Jersey Competition Regulatory Authority ("JCRA")

Decision C332/08 Imposing Financial Penalties

Under Articles 35 and 39 of the Competition (Jersey) Law 2005

Concerning an Infringement of

Article 20(1) of the Competition (Jersey) Law 2005

by

Deutsche Lufthansa AG

Introduction & Executive Summary

1. It was publicly reported in November 2008 that Deutsche Lufthansa AG ("**Lufthansa**") intended to acquire a controlling 80% share in the UK airline British Midland PLC ("**BMI**"). In response to these reports, in November 2008 the JCRA contacted both Lufthansa and BMI informing them that, if the news reports were correct, given the presence of BMI in Jersey, JCRA approval may be required under the Competition (Jersey) Law 2005 (the "**Law**").

2. In August 2009, the JCRA obtained evidence that Lufthansa may have obtained control over BMI. This evidence consists of information on the BMI website,[1] which came after the European Commission issued its decision on 14 May 2009 declaring the concentration compatible with the common market. This information was later confirmed by Lufthansa, which stated that it acquired control of BMI on 1 July 2009.

3. Lufthansa failed to seek the JCRA's approval of its acquisition of BMI. Under Article 20(1) of the Law, Lufthansa and BMI were under an obligation to file notification of this concentration to, and receive approval from, the JCRA, prior to executing the merger. The aforementioned information provided the JCRA with a reasonable cause to suspect, under Article 26 of the Law, that Lufthansa executed its acquisition of BMI in breach of Article 20(1) of the Law.

4. On the basis of the above, the JCRA commenced an investigation into the matter. As a result of that investigation, the JCRA has determined that Lufthansa has acquired control of BMI, as the concept of control is defined in Article 2(2) of the Law, without first notifying this acquisition to, and receiving approval from, the JCRA. The JCRA therefore has determined that a breach of Article 20(1) of the Law has occurred. Because of the breach the JCRA hereby issues a decision, under Article 35 of the Law, and a financial penalty under Article 39 of the Law. The amount of the financial penalty is £25,000.00.

Background

The Parties

Lufthansa

5. According to the EC Decision, Lufthansa provides scheduled air passenger and cargo transport and related services. According to the 2009 Jersey Airport Summer Schedule, Lufthansa provided a weekly air service between Jersey and Frankfurt from 25 April to 26 September. Lufthansa is based in Germany and in 2008 reported revenues of €24,870 million and operating profits of €1,354 million. According to Lufthansa, in the calendar year 2008 it transported only

[1] The section Our history states that "in July 2009 Lufthansa took control of bmi". www.flybmi.com/bmi/en-gb/about-us/our-history/our-history.aspx .

[250-500] passengers from Frankfurt to Jersey and only [500-1,000] passengers from Jersey to Frankfurt.[2]

BMI

6. BMI is based in the United Kingdom and is the second largest airline at London's Heathrow Airport. BMI operates flights on 56 routes in Europe, Africa and Asia. In 2008, BMI reported a turnover of £1,039 million and an operating loss of £99.7 million.[3] According to the 2009 Jersey Airport Summer Schedule, bmibaby, a subsidiary of BMI, offers flights between Jersey and Manchester, Nottingham/East Midlands and Cardiff. It appears that on at least one of these routes, bmibaby is the sole operator. Any reference to BMI in this Decision includes references to bmibaby.

The Law's Requirements concerning Mergers and Acquisitions

7. Article 20(1) of the Law states that a person must not execute a merger or acquisition of the type prescribed by the Order except with and in accordance with the approval of the JCRA. This approval requirement means that mergers or acquisitions that are subject to Article 20(1) must be notified to the JCRA prior to their execution.

8. The Order referred to in Article 20(1) of the Law is the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the "**Order**"). Acquisitions satisfying one or more of the thresholds set out in this Order are therefore subject to the Law's notification and approval requirements. One of these thresholds, and the one relevant to this matter, is set out in Article 1(4) of the Order, which states:

> *"A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if one or more of the parties to the proposed merger or acquisition has an existing share of 40% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey."*

9. Article 1(5) of the Order states that, to determine if the threshold set out in Article 1(4) is satisfied: (1) any appropriate description of goods or services may be adopted; (2) a reference to goods or services that are subject to different forms of supply is to be construed as a reference to any of those forms of supply taken separately, together, or in groups; and (3) any appropriate criterion, or any combination of criteria, may be applied.

10. Article 2(1) of the Law states that an acquisition occurs if two or more previously independent undertakings merge, or if a person who controls an undertaking

[2] Precise passenger numbers redacted on the basis of confidentiality.
[3] http://www.flybmi.com/bmi/en-gb/about-us/key-facts.aspx

acquires direct or indirect control of the whole or part of another undertaking. Under Article 2(2) of the Law, control is taken to exist if decisive influence is capable of being exercised with regard to the activities of the undertaking.

11. As stated in the JCRA's Guideline on Mergers and Acquisitions (the "**Guideline**"), the combined effect of Article 20(1) and the Order means that, for acquisitions subject to the Law, "**[t]he merging parties must not implement the merger, or otherwise engage in joint commercial activities, until the merger has been approved by the JCRA.**"[4]

Evidence for an Infringement of Article 20(1)

(i) An Acquisition Requiring Notification to, and Approval by, the JCRA

12. BMI provides scheduled air passenger transport services from Jersey to airports in the UK such as Manchester, Cardiff and Nottingham/East Midlands.

13. Concerning the Jersey to Nottingham/East Midlands city pair, the JCRA understands that BMI was the only airline that provided scheduled air passenger transport services during the time of the acquisition. This implies that BMI's share of supply for this city pair is 100%.

14. Concerning the Jersey/Cardiff city pair, Lufthansa informed the JCRA that BMI currently operates three weekly flights and that Flybe operates four weekly flights. This means that BMI's share of supply based on the number of flights offered on this city pair is 43%. In addition, again according to Lufthansa, BMI is operating slightly larger aircraft (Boeing 737-500 for BMI as against De Havilland Dash 8-400s for Flybe). This means that BMI's share of supply based on the number of seats for this city pair is more than 40%.[5]

15. Concerning the Jersey/Manchester city pair, Lufthansa informed the JCRA that both BMI and Flybe currently operate eight weekly services. This implies that BMI's share of supply based on the number of flights is 50% for this city pair.

16. From the evidence provided by Lufthansa, which is confirmed by the 2009 Jersey Airport Summer Schedule that covers the day (1 July 2009) on which Lufthansa obtained control over BMI, BMI had a share of supply on each of the three city pairs identified above that surpassed the 40% threshold contained in Article 1(4) of the Order. In both the JCRA's Decision concerning the proposed acquisition of British Regional Air Lines Group Limited by Flybe Group Limited (the "**Flybe Decision**"),[6] and the JCRA's Decision concerning an infringement of Article 20(1)

[4] JCRA, Guideline on Mergers and Acquisitions at p.6 (emphasis in original).
[5] Public sources indicate a seating of around 106-112 and 70-75 respectively depending upon configuration.
[6] See Paragraphs 12-13, JCRA Decision regarding the Proposed Acquisition of British Regional Air Lines Group Limited by Flybe Group Limited (29 Jan. 2007), published on www.jcra.je.

of the Law by TUI AG (the "**TUI Decision**"),[7] the JCRA analysed passenger air transport services using a city pair approach. This is consistent with how the European Commission most often has defined relevant product and geographic markets for scheduled passenger air transport services.[8] The city pairs as listed above therefore appear to be appropriate shares of supply in which to view the activities of BMI, under Article 1(5) of the Order. Thus, on this basis, any concentration involving BMI would be subject to the requirements of the Order and Article 20(1) of the Law.

(ii) Execution without prior JCRA Notification and Approval

17. As stated above, on 3 April 2008 the European Commission received a notification concerning Lufthansa's proposed acquisition of BMI. The European Commission declared this concentration compatible with the common market on 14 May 2009.

18. The execution of the concentration involving Lufthansa and BMI was indicated by information on the BMI website, which states that:

> *"In July 2009, Lufthansa took control of bmi with Stefan Lauer replacing Sir Michael Bishop as chairman. Lufthansa's Jörg Hennemann was appointed to the bmi board."*[9]

19. Lufthansa subsequently confirmed to the JCRA in writing that it obtained control over BMI on 1 July 2009.

20. Based on these facts, the JCRA concludes that Lufthansa acquired control over BMI, as defined under Article 2(2) of the Law, on 1 July 2009. This acquisition of BMI by Lufthansa has been executed without notifying this acquisition to, and receiving approval by, the JCRA.

<u>The JCRA's Procedure Concerning this Matter</u>

21. As stated above, after hearing of public reports that Lufthansa intended to acquire control of BMI, in November 2008 the JCRA contacted both BMI and Lufthansa to inform them of their potential obligations under of the Law. Subsequently, after the JCRA had learned that Lufthansa had acquired control of BMI without the JCRA's notification and approval, the JCRA contacted Lufthansa in August 2009. The JCRA informed Lufthansa that it had a reasonable cause to suspect an infringement

[7] See Paragraphs 13-15, JCRA Decision Imposing Financial Penalties Under Articles 35 and 39 of the Competition (Jersey) Law 2005 Concerning an Infringement of Article 20(1) of the Competition (Jersey) Law 2005 by TUI AG (24 Jan. 2008), published on www.jcra.je.
[8] Article 60 of the Law requires that, so far as possible, matters arising under competition law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.
[9] The section Our history states that "in July 2009 Lufthansa took control of bmi". www.flybmi.com/bmi/en-gb/about-us/our-history/our-history.aspx .

of Article 20(1) of the Law, based on the facts and circumstances set out in Paragraphs 12 to 20, above, and commenced an investigation thereof.

22. On 27 August 2009, the JCRA requested additional informed from Lufthansa. The additional information requested was supplied by Lufthansa on 9 September 2009.

23. On 16 September 2009, the JCRA gave written notice to the legal representative of Lufthansa of its proposed decision concerning this matter, and invited Lufthansa's comments to the proposed decision, to comply with the procedure set out in Article 35(2) of the Law.

24. On 1 October 2009, the JCRA received representations from Lufthansa. Lufthansa raised two main objections against the proposed decision. First, Lufthansa states that its acquisition of control over BMI did not require notification to and approval by the JCRA. This is dealt with in Paragraphs 25 to 31, below. The second objection is that the proposed fine is disproportionate. The objection regarding the size of the financial penalty will be addressed in Paragraphs 48 to 51, below.

25. With respect to the share of supply test, in its 1 October response Lufthansa cites to an earlier letter provided to the JCRA, dated 25 August 2009, to allege that the Order's 40% share of supply test is not satisfied with respect to the city pairs at issue in this matter. Specifically, Lufthansa argues that the JCRA's share of supply analysis has inappropriately focussed on the *capacity* on the routes in question, while both the Order and relevant JCRA precedent focus on actual *sales* to Jersey originating passengers. With respect to the specific city pairs at issue, Lufthansa argues, in summary:

- Jersey – Manchester: That both Flybe and BMI offer eight direct services per week, but also that British Airways ("**BA**") offers indirect service via London. Based on BA's presence, BMI's share of supply is reduced to 30-35%.

- Jersey – Cardiff: That because of the short distance between Cardiff and Bristol, these airports should be considered interchangeable, particularly for Jersey originating passengers. If the share of supply is expanded to include flights from Jersey to Bristol in addition to flights from Jersey to Cardiff, BMI's share of supply is reduced to 15-20%.

- Jersey – Nottingham/East Midlands – Similar to Jersey/Cardiff, with respect to Nottingham/East Midlands, Jersey originating passengers can just as easily fly to Birmingham. Lufthansa cites to the European Commission's decision in *Ryanair/Aer Lingus* (M. 4439, para 142) to support its position that Nottingham/East Midlands and Birmingham are substitutes If the share of supply is expanded to include flights from Jersey to Birmingham in addition to flights from Jersey to Nottingham/East Midlands, BMI's share of supply is reduced to 15-20%.

26. Even accepting, however, Lufthansa's focus on sales to Jersey originating passengers versus the capacity supplied, the operations of BMI still would satisfy the share of supply test set out in Article 1(4) of the Order on one, and perhaps two, of the city pairs in question:

- As observed in Paragraph 13, above, BMI was the only airline that provided scheduled air passenger transport services to Jersey originating passengers during the time of the acquisition on the Jersey to Nottingham/East Midlands city pair. This means that BMI's share of supply for this city pair is 100%.

- As observed in Paragraph 14, above, concerning the Jersey/Cardiff city pair, BMI operates approximately 43% of the weekly flights on that route, using an aircraft that is approximately 50% larger than its competitor, Flybe. Thus, BMI's share of supply of scheduled air passenger transport services to Jersey originating passengers on this city pair is also most likely greater than 40%.

27. While Lufthansa argues that with respect to Nottingham/East Midlands and Cardiff other potentially substitutable destination airports should be included in the share of supply analysis (Birmingham and Bristol, respectively), in its two prior Decisions concerning the provision of scheduled air passenger transport services from Jersey, the JCRA has viewed the relevant shares of supply based on a point of origin/point of destination ("**O&D**") approach to city pairs. Indeed, the argument that, based on the European Commission's decision in *Ryanair/Aer Lingus*, different destination airports should be combined into the same share of supply analysis was considered but rejected by the JCRA in Paragraphs 24 to 27 of the TUI Decision. The same reasoning from the TUI Decision on why an O&D approach is appropriate to examine the share of supply for city pairs applies equally to this current matter.

28. Thus, even focussing the share of supply test on Jersey originating passengers, as Lufthansa suggests, the JCRA concludes that the 40% share of supply threshold set out in Article 1(4) of the Order still was satisfied on at least one, and most likely two, of the city pairs operated by BMI from Jersey at the time of the acquisition.

29. Nor is the share of supply analysis limited to the actual sales of the good or service in question. In interpreting Article 1(5) of the Order, the Guideline states that:

> *"A number of measures may be used in determining share of supply such as value of sales of purchases (i.e., turnover), capacity (in the case of a manufacturing business), floor space (in the case of a retailing business), and/or employees. Where more than one such measure is available, and any of them results in the threshold being exceeded, the parties should apply for approval."*[10]

[10] Guideline at 4-5.

30. The JCRA's guidance on this point is analogous to guidance provided by the Office of Fair Trading on the share of supply test within the United Kingdom, which states that:

> *"[t]he OFT will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met. This will often mean that the share of supply used corresponds with a standard recognised by the industry in question, although this need not necessarily be the case. In applying the share of supply test, the OFT may . . . have regard to the value, cost price, quantity, capacity, number of workers employed or any other criterion[.]"*[11]

31. Therefore, contrary to Lufthansa's arguments, capacity too can be an appropriate measure for calculating the share of supply.

Conclusions Concerning the Suspected Infringement

32. Based on the facts and circumstances detailed in Paragraphs 12 to16 above, the JCRA concludes that the acquisition of BMI by Lufthansa satisfies the threshold set out in Article 1(4) of the Order, as that threshold may be determined under the parameters set out in Article 1(5) of the Order.

33. Based on the facts and circumstances detailed in Paragraphs 17 to 20 above, the JCRA concludes that Lufthansa acquired control of BMI, as the concept of control is defined in Article 2(2) of the Law. Specifically, the JCRA concludes that that Lufthansa obtained control over BMI on 1 July 2009.

34. The JCRA did not receive an application under Article 20(1) of the Law regarding this acquisition.

35. The JCRA therefore concludes that Lufthansa executed its acquisition of BMI without complying with the obligations set out in Article 20(1) of the Law, namely, to notify the acquisition to the JCRA and not execute it until after it has received the JCRA's approval to do so.

Appropriate Remedy concerning the Infringement

36. Having determined that an infringement of Article 20(1) exists, Articles 38 and 39 of the Law set forth potential enforcement mechanisms available to the JCRA. Article 38(1) of the Law states that "[i]f the Authority decides that there has been a breach of Article 20(1) it may give the relevant person such directions as it considers appropriate to bring the breach to an end." Such directions can include orders that (1) require a person to take possible action to nullify the acquisition, (2) impose on the person a condition as to the manner in which the person conducts business, or (3) require a person to sell or otherwise dispose of any part of the

[11] UK Office of Fair Trading, *Mergers Jurisdictional and Procedural Guidance* at 3.55 (June 2009).

acquired business or assets. In addition to, or in lieu of, such direction, under Article 38(7) of the Law the JCRA may impose financial penalties for infringements of Article 20(1). To impose a financial penalty, the JCRA must be satisfied that the breach was committed either intentionally, negligently, or recklessly. Under Article 39(2) of the Law, the amount of such a penalty must not exceed 10% of the turnover of the undertaking during the period of the breach, up to a maximum period of 3 years.

37. The JCRA concludes that it is appropriate and necessary to reach a decision and impose a remedy concerning this matter. This matter concerns what is, in the JCRA's view, a clear breach of the Article 20(1) filing requirements. The circumstances requiring the enforcement of these requirements in Jersey appear no less relevant than those relied upon by the European Commission in its own decision to enforce the EC's mandatory merger filing requirements:

> *"The Commission considers that the underlying principles in these provisions are in themselves very important and that their violation undermines the effectiveness of the merger control provisions, Indeed, the obligation of prior notification of concentrations which fall within the scope of the Merger Regulation, allows the Commission to prevent companies from carrying out a concentration before it takes a final decision, thereby avoiding irreparable and permanent damage to competition."*[12]

38. The JCRA also concludes that resolving this matter informally would be inappropriate. Whereas, in its Guideline on Investigation Procedures, the JCRA states it is willing, in appropriate cases, to consider voluntary commitments put forward by the parties to take certain pre-emptive or remedial states as an alternative to investigation and/or enforcement,[13] given the procedural nature of this infringement and the fact that that the factors and circumstances leading up to it have all occurred (resulting in Lufthansa's acquisition of BMI), the JCRA does not think that voluntary commitments would be a sufficient or an appropriate remedy.

39. The JCRA therefore concludes that this matter is appropriately resolved through a decision under Article 35 of the Law, and the imposition of one or more of the enforcement mechanisms provided in Articles 38 and/or 39.

40. Based on the evidence available, the JCRA does not have reason to believe that the concentration has resulted in a substantial lessening of competition in Jersey or any part of Jersey. Whereas both Lufthansa and BMI offer flights to and from Jersey, the acquisition does not appear to affect competition on any of the city pairs that are being served by either undertaking. Given that Lufthansa only offers flights

[12] Commission Decision of 10 February 1999 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89, O.J. L183/29 at ¶ 12.
[13] JCRA, Guideline on Investigation Procedures at 7.

between Jersey and Germany and that BMI only offers flights between Jersey and the United Kingdom, this conclusion would not change if the shares of supply were expanded to include all airports within a particular jurisdiction. Where possible, the JCRA has verified the information provided to it by Lufthansa from third-party sources, and the JCRA has no indications that the evidence provided by Lufthansa is incorrect or open to interpretations that would suggest that the acquisition could substantially lessen competition in Jersey or any part thereof.

41. In these circumstances, the JCRA does not consider it appropriate or proportional to remedy this breach through directions, as provided for under Article 38(1) of the Law. The JCRA does consider, however, that imposition of a financial penalty under Article 39 of the Law is appropriate

42. In establishing the level of fines for infringements of merger filing requirements, the European Commission has examined both aggravating and mitigating circumstances.[14] The JCRA's consideration of such factors with respect to this matter is set out in the following paragraphs.

43. Lufthansa is a major international company and should be aware of the legal obligations that apply to its activities, including those originating from the Law in Jersey. The JCRA contacted Lufthansa in November 2008 to notify it of the potential requirements under the Law and referred it to the JCRA website for more information. At that time, the TUI Decision was published and available on the JCRA's website.[15] As explained above, in that Decision, the JCRA fined TUI AG for an infringement of Article 20(1) of the Law arising from a failure to notify its acquisition of First Choice Holidays PLC, in circumstances highly analogous to this current matter. Specifically, in that Decision, satisfaction of the threshold contained in Article 1(4) of the Order was based on the acquired undertaking's airline, Thomsonfly, having a 40% or greater share of supply on certain city pairs between Jersey and the UK. Thus, the JCRA specifically notified Lufthansa of its potential notification obligations under the Law, and directed it to the JCRA's website that contained a highly analogous prior Decision.[16]

44. In these circumstances, the JCRA concludes that Lufthansa's failure to comply with the Article 20(1) requirements with respect to its acquisition of BMI was negligent under Article 39(1).[17]

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[14] Commission Decision of 10 February 1999 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89, O.J. L183/29; *see also* Commission Decision of 18 February 1998 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89.

[15] The JCRA published this Decision on 24 January 2008.

[16] The Flybe Decision, which also took a city pair approach to market definition, was also available and published on the JCRA's website at this time.

[17] *See* Commission Decision of 18 February 1998 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89 para 10 (fining a party for consummating an acquisition without notification to, and approval by, the Commission because, while there was no deliberate intention to circumvent the merger regulations, "the provisions of

45. The following facts and circumstances can be seen as mitigating in this matter:

- Lufthansa has cooperated with the JCRA in its investigation; and
- there is no evidence that Lufthansa's acquisition of BMI resulted in a substantial lessening of competition in Jersey or any part of Jersey, as detailed in Paragraph 40 above.

46. Thus, the facts and circumstances here indicate that Lufthansa's acquisition of BMI without notification to and approval by, the JCRA was not intended to circumvent the Order or the Law, but was merely negligent.

47. In its proposed decision sent to Lufthansa on 16 September, the JCRA originally proposed a fine of £40,000.00 for this infringement. This fine level was based on doubling the maximum possible filing fee payable to the JCRA of £20,000.00 – which is comprised of £5,000.00 for the initial filing fee and an additional fee of £15,000.00 if a full investigation would have been required. In addition to the filing fees, the JCRA is aware that applicants would incur additional compliance costs in relation to the completion of the Merger Application Form and providing the JCRA with any additional information that may be required to asses whether the proposed acquisition would substantially lessen competition. The JCRA is mindful that a financial penalty should not result in the parties being in a better financial position as a result of the infringement of the Law.

48. In its 1 October response, Lufthansa argues that a fine of £40,000.00 is, in Lufthansa's view, clearly disproportionate. Lufthansa observes that the JCRA's proposed decision concerning this matter states that the infringement was negligent, and that the transaction itself did not result in any substantial lessening of competition in Jersey. Thus, a full investigation, warranting a maximum £20,000.00 would not have been necessary. Lufthansa also observes that this amount is four times the fines imposed in the two prior JCRA Decisions regarding similar infringements.

49. After considering Lufthansa's representations concerning the level of financial penalty, the JCRA partially agrees with Lufthansa's analysis. In light of our findings set out in Paragraph 40, above, a full investigation of Lufthansa's acquisition of BMI would have been unlikely, meaning that the likely filing fee payable by Lufthansa would have been limited to the initial fee of £5,000.00.

50. The JCRA still concludes, however, that the circumstances of this matter warrant a financial penalty greater than the £10,000.00 fines the JCRA has levied on Autogrill

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the Merger Regulation are clear in that they cover not only intentional circumvention, but also negligent circumvention").

S.p.A.[18] and TUI AG, respectively, for infringements of Article 20(1) of the Law. As observed in Paragraph 44 of the TUI Decision, "[i]n setting the amount of [the £10,000.00] penalty, in the interests of proportionality the JCRA is mindful that, at the time of TUI's acquisition of First Choice, the JCRA had not previously published a Decision identifying a breach of the Article 20(1) requirements and imposing a financial penalty." Similarly, in Paragraph 37 of the Decision against Autogrill S.p.A., the JCRA stated that "[i]n setting the amount of [the £10,000.00] penalty, in the interests of proportionality the JCRA is mindful that this is the first time it has identified a breach of the Article 20(1) requirements, and decided to impose a financial penalty."[19] These circumstances do not apply here, as both the TUI and Autogrill Decisions were published and available to Lufthansa when the JCRA contacted it concerning the potential obligations under Article 20(1) of the Law arising from the then-proposed acquisition of BMI.

51. In light of this, and considering both the size of Lufthansa and the circumstances and considerations set out in Paragraphs 43 to 46 above, the JCRA has determined that the appropriate financial penalty for this infringement is £25,000.00. The financial penalty is within the limit set by Article 39(2) of the Law. The amount of the financial penalty is specific to this case, and is not indicative of penalties or other remedies that the JCRA might impose in other cases in the future.

Decision and Financial Penalty Order

52. In the light of the facts and circumstances set out above, the JCRA has decided that Lufthansa has acquired control of BMI in breach of Article 20(1) of the Law.

53. Based on this breach, the JCRA hereby imposes a fine of £25,000.00 on Lufthansa under Article 39 of the Law. The amount of the fine must be paid to the JCRA no later than 15 January 2010.

54. Lufthansa may pay this fine by any combination of cheque or wire transfer. Wire transfers may be made to the JCRA's account upon instructions available from the JCRA.

55. If payment is not made by 15 January 2010, interest will accrue daily thereafter on any unpaid amount at four percentage points above the published base rate of the Bank of England.

15 October 2009 **By Order of the JCRA Board**

[18] JCRA Decision Imposing Financial Penalties Under Articles 35 and 39 of the Competition (Jersey) Law 2005 Concerning an Infringement of Article 20(1) of the Competition (Jersey) Law 2005 by Autogrill S.p.A. (13 Dec. 2007), published on www.jcra.je

[19] Both the TUI and Autogrill Decisions also stated that the level of financial penalties imposed therein were "not indicative of penalties or other remedies that the JCRA might impose in other cases in the future."