

Case SA.57153 COVID-19 - Aid to Lufthansa

1. [Introduction](#)
2. [The Divestment Procedure of the Business Package \(Slots and Additional Assets\)](#)
3. [Key Dates for the Divestment Procedure ahead of the IATA Winter 2022/23 Season](#)
4. [Applications for the Business Package for operations as from the IATA Winter 2022/23 Season](#)
5. [Monitoring Trustee contact details](#)

1. Introduction

On 28 August 2020, the European Commission approved Smith & Williamson LLP as the Monitoring Trustee to monitor the implementation of the Commitments given by Germany in relation to the German plans to contribute €6 billion to the recapitalisation of Deutsche Lufthansa AG (“DLH”). The Commission found that the German measure is in line with Article 107(3)(b) TFEU and the conditions set out in the Temporary Framework adopted by the Commission on 19 March 2020, as amended on 3 April and 8 May 2020.

The [Commission’s Press Release](#) of 25 June 2020 summarises the Commitments. The full text of the Structural Commitments is **annexed** at the bottom of this document.

2. Divestment Procedure of the Business Package (Slots and Additional Assets)

Germany committed that DLH will divest a business package to allow one air carrier to newly enter the market and establish a base at Frankfurt airport (“FRA”) and one air carrier to newly enter the market and establish a base at Munich airport (“MUC”) (the “new entrants”).¹

The business package shall comprise up to 24 slots/day at each of FRA and MUC (including both winter and summer slots) for a base of 4 aircraft, and any additional assets to allow for a transfer of those slots by way of a partial take-over of an air carrier within the meaning of the Slot Regulation (EU 95/93).

In particular, Germany committed that, upon request of the new entrants, DLH makes available to them: (i) access to the airport infrastructure or facilities at FRA and MUC not covered by the above, on the same terms as those granted to DLH by the airport managers; (ii) overnight parking stands for the aircraft to be based at FRA and/or MUC; and/or (iii) relevant staff (cabin/cockpit) to operate the bases.

To ensure the viability of DLH’s hub-and-spoke network at each of FRA and MUC, DLH shall not be obliged to divest more than three departure slots and three arrival slots in any one of the three following one-hour periods at each of FRA and MUC.

To be eligible, potential purchasers will need to:

- a. be a new entrant within the meaning of the Structural Commitments, i.e. not having a base at the airport for which it requests the slots during the IATA Winter 2019/2020 Season (i.e. no aircraft overnighing at the airport during the IATA Winter 2019/2020 Season);²

¹ A base implies that aircraft overnight at the airport, and are used to operate several routes from that airport. An air carrier is considered as a new entrant within the meaning of the Commitments, if it did not have a base at the airport for which it requests the slots during the IATA Winter 2019/2020 Season (i.e. no aircraft overnighing at the airport during the IATA Winter 2019/2020 Season).

² However, the slots shall be made available for divestment to one air carrier for the expansion of its existing base (“based carrier”) at respectively FRA or MUC if, after three IATA seasons from the last IATA season for which Art. 8(2), second indent, of the Slot Regulation (the “use-it-or-lose-it rule”)

- b. be an air carrier holding an operating licence issued by an EU/EEA Member State, and with the ability to operate intra-EU services;
- c. be independent of and unconnected with DLH;
- d. not be subject to competition remedies for having received a COVID-19 recapitalization instrument of more than EUR 250 million;
- e. have the intention to establish a base of at least four aircraft at FRA and/or MUC;³ and
- f. commit to comply with the applicable Union and national labour laws.

Procedure

- a. Potential purchasers shall indicate their interest, by way of an application, in slots/bases/assets to the Monitoring Trustee by Thursday 31 March 2022, 18:00 UTC. Potential purchasers may request anonymity.
- b. By the IATA initial submission deadline of Thursday 19 May 2022, potential purchasers shall apply for slots through the general slot allocation procedure and submit, by 18:00 UTC, a formal bid for DLH slots and assets to the Monitoring Trustee (at the same time as those requested through the general slot allocation procedure). The Monitoring Trustee will provide guidance to potential purchasers about the content required in their formal bids.
- c. The potential purchasers shall offer a price for the divested slots and assets. The bidding price will be taken into account in tied bids. For the avoidance of doubt, the divestment shall be at no minimum price.
- d. The formal bids will be evaluated by the Commission, advised by the Monitoring Trustee. The Commission may reject the formal bids that are not credible from an economic or operational point of view.

3. Key Dates for the Divestment Procedure ahead of the IATA Winter 2022/23 Season

Thursday 3 March 2022: the Monitoring Trustee opens the divestment procedure.

Thursday 31 March 2022, 18:00 UTC: applications for the business package shall be received by the Monitoring Trustee (applications received after this deadline will be rejected).

Thursday 19 May 2022: IATA Initial Submission Deadline and Potential purchaser(s) to submit formal bid(s) for DLH slots and assets to the Monitoring Trustee by 18:00 UTC (applications received after this deadline will be rejected).

4. Applications for the Business Package for operations as from the IATA Winter 2022/23 Season

The Monitoring Trustee is opening the divestment procedure for the business package for the IATA Winter 2022/23 Season. The business package comprises up to 24 slots/day at FRA and MUC and any additional assets to be compliant with Article 8a of the Consolidated Slot Regulation and requested by potential purchasers.

Potential purchasers for the business package at FRA and/or at MUC are requested to contact the Monitoring Trustee at DLH.Trustee@smithandwilliamson.com with copies to: Nasoul.Gopal@smithandwilliamson.com and Michel.Alexander@smithandwilliamson.com in order to obtain the application form.

Potential purchasers for the business package are entitled to request anonymity.

5. Monitoring Trustee contact details

does not apply in full, the slots have not been divested to one new entrant for the establishment of a base at respectively FRA or MUC.

³ The same air carrier could be eligible to establish or expand a base at both FRA and MUC.

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Annex - Full text of the Structural Commitments

1. Type of commitments

Germany commits that the Lufthansa Group (LH) divests the following business package to one air carrier to allow it to newly enter the market and establish a base⁴ at Frankfurt airport (FRA) and to one air carrier to allow it to newly enter the market and establish a base at Munich airport (MUC) (the “new entrants”).

If, after three IATA seasons from the last IATA season for which Art. 8(2), second indent, of the Slot Regulation⁵ (the “*use-it-or-lose-it rule*”) does not apply in full, the slots have not been divested to one new entrant for the establishment of a base at respectively FRA or MUC, they shall be made available for divestment to one new entrant or to one other air carrier for the expansion of its existing base (“based carriers”) at respectively FRA or MUC.

New entrants and based carriers are further referred to as the “purchasers”.⁶

The business package shall comprise:

- Slots⁷:
 - FRA:
 - up to 24 slots/day for a base of four aircraft
 - MUC:
 - up to 24 slots/day for a base of four aircraft.
 - Including both Winter and Summer slots

 - To ensure the viability of LH’s hub-and-spoke network at each of FRA and MUC, LH shall not be obliged to divest more than three departure slots and three arrival slots in any one of the three one-hour periods at each of FRA and MUC, to be communicated by LH by the date of the Commission decision on the State aid.⁸ In the event that a request is made for the divestment of more than three departure slots or three arrival slots in any one of these three one-hour periods, LH shall offer the purchasers the next closest slot to the time requested.

⁴ A base implies that aircraft overnight at the airport, and are used to operate several routes from that airport. An air carrier is considered as a new entrant within the meaning of the Commitments, if it did not have a base at the airport for which it requests the slots during the IATA Winter 2019/2020 Season (i.e. no aircraft overnighing at the airport during the IATA Winter 2019/2020 Season).

⁵ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.

⁶ For the avoidance of doubt, the same purchaser can acquire the business package at both FRA and MUC.

⁷ Slots: the permission (as defined by Article 2(a) of the EU Slot Regulation) to use the full range of airport infrastructure necessary to operate an air service at an airport on a specific date and time for the purpose of landing or take-off.

⁸ For the avoidance of doubt, LH may communicate different three one-hour periods for FRA and MUC.

- Additional assets as required by the Slot Coordinator to allow for a transfer of the abovementioned slots by way of a partial take-over of an air carrier within the meaning of the Slot Regulation.

In particular, upon request of the purchasers, Germany commits that:

- LH makes available to the purchasers access to the airport infrastructure or facilities at FRA and MUC not covered by the above, on the same terms as those granted to LH by the airport managers;
- LH makes available overnight parking stands for the aircraft to be based at FRA and/or MUC; and
- LH makes available to the purchasers relevant staff (cabin/cockpit) to operate the bases.

To obtain the slots, an eligible potential purchaser must demonstrate that it has exhausted all reasonable efforts to obtain the necessary slots to operate the base concerned through the normal workings of the general slot allocation procedure. The eligible potential purchaser shall be deemed not to have exhausted all reasonable efforts to obtain necessary slots if slots at FRA or MUC, respectively, were available through the general slot allocation procedure within +/- 20 minutes for short-haul flights⁹ and within +/- 60 minutes for long-haul flights¹⁰ of the times requested but such slots have not been accepted by the eligible potential purchaser.

If the eligible potential purchaser is deemed to have exhausted all reasonable efforts to obtain necessary slots, Germany commits that LH makes available the slots within the abovementioned time windows. In the event that LH does not have slots within the relevant time window, LH shall offer to release the slots closest in time to the purchaser's request. LH does not have to offer slots if the slots which the eligible potential purchaser could have obtained through the general slot allocation procedure are closer in time to the purchaser's request than the slots that LH has. The arrival and departure slot times shall be such as to allow for reasonable aircraft rotation to the extent possible, taking into account the eligible potential purchaser's business model and aircraft utilisation constraints.

Germany commits that LH will not reacquire the divested slots and assets from the purchasers. For the avoidance of doubt, this does not prevent LH from obtaining slots through the general slot allocation procedure.

The obligation on Germany to commit that LH divests the slots and the other elements to the purchasers as mentioned in this section shall apply for six (6) full consecutive IATA seasons after the last season for which the "use-it-or-lose-it rule" does not apply in full. The commitments under point 1. shall no longer apply to FRA and MUC once LH has divested slots to one purchaser at respectively FRA and MUC according to the process outlined above.

The Commission may, upon a substantiated request from LH, review the commitments should the "use-it-or-lose-it" rule be significantly amended following a review of the Slot Regulation.

2. The purchasers

To be eligible, a potential purchaser must:

⁹ Flights of a duration of more than 6 hours.

¹⁰ Flights of a duration of more than 6 hours.

- Be an air carrier holding an operating licence issued by an EU/EEA Member State;
- be independent of and unconnected with LH;
- not be subject to competition remedies having received a COVID-19 recapitalization instrument of more than €250 million; and
- have the intention to establish a base of at least four aircraft for a new entrant or expand its base for a based carrier at FRA and/or MUC.¹¹

For that purpose, the potential purchaser commits to comply with the applicable EU and national labour laws, as interpreted as relevant by the EU Courts (see e.g. Nogueira, joined cases C-168/16 and C-169/16).

In addition, a potential purchaser that is a based carrier commits to operate the total number of aircraft after expansion of its base for at least three IATA seasons.

3. Procedure

- Appointment of a monitoring trustee.
- Calendar and steps of the selection procedure similar to the aviation-specific merger practice:
 - Monitoring trustee publishes number of available slots/bases in advance of the start of the general slot allocation procedure;
 - Potential purchasers indicate their interest in slots/bases in advance of the start of the general slot allocation procedure;
 - By the IATA slot request submission deadline, potential purchasers apply for slots through the general slot allocation procedure and submit a formal bid for LH slots (at the same time as those requested through the general slot allocation procedure);
 - The potential purchasers must offer a price for the divested slots and assets. The bidding price will be taken into account in tied bids (see below). For the avoidance of doubt, the divestment shall be at no minimum price;
 - The Commission, advised by the Monitoring Trustee, evaluates the bids. It may reject the bids if they are not credible from an economic or operational point of view. In case of competing bids, it shall give preference to potential purchasers offering in particular:
 - Greatest total number of destinations served (connectivity);
 - Largest capacity deployed at the airport (in number of seats for the IATA Summer and Winter Seasons);
 - If the Commission gives the same evaluation to several bids (tied bids), it shall give preference to the bid best ranked by LH (which may use any criteria of its choice, provided that they are transparent, such as the level of State support such as grants, subordinated loans, loans or guarantees received by the potential purchaser, considerations on labour standards or bidding price);
 - Shortly after the IATA Scheduling Conference, the potential purchasers confirm that they did not obtain the slots through the general slot allocation procedure and that they intend to establish a base or expand their base using LH's slots;

¹¹ The same purchaser could be eligible to establish or expand a base at both FRA and MUC.

- Shortly after the IATA Scheduling Conference and confirmation by the potential purchasers, LH and the potential purchasers enter into an asset purchase agreement, to be reviewed by the monitoring trustee and approved by the Commission.
- Definition of a fast-track dispute resolution procedure, considering the duration of the commitments.