serve to achieve effective capacity utilization. Such restrictions are:

- advanced booking period,
- Minimum stay or Sunday rule (a Sunday between outward and return journey) or restriction of budget flights to Saturdays/Sundays
- no rebooking possibility (see annex p. 321).

Instead Lufthansa has placed only marginal restrictions on these tariffs, making them suitable for business travellers as well:

- Outward and return flights can only be booked separately,
- the cost of unused tickets cannot be reimbursed,
- Rebookings are only possible up to departure of the booked flight,
- A charge of 22 € is made for each rebooking (see annex, p. 293).

These restrictions were imposed by Lufthansa based on the price conditions set by Germania. Germania applies the same restrictions, but in addition a RT ticket (outward and return journey together) is also bookable. Neither the necessary booking of two one-way flights instead of an outward and return flight in Lufthansa's case nor the other conditions specified make the flights offered by both providers unsuitable for business

travellers. By its own account Germania's own product is also targeted at business travellers (see annex p. 308) which account for almost three-quarters of all air passengers on this route. The fact that the cost of unused tickets is not reimbursed only insignificantly affects business travellers on account of the rebooking possibilities. So far as business travellers consider the necessity to rebook, they will compare the newly introduced M-Fly-OW-Tariff with Lufthansa's normal, fully flexible Economy Tariff (currently: 439 € + 49.42 € passenger charges = 488.42 € as RT Tariff, meaning one-way a round half = 244 €) and weigh the rebooking charge of 22 € against the price advantage. Compared with this price of 244 € the price advantage of the M-Fly-OW-Tariff of 105 € currently amounts to at least 139 € for a one-way route. Only someone who rebooks a flight at least seven times before departure flies cheaper with the normal, fully-flexible Economy Ticket than with the M-Fly-OW-Tariff.

The argument presented by Lufthansa that the new M-Fly-OW-tariffs are not fully-flexible and thus only have at the most a marginal affect on the market for German domestic flights for time-sensitive business travellers (see annex p. 299) is therefore incorrect. The choice of the normal Economy Tariff instead of M-Fly-OW tariff would only be cheaper in the case of completely atypical flight travel patterns; the M-Fly-OW tariff is normally flexible enough for every business traveller to book. To get a price saving of at least 139 € the business traveller only has to

- wait for a few "mouse clicks" until the return as well as the one-way ticket is issued
- if the deadline is exceeded have the ticket rebooked before departure against a charge of 22 €,
- in the worst case book a new ticket for an average of 105.21 €.

As he does not get a RT ticket anyhow he still saves around 34 €, even if a rebooking is not possible during the time available, if he simply lets the ticket expire and has a new one issued.

In announcing the new 100 € tariffs, ([News-Service@Lufthansa.com](mailto:News-Service@Lufthansa.com) annex p. 8, Lufthansa also explicitly advertised them for use by business travellers flying economy class. "Anyone combining two one-way tickets can now fly to and from Berlin or Frankfurt for only DM 379.14 (193.86 Euros) without any time limits and with the usual Lufthansa board service, cheaper than ever. The new tariff, which is only available on Lufthansa direct flights between Berlin and Frankfurt, is not bound to any advance booking periods or minimum stay condition. Rebookings are possible against a charge

of 22 €. The passenger also receives the usual bonus miles available under the Lufthansa Miles and More frequent flyer programme. On the Berlin – Frankfurt route (and in the other direction) Lufthansa operates 14 flights in each direction on work days, at almost hourly intervals and 12 frequencies between Frankfurt and Berlin on Saturdays and Sundays (annex p. 8)”.

It is clear from this that the 100 € tariff like Lufthansa’s M-Fly-OW-tariff introduced later was introduced especially for business travellers, who are also targeted by Germania. “The usual mileage bonuses” are also an indication of this because many business travellers do not pay for the flights themselves and are therefore more interested in collecting miles than in lower flight prices.

Lufthansa argues that the new M-Fly-OW tariffs are also conducive to “capacity and yield management” (see annex, p. 99). Effective capacity management by winning additional passengers who would not have flown at normal tariffs, normally requires restrictions such as advanced booking periods, minimum stay conditions and the absence of rebooking facilities. This merely prevents a shift in demand from the higher to lower tariff classes, such as in the case of Lufthansa’s budget tariffs but not in the case of the M-Fly-OW-tariff (see annex, p. 321; this only lists tariffs for the Frankfurt-Berlin route (without passenger charges), which amount to 13.11 € or 36.31 €, together 49.42 €.

2. On 12 November 2001, as a result of Lufthansa’s price reduction to 100 € for a flight between Berlin and Frankfurt, Germania reduced its original tariff of 99 € to 55 € (including passenger charges). The principle reason for this was that at a price difference of only 1 € there was no more incentive for customers to fly with Germania instead of Lufthansa. Here the advantages which Lufthansa offer its customers in the form of additional services such as onboard service, the use of its lounges, mileage bonuses for its Miles & More frequent flyer programme as well as 14 flight frequencies on workdays compared with 4 flight pairs daily with Germania are too great. However, according to the cost and revenue accounting figures which it submitted to the Decision Division (in this respect to be treated as business secrets) Germania did not achieve the break-even point with the reduced tariff . This is the reason why it raised the price back to 99 € at the beginning of 2002. At the same time Germania submitted to the Decision Division figures on its seat load factor and the profitability of these flights before and after the price rise. Accordingly

in December 2001 an average of (...) passengers a week booked a flight with Germania. After the increase from 55 € to 99 € it was only [...] passengers a week (level as of 14.01.02). This signifies a 39 per cent fall (see Germania's letter of 17.01.2002, excerpts from the attached annexes, excluding business secrets, pages 207 – 210 of the annex). If January 15 and 16, 2002 are included in the comparison, the fall in sales amounts to an average of ( ) passengers per week (fall of 37 per cent). Lufthansa's booking figures rose in the first three calendar weeks from(...) to (...) (see annex, p. 346), i.e. in comparison to those of Germania Lufthansa's booking figures remained largely constant in January 2002 compared with December 2001.

Germania announced that for economic reasons it would not be able to continue operations on this route in the long term if Lufthansa were to continue with massive price reductions (p. 207 f.)

As of 1.1.2002, at the same time that Germania raised its prices, Lufthansa also raised its prices to 105.11 € (Berlin-Frankfurt) and 105.31 € (Frankfurt-Berlin) and is thus on average 6.21 € (12.15 DM) per return flight above Germania's price of 99 €.

3. The introduction of a new tariff, which in terms of conditions practically corresponded with the normal, full-flexible Economy Tariff for an outward and return flight between Berlin and Frankfurt, represents a price reduction from previously 485 € to 200 € (including passenger charges), i.e. of 58.7 %. For rebookings Lufthansa, like Germania, demands a 22 € fee, although it normally rebooks flexible tickets free of charge. As an exception to its other tariffs on German domestic routes in the case of the M-Fly-OW ticket the passenger fee is included in the calculation of the travel agencies' commission.
4. As a reaction to Germania's entry to the market Lufthansa offers the new M-Fly-OW-Tariff of initially 100 €, now 105.21 € for a one-way flight only on the Frankfurt-Berlin route. This flight price is not available on all other German domestic routes. On a comparable route like Berlin-Munich, e.g. where it stands in competition with Deutsche BA, Lufthansa still demands 441 € for a RT flight in the Economy Class (including charges, see Lufthansa-InfoFlyway of 13.11.01, see annex, pages 18 – 21) i.e. more than double the new tariff on the Frankfurt-Berlin route. On 1 January 2002 Lufthansa carried out an overall price increase in Economy Class tariffs (Frankfurt-Berlin RT Economy Class: from 435 to 439 € excl. passenger charges, see annex, page 321).

5. By introducing a M-Fly-OW-Tariff of initially 100 € Lufthansa not only adjusted to Germania's price levels but practically undercut Germania's price of 99 €. The Lufthansa price contains services which Germania does not offer on this route:

a) Lufthansa customers receive onboard catering. In its statement of 3 February 2002 Lufthansa quoted catering costs of (...) € for its passengers flying economy class. In order to examine the effects on competition of the M-Fly-OW-Tariff consideration needs to be taken of the booking patterns of customers, because the decisive factor for the survival of the new competitive alternative is whether sufficient passengers are prepared to book Germania (instead of Lufthansa). Additional services included in the Lufthansa tariff such as the Frequent Flyer Programme and the higher number of flight connections offered therefore have to be evaluated from the perspective of the passengers and not, as Lufthansa claims, according to the additional costs for these services. Consequently attention should not be focused on catering costs in terms of profitability analysis but on the pecuniary benefit of catering services from the perspective of the passenger. To the knowledge of the Decision Division passengers in the economy class receive a drink and newspapers/magazines. If one assumes that business travellers are also prepared to purchase these themselves at the airport before they board a Germania aircraft, at least 2 € for a drink and 1 € for a newspaper should be calculated for this.

b) Lufthansa customers participating in the Miles and More frequent flier programme receive a bonus of 1000 miles for every German domestic flight in the economy class. For every flight at the new tariff of 100 € Lufthansa awarded "at least 500 miles" (see annex, pages 13, 30). Apparently Lufthansa's mileage bonuses exceed this for flights at 105 €. The Decision Division assumes a mileage bonus of 500 miles for a one-way flight at M-Fly-OW-tariff and a mileage requirement of 20,000 miles for a domestic RT flight to the value of 488 €. This award is granted after a maximum of 40 flights at M-Fly-OW-Tariff. The monetary reward in return for the passenger thus amounts to around 12 € per flight.

It is not the actual costs per mileage bonus ensuing to Lufthansa which are important because the passenger simply compares Lufthansa's offer and the services rendered or pecuniary benefits, which influence his willingness to pay. Lufthansa's costs of providing these services do not influence his decision (see short report by Prof. Dr. Herbert Baum, Institute of Transport Economics, Cologne University: Der monetäre Wert von Angebotsunterschieden im Luftverkehr – Das Beispiel Deutsche Lufthansa

– Germania (The Monetary Value of Differences in Offer in Air Traffic – The Deutsche Lufthansa – Germania example), February 2002, annex, p. 282 ff, 286).

Lufthansa's Frequent Flyer Programme is particularly attractive for business travellers, who do not pay for the flights themselves, because the mileage bonuses are booked onto the customer's private account and in contrast to the treatment of all other perks under tax law are not individually taxable. Instead Lufthansa pays a flat rate of tax for all members of its Miles and More Programme.

c) Lufthansa offers 14 outward and return flights per day (frequencies) on the Frankfurt-Berlin route on workdays, Germania only 4. The fact that DLH offers three times as many flights is another strong incentive for business travellers and also leisure travellers to fly with DLH and not Germania. This is the result of a study comparing the main selection criteria of business and leisure travellers (maximal number of points: 10):

<b>Criterion</b>	<b>Leisure travellers</b>	<b>Business travellers</b>
price	3.9	2.1
Convenient flight schedules	3.2	4.5
Frequent flyer programme	1.5	2.0
Standing of airline	1.5	1.5

(P. Ostowski, T.V.O'Brien, Predicting Customer Loyalty for Airline Passengers. Dept of Marketing. Northern Illinois University, 1991).

A study of the British Consumers' Association comes to the conclusion that "...the most important factor influencing carrier choice is the schedule offered by an airline. For the business traveller the ability to miss one flight and book onto the next is an important one. This allows for meeting overruns and schedule changes while allowing a full-fare ticket to be altered without additional cost. However, this power can only be exercised if there are a significant number of flights in any one day by the chosen airline. This skews the choice of the business traveller toward the airline with the most dense and regular service. This makes the job of the new entrant an even more difficult one".

(Consumers' Association, London: Airline competition – a long haul for the consumer, 1997, p.10, see p. 254 ff. of annex).

This study also includes the result of a questionnaire among 5250 business travellers worldwide about the importance of factors in the choice of an airline (p. 258 of annex). Out of 10 possible points the following were awarded:

<b>Factor</b>	<b>Points Index</b>
Flight schedule	8.27
Safety	8.03
Punctuality	7.22
Comfort, leg room	6.84
Efficient check-in	6.79
Frequent flyer programme	6.59
Cabin staff	6.38
Free choice of seat	6.33
Cheapest price available	5.54
Use of lounge	5.45
On-board meals/drinks	5.28

As a charter airline offering scheduled flights for the first time, Germania took second place to Lufthansa in fulfilling at least five of the 11 most important selection criteria of business travellers (flight schedule/frequency, comfort and leg room, frequent flyer programme, lounges and catering). It was considered to be of equal standard in the case of four criteria (safety, punctuality, choice of seat, check-in). According to the study the only competition parameters left for it to attract passengers in competition with Lufthansa are its cabin staff and its low flight price. In the scale of preferences of business travellers (see above table) both rank at the lower end of the index scale anyway. If Lufthansa also takes away its price advantage Germania has no chance of competing for business travellers in the long term.

A questionnaire conducted among corporate travel agencies and travel agencies by the US Department of Justice, DoJ as part of an examination of the alliance agreements between Delta Airlines/Swissair/Sabena/Austrian Airlines has shown that “(those guidelines) require a difference in fare ... before the one-stop alternative is preferred, with many corporations requiring up to 25 % or more. This is not surprising

given the value of employees' time, especially those that are dispatched to Europe ... " (Docket OST 95 618, annex folder, annex 3).

Lufthansa flights take off from Berlin or Frankfurt between 7.25 h and 20.00 h at almost hourly intervals. Out of [...] mio. Lufthansa domestic flight passengers [...] mio., i.e. [...] % booked fully flexible tariffs in the last business year 2000/01 and can therefore be categorized as time-sensitive business travellers. Business travellers will also take Lufthansa's high frequency density into consideration as a factor in their choice of airline if this is a domestic flight. In the case of flights taking off at hourly intervals a time-saving of at least one hour can generally be gained by choosing Lufthansa instead of Germania. If one were now to take the price of a German domestic flight of 485 € (Lufthansa Frankfurt – Berlin RT Economy class) and calculate in a surcharge of 25 per cent, which business travellers are prepared to pay for time flexibility, one could, with a time-saving of an hour on a one-way route, estimate a surcharge of up to 60 € as a basis, which business travellers are prepared to pay for more time flexibility on German domestic flights. Even based on a price of 210 € for an outward and return flight (current M-Fly-OW-Tariff) Lufthansa's price would still have to be 52.50 € above Germania's price to compensate for time-saving advantages as a result of greater frequency intensity. How Lufthansa itself evaluates the benefits of its time saving for business travellers is clear from the introduction of a minimum stay regulation for its BRTFLEX Economy-Tariff of 520 DM on 1 February 2000 (renamed BRT1M, subject to two days minimum stay). As a consequence this tariff could no longer be used by business travellers which have to depart and return the same day. They had to opt for the HFLEX tariff for 850 DM, which meant a price rise of 330 DM (168 €).

Prof Dr Baum comes to a comparable result in his brief report on the monetary value of differences in offer between Lufthansa and Germania. From the advantage of 14 outward and return flights (frequencies) per working day in the case of Lufthansa compared with 4 frequencies in the case of Germania he calculates a time-saving for Lufthansa passengers of on average 1 hour 5 minutes and evaluates this advantage at 25 € per one-way flight (p.282 ff., 284 f. of the annex).

d) In addition Lufthansa has further advantages:

- Frequent fliers with status miles can use Lufthansa lounges at both airports.

- Through its subsidiary Start Lufthansa has excellent access to travel agencies. In addition it is significantly involved in the Amadeus reservation system (Annex, p. 317). In terms of bookability of its flight offer Lufthansa is superior to competitors with limited sales opportunities such as Germania. This is shown, for example, by Germania's total lack of any significant distribution channel such as L'Tur (Annex, p. 211 to 246).
- Frankfurt airport is Lufthansa's hub. In 2000 [...] per cent of Lufthansa's paying customers on the Frankfurt – Berlin route were transit passengers. For Airlines such as Germania, which only carry O&D passengers (origin: Frankfurt, destination: Berlin) it is therefore more difficult to reach profitable utilisation rates on this route than for Lufthansa which operates this route as part of its network.
- Lufthansa has an extensive network of German, European and international flight connections which has been further extended through its membership in the Star Alliance. Before Germania's market entry, Deutsche BA was Lufthansa's only competitor in the German domestic air traffic market. All other airlines of any significance either cooperate with Lufthansa or have meanwhile become Lufthansa affiliates, as in the case of Eurowings.
- In terms of reputation among business travellers Lufthansa enjoys an enormous advantage over Germania which so far has only offered charter flights.
- Lufthansa's aircraft seats offer more comfort and legroom.
- Lufthansa has established customer relations with companies over several decades: Almost 90 per cent of the German top 100 companies and almost half of all Western European top 500 companies use the business travel management services of the Lufthansa subsidiary AirPlus. In addition Lufthansa has tied business travellers from many companies through so-called "company promotion models" ("*Firmenfördermodelle*", cf. excerpts from Lufthansa Corporate Flyway, annex folder, Annex 6).

Considering these together with Lufthansa's other advantages (catering, frequent flier programme, frequency density), Lufthansa's flight price must exceed that of Germania considerably in order to represent a comparable offer in terms of price-performance ratio. Despite all the problems which arise in trying to express Lufthansa's additional services in monetary terms, and allowing for an appropriate

security margin, the Decision Division is convinced that a minimum price difference of € 35 is necessary.

6. Irrespective of the (open) question whether, on balance, Lufthansa made profits or losses on the Berlin-Frankfurt route in 2001, its new budget tariff of € 105 does not cover its average costs per paying customer.

a) A single flight between Frankfurt and Berlin (both directions – vv) at an average price of € 105.21 after deduction of passenger fees amounting to an average sum of € 24.71 (Annex, page 293) yields an income of € 80.50 (DM 157.44) for Lufthansa. The commission fee amounting to [...] per cent is calculated by Lufthansa on the basis of the flight price including passenger fees; it amounts to € [...] (DM [...]). After deduction of 16 % VAT (€ [...] or DM [...]) Lufthansa's remaining proceeds per flight and paying customer amount to € [...] (DM [...]).

b) Lufthansa's so-called "route results calculation" ("*Streckenergebnisrechnung*", SER) for 2000 (Annex, page 100-103, the most recent SER for 2001 is not yet available) shows total costs of DM [...] (line „Vollkosten onb“, Annex, page 102). Of these, DM [...] were accounted for by variable costs (sum of lines "BAK TTL" and "FAK TTL", Annex, page 102). After deduction of passenger fees (line "Fluggastgebühren": DM [...] million) for 2000 on this route with [...] paying passengers (line "Zg. TTL credited", Annex, page 100) the average costs per paying customer are DM [...] (€ [...]). In its route results calculation Lufthansa itself states its direct costs per paying customer as DM [...] (line "dir kst/Zg", Annex, page 103).

In 2000 these average figures were based on a seat load factor of [...] %. An increase of this load factor by 1 % requires a passenger increase by [...] paying customers/year and, ceteris paribus, results in a reduction of the average costs per paying customer by € [...] (DM [...]).

Lufthansa's normal, flexible economy tariff is calculated in such a way that it "subsidises" Lufthansa's budget tariffs which, due to their restrictive conditions, serve to improve utilisation by attracting leisure travellers. To these customers particularly the price is relevant which therefore has to be kept at a low level. Without the M-Fly-OW tariff the majority of business travellers using it would use the normal economy tariff. This is another reason why, in view of the price difference vis-à-vis the normal economy tariff, the M-Fly-OW tariff cannot cover the average costs per paying customer. After all,

the normal, flexible economy and business tariffs are the main source of revenue for every airline with flexible yield management, just as for Lufthansa.

7. By letter of 16 November 2001 the Decision Division gave Lufthansa an opportunity to either comment on the abuse accusation or discontinue the abuse. By letter of 21 January 2002 it informed Lufthansa of its intention to prohibit the conduct objected to (Annex, p. 75 ff, 149 ff). By letters of 23 November 2001, 3 February 2002 and 15 February 2002 Lufthansa commented on this (Annex, p. 98 ff, 292 ff, 343 ff). On 23 January 2002 a meeting with Lufthansa took place at the Bundeskartellamt during which measures to stop the abuse of a dominant position alleged by the Bundeskartellamt were discussed (Annex, p. 192 ff). The Decision Division rejected a settlement proposed by Lufthansa since in its view this would not have removed the alleged abuse (Annex, page 205 f.)

By facsimile of 30 January 2002 Lufthansa declared its agreement to a decision without oral hearing (Section 56 (3) ARC) (Annex, p. 225).

## **B.**

By charging flight tariffs which are not at least € 35 above the price charged by Germania at comparable conditions, Lufthansa abuses its dominant position on the Berlin-Frankfurt route by restricting Germania's opportunity to compete, thus substantially affecting competition in the market concerned without any objective justification (Section 19 (1), (4) sentence 1 no.1 ARC).

1. Flights between Frankfurt and Berlin constitute a separate product market. Time-sensitive business travellers in any case, which are mainly affected by Lufthansa's conduct in question, cannot substitute air transport by other means of transport such as car or rail (cf. Federal Court of Justice, decision of 22 July 1999, WuW/E DE/R 375, 376 "Flugpreisspaltung" (flight price discrimination)). Even if rail transport were taken into account, the market volume, which most recently amounted to [...] paying passengers (Lufthansa being the sole supplier), would merely increase by clearly less than 100,000 passengers who, according to information provided by DB AG on 17 January 2001, used first-class "Sprinter" train services between Berlin and Frankfurt (number of passengers travelling in second class: clearly less than 300,000; the exact numbers are

DB AG's business secrets, cf. folder "business secrets" which cannot be made available to Lufthansa). Since Germania currently conveys not more than 10 per cent of all passengers using flights between Frankfurt and Berlin, Lufthansa's overall market share - with a market volume increased to [...] million and a share of flight passengers of merely [...] % - is still [...] %. In view of its superior resources in comparison to Germania, Lufthansa is still dominant on this flight route today within the meaning of Section 19 (2) no. 1 of the ARC. In terms of passengers conveyed, Lufthansa's 2000 share in the overall German domestic air traffic market was about [...] % . Lufthansa is thus dominant also from this point of view (Bundeskartellamt decision of 19 September 2001, WuW/E DE-V 483 "Lufthansa/Eurowings").

2. In the Decision Division's view, Lufthansa's reaction to Germania's market entry on the Frankfurt-Berlin route, i.e. the introduction of the € 100 tariff and the M-Fly-OW tariff, constitutes a cut-price predatory behaviour. This cut price is intended and suitable to impede Germania's opportunities to compete and to force it from this route.

a) The term 'predatory behaviour' refers to aggressive market behaviour (e.g. price dumping, capacity increase, supply extension) by dominant companies for the purpose of eliminating or disciplining competitors or deterring them from entering into the market.

Predatory competition as a rule requires market dominance associated with great financial strength. For the dominant company it is a rational strategy to squeeze new entrants out of the market, discipline existing competitors or deter third companies from entering the market (immediately or in future). Generally predatory pricing occurs where companies temporarily forgo possible gains or accept losses which are subsequently (over)compensated once the new entrant has left the market (recoupment, price reversal rule). The main problem in establishing whether a predatory strategy exists is to draw the line between normal, admissible competitive behaviour (meeting the competition) and inadmissible exertion of market power or abuse of a dominant position.

In view of the positive effects of market entries on competition and consumers the US Antitrust Division, for example, is careful to ensure that market entries are not prevented by anti-competitive behaviour on the part of the market leader. Predation is particularly likely to occur in the air traffic sector (cf.: Predation in the Airline Industry. Remarks by Roger W. Fones, Chief Transportation, Energy, and Agricultural Section,

Antitrust Division, U.S. Department of Justice, Before the American Bar Association, Forum on Air and Space Law, Seattle, Washington, June 2, 1997, p. 1, 27).<sup>1</sup>

Recently, mainly low-cost carriers offering no-frills services have been the victims of predatory competition, particularly when, as new entrants, they threatened to eliminate so-called hub premiums, i.e. advantages accruing to the dominant company by operating a network (hub and spoke system). Since flight customers have so far mainly profited from the liberalisation of air traffic through the emergence of such low-cost suppliers, there is a substantial competitive interest in such airlines successfully entering the market.

- b) Predatory competition is covered by Section 19 (4) no. 1 of the ARC. Cut prices and low price strategies pursued by dominant companies are readily suitable for impeding third companies' opportunities to compete (cf. Langen/Schultz, KartR (9<sup>th</sup> ed.) Section 19, para. 147). In fact, against the background of high barriers to entry, such strategies can be successfully pursued by financially strong companies (cf. Möschel in Immenga/ Mestmäcker, 3<sup>rd</sup> ed., para. 122 on Section 19 of the ARC). However Section 19 of the ARC does not prohibit any kind of mixed calculation or price competition which may also result in losses incurred by dominant companies (Langen/Schult, loc. cit.). Since Section 19 of the ARC is meant to limit the scope of action of dominant companies if this cannot be ensured any more due to a lack of competitors (as is the case with Lufthansa on the Frankfurt- Berlin route) or lack of effective competition, only an overall appraisal of the conduct in question can reveal whether an abuse within the meaning of Section 19 of the ARC is the case. Here it should be noted that, in principle, the purpose of abuse control under competition law is to protect competition rather than individual suppliers. This, however, does not exclude the possibility that under certain circumstances the protection of both may coincide.
- c) Lufthansa's tariff of € 100 or € 105.21 impedes Germania's opportunities to compete while Germania's market entry has challenged Lufthansa's monopoly position on the Frankfurt-Berlin route. Lufthansa's reaction is seriously threatening Germania's chances to permanently hold its ground on this route. The setting of a flight price of € 105.21 combined with the additional advantages this tariff offers to flight passengers

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<sup>1</sup> Fones, p.21:...the structure of the airline industry is conducive to successful predation strategies...).

means that Germaniavia's prices are undercut by at least € 35 and that possible losses are accepted. With a flight price of € 105.21 and after deduction of VAT, fees and commission, Lufthansa yields € [...] or DM [...]. Its total costs per paying customer, however, amount to DM [...] (€ [...]), i.e. this price falls well short of the average costs per paying customer (see above, part A, item 6). 6.) In the competition for business travellers Lufthansa uses a frequent flyer programme while Germaniavia has nothing to counter this incentive effect with. In addition Lufthansa introduced the € 100 or € 105.21 tariffs only and specifically on this route and even adapted its tariff conditions to those of Germaniavia, thus deviating from its own system (introduction of a rebooking fee of € 22: no reimbursement for unused tickets). As a low-cost carrier which so far has not offered any regular scheduled flight services or additional services and which has only a third of the frequencies and no frequent flyer programme, Germaniavia can only survive in the market through lower prices (on the function of price as key marketing instrument in the electricity sector cf.: Munich Higher Regional Court, decision of 22 November 2001 – Kart 1/00 – “Stadtwerke Bad Tölz GmbH ./L. LkartB Bayern”, UA p. 26 f.).

With its flight price of € 105.21 Lufthansa is purposely creating an additional barrier for Germaniavia and other newcomers intending to take up air services on German domestic routes. The only rational explanation for this pricing strategy is that it is an attempt to force Germaniavia from this route and to recoup resulting losses at a later stage by discontinuing this price tariff and resorting to previous ones. Furthermore and at the same time Lufthansa's strategy is sending a signal to other market participants deterring them from entering the market. New airlines - if they decide to enter the market at all – must expect such a price reaction on the part of Lufthansa and will thus have to calculate considerably higher launching costs or losses.

3. Such conduct by a dominant company is aimed at and suitable for squeezing competitors out of the market.
  - a) The impairment of Germaniavia's opportunities to compete has considerable effects on competition in the market for scheduled flights between Berlin and Frankfurt. After Eurowings' retreat, Lufthansa again held a monopoly position in this market. If it continues its price strategy, Germaniavia is likely to disappear from this route as well. If an established monopolist successfully prevents follow-up competition from

a newcomer, this constitutes a substantial impediment of competition in the entire market concerned (cf. also Langen/Schultz, Section 19, para. 135 f.).

b) With a price of € 105.21 for a one-way ticket and after deduction of VAT, fees and commissions Lufthansa merely yields € [...] or DM [...] and thus substantially undercuts its average total costs of DM [...] per paying customer. This indicates (incidentally also according to European law) an abuse of its dominant position if this price is part of an overall strategy aimed at eliminating competitors (cf. ECJ, 03.07.1991 „AKZO/Kommission“, Slg. 1991 I, 3359, 3455 para. 71 f.; ECJ, 14.11.1996 „Tetra Pak/Kommission“, Slg. 1996 I, 5987; Langen/Dirksen, Art. 82 EC, para. 181 f.). The Decision Division believes that Lufthansa is pursuing such a strategy. Since, as a rule, the inner motive of the acting person cannot be proven in legally relevant terms, a sufficient criterion for assuming a predatory intention must be that the measure chosen is in principle suitable to result in a predatory effect and that the objective circumstances compel the conclusion that this measure is specifically aimed against the competitor which is to be squeezed out of the market. These preconditions are fulfilled in the present case:

- Lufthansa introduced the new one-way tariffs only on the route which the new entrant Germania included in its flight schedule. In addition its conditions are aimed at the same passengers (business travellers).
- Lufthansa's price reduction to the level of the tariff originally calculated by Germania (and claimed by Germania to be cost covering), i.e. € 99, while continuing to offer the same on-board service as before as well as bonus miles, de facto constitutes a substantial undercutting of Germania's flight price. By offering this tariff Lufthansa accepts substantial losses, based on the average costs per paying customer. Moreover the reduction of the normal economy tariff does not serve to improve the load factor by acquiring additional customers as part of yield management because this is already achieved through a number of budget tariffs with restrictive conditions. As the new budget tariff is offered on terms which are also suitable for business travellers – such as the fully flexible economy tariff which is still available – it does not serve the purpose of controlling the load factor or improving revenue. It is to be expected that at least some of the flight passengers who previously booked the normal (full) economy tariff will now choose the new tariff, which will worsen the revenue situation.

- Lufthansa's introduction of the new budget price is a well-aimed reaction to the competitive initiative taken by Germanía. Not only the timing but also the scope of this reaction is clear evidence of this as it is limited to the Berlin-Frankfurt route while the existing tariff structure is maintained on all other domestic routes.
- By nominally adopting a competitive price or by exceeding it only slightly a competitor can also be forced from the market. Being an airline not known for offering scheduled flight services Germanía can only win customers via its prices. Even though it cannot be ruled out that the low price also attracts new customers who would not have bought tickets at the tariffs offered so far, it has to be realistically assumed that Germanía, in order to obtain an economically viable seat load factor, basically has to win customers who have so far flown with Lufthansa. By offering a price only slightly deviating in nominal terms, also price-conscious customers are deterred from changing. In this respect it is irrelevant whether (nominally) adopting the competitive price alone results in predation. Lufthansa's offer, with the additional services it includes, de facto clearly undercuts the competitive offer. It is therefore very unlikely that Germanía will be able on a permanent basis to lure customers away from Lufthansa to the extent required for sustainable cost recovery. Without this prospect of cost recovery a competitor is unlikely to survive in the market after the launch phase.

Germanía's booking figures, which after the reintroduction of the original price of € 99 dropped by almost 40 per cent (Annex, p. 207-210, 333-342), confirm the likelihood of a predatory effect at almost equal prices.

- In addition, by its own account, Lufthansa provides a relatively small contingency for the € 100 or € 105 tariff (Lufthansa's brief of 15 February 2002, Annex, p. 346). Even though, in view of Germanía's clearly smaller seat capacity, this contingency amounting to just under [...] per cent of Lufthansa's capacity on this route is suitable to appreciably reduce Germanía's capacity utilisation rate, Lufthansa could still increase the predatory effect anytime by extending the contingency. It would then, however, have to accept a further decrease in proceeds.

- Lufthansa used the same massive price reduction strategy after the budget airline Go-fly had started operating on the London/Stansted – Munich route and after Ryanair’s start on the London/Stansted – Frankfurt and Hamburg routes (Proceedings by the EU Commission: Ref: IV/37829 and IV/37998). On these routes Lufthansa also reacted to the entry of the low-cost carriers by reducing its flight prices, combined with capacity extensions, and by adapting its flight schedules to those of its competitors. On 29 October 1998 Go-fly announced that it would start operating budget flights between London/Stansted and Munich (3 daily flights; lowest price for an outward and return flight: GBP 58). Shortly afterwards Lufthansa applied for slots for three daily flights on this route and started operating its own flights one week after Go-fly had made its announcement and two days before Go-fly actually started its flight operations. Lufthansa’s lowest flight price was GBP 55. When Go-fly subsequently introduced a special tariff of GBP 38, Lufthansa reacted with a promotion ticket priced GBP 40 (without restricting the number of seats offered at this tariff). Only when Go-fly returned to its original tariff of GBP 58, Lufthansa again charged at least GBP 55 per flight. For its winter flight schedule Lufthansa reduced its lowest tariff to GBP 29 after Go-fly had lowered its price to GBP 28. After Go-fly had discontinued its flights to Munich in March 2000 due to serious losses, Lufthansa raised its regular flight price for the promotion ticket from GBP 55 to GBP 129.
- On the Munich-Frankfurt route Lufthansa deliberately reduced its prices in the business and economy class after the entry of Deutsche BA on 26 February 1998. When Deutsche BA exited the market on 11 March 1998 Lufthansa raised its prices again step by step on a continual basis.
- The price charged by Lufthansa is also clearly below the level which is analogous to the competitive price for German domestic flights which has developed on routes flown by Lufthansa in competition with the only remaining competitor, Deutsche BA. The price for servicing the Berlin – Munich route can be considered in comparison since it roughly corresponds to the Berlin – Frankfurt route in terms of distance. On this route Lufthansa charges € 441 for an economy-class return ticket (Annex, p. 18 f.) which clearly more than doubles its new (cut) price on the Berlin – Frankfurt route.

- c) There is no objective justification for Deutsche Lufthansa's low price strategy. In the process of weighing up the interests of the participating companies Lufthansa and Germania, the objective of the law, i.e. to ensure freedom of competition, is of major importance (Langen/Schultz, loc.cit., marginal note 138 ff.). By means of its pricing strategy Lufthansa pursues the aim of not losing any customers to Germania as well as preventing an elimination of its monopoly position and the permanent establishment of a new supplier on this route. Germania's interest is to use free capacities by providing a new domestic German flight connection and to create a new offer in the lower price segment on a route which has so far been structured monopolistically and where low prices have so far only been available as "(super-) budget tariffs" under very restrictive conditions. Neither Lufthansa's entrepreneurial goal to maintain its unique position in the market nor the special significance of this route for its Frankfurt hub outweigh a new supplier's interest in taking up a new flight service. Long-term protection of competitive structures means that in the case of market dominance there are still opportunities for a revival of competition and the markets continue to be open to new entries. Lufthansa's present low price strategy not only jeopardises Germania's further existence on the Frankfurt-Berlin route, but also, through its deterrent effect on third parties, the general prospects for additional competition emerging on domestic German routes. In an overall appraisal of all circumstances and taking into account the ARC's objective of ensuring freedom of competition, the weighing up of interests which has to be undertaken turns out to be to the disadvantage of Lufthansa.
4. A minimum price interval in the amount of € 35 is established in para. 1 of the operative provisions within the framework of exercising due discretion. This is a proportionate measure particularly since it is based on a cautious evaluation of the monetary value of the differences between the two airlines' flight offers. It is to be expected that if this minimum price interval is observed the predatory effect will drop to an uncritical level corresponding to the normal competitive pressure. At the same time paragraph 1 sentences 3 and 4 of the operative provisions ensure that despite the price interval requirement Germania will not have a protective wall enabling it to raise its flight price on this route without any competitive pressure after the decision

has come into effect. Since according to its own statement Germania can reach the break-even point in competition at a price of € 99, the competitive interest in a minimum interval lessens with increasing prices charged by Germania. The volume of each price increase reduces the distance between Germania's price and Lufthansa's price for flights under the same conditions because Lufthansa's price for a flight under the same conditions does not have to exceed € 134. In view of Lufthansa's abuse through hindrance the decision is thus both necessary and appropriate.

### C.

1. In accordance with Section 36 (2) 1 of the VwVfG (German law on administrative proceedings) the provision's period of validity is limited to 2 years. This is due to the fact that on the one hand competition on the Frankfurt-Berlin/Tegel air traffic route can only be protected by providing the currently sole competitor Germania with the possibility to establish itself in the market permanently and effectively by means of the minimum price interval requirement. On the other hand, however, once the new competitor has established itself in the market and the predatory effect has thus increasingly been weakened, there will be no need to maintain the price interval requirement any longer.

It has to be noted that since November 2001 Germania has been active as a "newcomer" on the route mentioned above which had previously been flown exclusively by Lufthansa. From the statement of reasons for the Decision Division's decision in the merger control proceedings B 9 – 62100-U-147/00 (WuW/E DE-V 483 Lufthansa/Eurowings) it has already been known to Lufthansa as a former participating party that in the view of the Decision Division a "newcomer" to the domestic German air traffic market will only be provided with the possibility to establish itself in the market effectively and permanently in circumstances such as in the present case if protection of competition over several years is stipulated and enforced. The Decision Division bases this assumption on information provided by the German Aerospace Centre (DLR), Cologne, which had compiled the relevant data on behalf of the Decision Division within the context of an expert opinion regarding the B 9 – 62100-U-147/00 proceedings mentioned above. Lufthansa has been informed of this expert opinion in the course of the proceedings mentioned above so that a further explanation is not necessary. It is

particularly significant in this context that also in the opinion of the DLR protection of competition limited to several years is necessary in cases such as the present one in order to be able to effectively protect competition in the domestic German air traffic market. The Decision Division follows this view.

Conversely, however, the requirement of limited protection of competition means it would be disproportionate to oblige Lufthansa to observe the stipulated price interval requirement for an unlimited period of time. It is to be expected that after a certain period of time Germanair will have established itself on the route in question by building up customer loyalty, gaining recognition, making operational procedures more efficient and optimising other competition factors so that protection against predatory competition which is to be achieved by means of the present decision will no longer be necessary, at least not in this form. Against this background and at least from the present point of view an unlimited obligation imposed on Lufthansa to observe a price interval would not be necessary and would therefore have been a disproportionate measure to the disadvantage of Lufthansa. Thus the time limit within the meaning of Section 36 (2) 1 of the VwVfG is a means to moderate the effects of the imposed price interval obligation to the advantage of Lufthansa and thus fulfils the requirements of proportionality and lawfulness of the decision.

As to the length of a time limit, the DLR's opinion mentioned above generally assumes a three-year period of protection. In the above B 9 – 62100-U-147/00 proceedings the Decision Division also started from this assumption. In the present case it has to be taken into account, however, that Germanair has already been active on this route for about four months and therefore already possesses a certain market share.

Furthermore Germanair has already been able to influence certain competition factors to its advantage although it still has to be considered a “newcomer”. A time limit of two years thus appears to be appropriate against the background of a comparatively long-lasting commitment by Lufthansa to observe the price interval requirement.

2. With regard to the reservation of withdrawal within the meaning of Section 36 (2) no. 3 of the VwVfG it has to be stated first of all that on the whole the present decision not only results in an immediate negative effect to the disadvantage of Lufthansa, but also at least indirectly in a positive effect to the advantage of Germanair. If Lufthansa observes the stipulated price interval this will noticeably improve Germanair's competitive situation as compared to the time before the decision was issued. In competing with Lufthansa on this route Germanair is no longer exposed to the

overpowering price pressure exerted by Lufthansa so far. The present decision is thus an administrative act with third-party effect or double effect (cf. e.g. Kopp/Ramsauer, Kommentar zum VwVfG, 7<sup>th</sup> edition, Munich, 2000, Section 49 VwVfG, marginal note 1, Section 48 VwVfG, marginal note 68 ff., 72).

Due to the fast and profound changes which, as experience has shown, can occur in the air traffic market it cannot generally be excluded at this point that it could become necessary in the future to withdraw this decision. However, a withdrawal of a decision - also of a favourable one - can only be considered under certain preconditions which are conclusively listed in Section 49 (2) of the VwVfG (thus also in Kopp/Ramsauer, loc.cit., Section 49 of the VwVfG, marginal note 26). Although these preconditions include subsequent changes of the facts which are relevant for the decision (Section 49 (2) sentence 1 no. 3 of the VwVfG) the possibility to withdraw a decision is subject to the restrictive precondition that without the withdrawal public interest would actually be at risk (cf. Kopp/Ramsauer, loc.cit., Section 49 of the VwVfG, marginal note 48). At the moment it cannot be assessed with any certainty whether a sufficiently concrete risk to public interest can be established in each case in which the Decision Division perceives an objective necessity for withdrawal of the decision in question, possibly also in order to regulate the matter differently by means of a new decision. Therefore, at least theoretically it cannot be excluded that market conditions can change profoundly at short notice on the Berlin/Tegel – Frankfurt route or in the entire domestic German air traffic market so that the restriction of Lufthansa's scope of action here imposed would no longer be adequate. If in this case the Decision Division were only able to resort to the reason for withdrawal under Section 49 (2) sentence 1 no.3 of the VwVfG there would be the threat of a delay due to a possible legal dispute with Germania as indirect beneficiary of the decision about the factual preconditions of this reason for withdrawal. The sole possibility of resorting to Section 49 (2) sentence 1 no.3 of the VwVfG for a withdrawal of the decision therefore appears to be too narrow for reasons of proportionality vis-à-vis Lufthansa.

Section 36 (2) of the VwVfG provides the Decision Division with the possibility to issue a reservation of withdrawal in the case of a discretionary decision, such as the one under Section 32 of the ARC in the present case. As a rule a reservation of withdrawal is definitely admissible in such cases. The Decision Division considers the reservation of withdrawal in the present case to be necessary in exercising due discretion, not solely in order to meet the requirements of competition – and also Lufthansa's requirements – for

an adequate and fast reaction by the Decision Division in the case of changed circumstances (also circumstances of the type described above under Section 49 (2) sentence 1 no. 3 of the VwVfG) without having to resort to Section 49 (2) sentence 1 no. 3 of the VwVfG. In addition to this the Decision Division assumes that the reservation of withdrawal will turn out to be favourable for Lufthansa above all as the withdrawal of the decision, which would easily be possible due to the reservation, would involve the elimination of the price interval requirement. Lufthansa would thus be treated more favourably than without an express reservation of withdrawal by the Decision Division. The effects of the decision which Lufthansa considers to be unfavourable will thus be reduced. On the other hand, against the background that a legal and administrative practice to the disadvantage of Germania does not (yet) exist, it seems to be proportionate and reasonable if a withdrawal of the decision, which is at least indirectly favourable, is reserved. In this context the Decision Division is also fully aware that the reservation of withdrawal also includes the possibility of a partial withdrawal of the decision, e.g. of the stipulated time limit (cf. e.g. Kopp/Ramsauer, loc.cit., Section 36 no. 23 f. of the VwFfG) and that this constitutes a negative effect of the reservation of withdrawal to the disadvantage of Lufthansa. However, against the background of the above considerations this appears to be reasonable and proportionate, particularly because in an overall appraisal the reservation's favourable effect to the advantage of Lufthansa outweighs its negative effect.

3. Finally it should be noted that a combination of various ancillary provisions within the meaning of Section 36 (2) of the VwVfG – such as a time limit and a reservation of withdrawal – are definitely admissible within the context of a decision provided that these are unopposed as in the present case (cf. Kopp/Ramsauer, loc.cit., Section 36 of the VwVfG, marginal note 11).

#### **D.**

The order of immediate enforcement of this decision is admissible in compliance with Section 65 (1) and (2) of the ARC, in conjunction with Section 64 (1) 2 of the ARC. The order of immediate enforcement of the decision is required by the public interest. This public interest exceeds the interest which justifies the order as such. This is the result of weighing up the aspects in favour of immediate enforcement against Lufthansa's interests.

In weighing up the interests of the parties concerned the Decision Division firstly takes into account that it is to be concluded from the wording of Section 65(3) sentence 1 no. 3 of the ARC that the Act provides the competition authority with greater scope in the area of competition law to order immediate enforcement than is provided by Section 80(2) no. 4 of the Rules of the Administrative Courts (“Verwaltungsgerichtsordnung”, VWGO). As Section 65(3) sentence 1 no. 3 of the ARC states the party concerned (in this case Lufthansa) must accept disadvantages arising from an order of immediate enforcement required by the public interest to such an extent where the order “would result ... in undue hardship” (cf. e.g. Kollmorgen in Langen/Bunte, Kommentar zum deutschen und europäischen Kartellrecht, volume 1, 9<sup>th</sup> edition, Neuwied, 2001, Section 65 ARC, marginal note 4).

Secondly, the Decision Division is aware that this process of weighing up interests is not guided by a general principle stating that in the area of competition law the public interest in maintaining competition always overrides the interests of the companies concerned (opinion shared by Kollmorgen in Langen/Bunte, loc.cit., Article 65 ARC, marginal note 7). In weighing up the interests of the parties concerned it must in fact be noted that in accordance with the wording of the Act the suspensive effect is the rule in cases covered by Section 65(1) whereas immediate enforcement is the exception (cf. the references to case-law by Schmidt in Immenga/Mestmäcker, Kommentar zum GWB, 3rd edition, Munich, 2001, Section 65 ARC, marginal note 7). The assumption of an overriding public interest thus involves strict requirements. A particular public interest is required which is directed at the future; immediate enforcement must be the specific object of this public interest and it must be of considerable importance (cf. the references to case-law by Schmidt in Immenga/Mestmäcker, loc.cit., Section 65 ARC, marginal note 6). In particular there must be reasons which justify an enforcement of the order prior to final legal review (opinion shared by Kollmorgen in Langen/Bunte, loc.cit., Section 65 ARC, marginal note 5 with further references to case-law).

In this context it is acknowledged that a public interest which is aimed at maintaining competitive structures can justify an order of immediate enforcement. According to the relevant case-law an order of immediate enforcement can generally be justified by threats to a “sound” market structure within the meaning of the ARC (cf. the references to case-law by Kollmorgen in Langen/Bunte, loc.cit., Section 65 ARC, marginal note 5). The Bundeskartellamt’s task, pursuant to the ARC, to keep markets open can thus override a company’s interest in pursuing its market strategies (cf. Schmidt in Immenga/Mestmäcker, loc.cit., Section 65 ARC, marginal note 7).

Against this background the public interest in immediate enforcement of the decision in the present case arises from the importance of this measure for the workings of the economy. The order to immediately enforce the decision is necessary in order to effectively enforce the public interest in maintaining the newly developed competition. As stated above, Germania's booking figures have considerably dropped since Lufthansa started its abusive pricing practices. For this reason Germania is incurring economic losses due to maintaining flight operations which are currently not cost-effective. These are not typical start-up losses which can generally arise when a newcomer enters a certain market, but permanent ones which are due to Lufthansa's abusive conduct. The fact that Germania has so far been able to stay in the market in spite of the small price difference is because it continues to operate in view of the present proceedings and in the expectation that Lufthansa will be prohibited from continuing its abusive conduct by a decision which will be immediately enforceable. According to the Decision Division's investigations Germania will thus only be able to sustain its loss-making market presence for a short period. There is therefore not only the acute and definite danger of Germania being forced for economic reasons to withdraw from the relevant market very soon – or in any case long before a final court decision will be issued on the merits of the case - if Lufthansa maintains its price which the Decision Division considers to be abusive. In view of Germania's losses incurred by Lufthansa's abusive conduct one must rather assume with certainty that Germania will very soon withdraw from the route in question if the present decision cannot be enforced immediately.

The threat of Germania being squeezed out of the Frankfurt – Berlin/Tegel route can thus only be countered if Lufthansa's current abusive pricing strategy is immediately prohibited, i.e. before an appeal which Lufthansa can be expected to file is granted suspensive effect. Only an immediate enforcement of the decision can enable Germania, which is currently the only competitor on the relevant route in this case, to continue operations without having to accept considerable losses, and thus to continue its operations on a long-term basis at all. Only in this way can existing competition be protected in the public interest. Moreover, against this background the order of immediate enforcement cannot be avoided by advising Germania that damages could be claimed against Lufthansa subsequently, i.e. that the concrete damage caused by Lufthansa could possibly be compensated for economically. Such a measure could merely safeguard the economic interests of a company affected, but not maintain and protect existing competition as such. However, it is not the primary task of the Decision Division to favour individual competitors, but to

effectively protect existing competition, even if this ultimately involves protecting the only existing competitor.

Furthermore it has to be considered that it would not easily be possible for Germania to re-enter the market after a withdrawal. As a precondition Germania would require the provision of sufficient and suitable slots. In view of the well-known congestion at Frankfurt/Main Airport this is very doubtful. Germania is currently able to use slots which have become temporarily available due to the general decline in air traffic (particularly on the transatlantic route as a reaction to the events of 11 September 2001), but to which their previous owners are still entitled in view of future requirements according to the so-called grandfather rule. In addition Germania (or other new operators) can use slots at Frankfurt/Main Airport which Lufthansa has to give up in fulfilment of a condition imposed in the Bundeskartellamt's clearance decision in the Lufthansa/Eurowings case (*loc.cit.*). Once these slots have been allocated to third parties after Germania's exit (even if only temporary) a new start-up of a flight connection from and to Frankfurt/Main is almost impossible.

However the order of immediate enforcement is necessary for another reason. Were Lufthansa's expected appeal to be granted suspensive effect, this would result, as already emphasized, in Germania being excluded from the Frankfurt – Berlin/Tegel route for economic reasons at least until a final decision had been made in the main issue by the court. Apart from the effects on Lufthansa's only current competitor as already illustrated this would also have a considerable deterrent effect on its other potential competitors, not only on the Frankfurt-Berlin/Tegel route but on all other German domestic routes where Lufthansa is still dominant. In this case this would give rise, justifiably, to the impression among these competitors that Germania's exclusion from this route as a result of the suspensive effect of the appeal is evidence that Lufthansa, at least for the time being, can successfully keep any other unwelcome rival from every other domestic German route. In other words further potential competitors of Lufthansa will not even attempt a market entry on other routes or even on the relevant route in this case if Lufthansa succeeds, ultimately by making use of the suspensive effect of its appeal, in excluding Germania from the market and consequently from competition, at least for an interim period until a legally binding court ruling is effected. As a result the emergence of further competition on the busiest domestic air route in Germany would be blocked for years. Irrespective of Germania's concrete exclusion from the market this would also have a general effect on

competition, a situation which the ARC aims to prevent by protecting competition in general, which in itself justifies the order of immediate enforcement.

In addition in weighing up the interests concerned the decision division also took into consideration the requirements of Section 65 (3) ARC which can lead to restoration of the suspensive effect of the appeal. Here the presumed outcome of the appeal proceedings should be taken into account (cf Schmidt in Immenga/Mestmäcker, loc. cit., Section 65 ARC, marginal note 7). As there are no serious doubts in this case as to the legality of the appealed decision, this did not stand in the way of the order of immediate enforcement. In particular, however, in the case at hand no undue hardship is to be expected for Lufthansa which is demanded by prevailing public interests (cf. Section 65 (3) sentence 1 (3) ARC). Lufthansa is neither generally prohibited from for operating services on the route concerned nor is its price structure in any way fundamentally regulated. The decision is ultimately merely directed against one of a total of eleven tariffs offered on this route by Lufthansa. Furthermore the decision only restricts Lufthansa on this and no other route. In this particular case the decision's only ultimate purpose is to ensure that Lufthansa may not squeeze Germania out of the relevant market until conclusive judicial clarification of the legality of this decision. It is intended to prevent Lufthansa from creating a *fait accompli* prior to final judicial clarification and causing irreparable damage to competition in domestic German air traffic. Against this background the assumption of undue, unjustified hardship to Lufthansa's detriment can be ruled out in the case at hand.

Finally the guarantee of legal recourse laid down in Art. 19 (4) of the Basic Law, which also incorporates the guarantee of effective legal protection, does not stand in the way of the order of immediate enforcement in general (cf references to case law by Kollmorgen in Lange/Bunte, loc. cit. Section 75 ARC, marginal note 7) and in this specific case. Although the judicial control of administrative decisions prior to their enforcement is the rule and the order of immediate enforcement the exception, the order of immediate enforcement demanded by public interest cannot be dispensed with for the reasons mentioned above. In conclusion the order of immediate enforcement is thereby legitimate.

### **Instruction of rights of appeal**

This decision may be appealed against. It should be filed with the Bundeskartellamt, Kaiser-Friedrich-Straße 16, 53113 Bonn within one month upon service of the decision. However, receipt of the appeal by the appellate court, the Düsseldorf Higher Regional Court, within the time limit shall be sufficient.

The appeal shall include a statement of reasons. The time limit for filing the statement of reasons is one month. It shall begin upon the filing of the appeal and may, upon application, be extended by the presiding judge of the appellate court. The statement of reasons must state the extent to which the decision is being appealed and its modification or revocation sought and indicate the facts and evidence on which the appeal is based. The appeal and the statement of reasons for the appeal shall be signed by a lawyer admitted to practise before a German court.

The appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal.

Dr. Ruppelt

Schulze

Wagner