competitiontribunal
SOUTH AFRICA

# COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No: LM084Aug19**

**In the matter between**

Comair Ltd — Primary Acquiring Firm

and

Star Air Cargo (Pty) Ltd and Star Air Maintenance (Pty) Ltd — Primary Target Firms

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| Panel | : E Daniels (Presiding Member) |
| | : Y Carrim (Tribunal Member) |
| | : A Ndoni (Tribunal Member) |
| Heard on | : 11 December 2019 |
| Order Issued on | : 11 December 2019 |
| Reasons Issued on | : 10 February 2020 |

## REASONS FOR DECISION

### Introduction

[1] On 11 December 2019 the Competition Tribunal ('Tribunal') approved a transaction in terms of which Comair Ltd (Comair) acquired sole control of Star Air Cargo (Pty) Ltd (SAC) and Star Air Maintenance (Pty) Ltd (SAM), collectively referred to as "Star Air", without conditions.

[2] The reasons for the approval follow.

**Parties to the transaction**

*Primary Acquiring Firm*

[3] Comair is a public company incorporated in accordance with the laws of the Republic of south Africa. It is listed on the Johannesburg Stock Exchange and controls several firms. Relevant to the transaction, Comair controls Kulula Air (Pty) Ltd (Kulula); Comair Retail Travel Services, Comair Air Cargo (Pty) Ltd, and Comair Catering (Pty) Ltd.

[4] Comair is a South African aviation company offering scheduled airline services within South Africa to the rest of sub-Saharan Africa and the Indian Ocean Islands. Comair operates under two brands, namely its low fare airline brand Kulula and the British Airways brand as part of a licence agreement with British Airways PLC.

[5] At the time of filing, Comair operated 27 Boeing aircraft, 18 of which are owned by the Group. The remaining 9 aircraft operated by Comair are leased from local and foreign leasing companies. All these aircraft are used solely for transporting passengers by air.

[6] Comair submits that it is in the process of upgrading its entire fleet to Boeing 737-800s and Boeing 737 Max aircraft.

*Primary target Firm*

[7] Star Air is comprised of two South African based companies (SAM and SAC) which provide aircraft leasing and aircraft maintenance services respectively. SAC provides aircraft leasing services while SAM provides aircraft maintenance, primarily to the SAC fleet. The Target Group holds international and domestic air service licences for transportation of passengers and cargo.

[8] The target group's fleet consists of 10 Boeing aircraft which it leases to customers on a "wet" and "dry" lease basis for the transporting of passengers

and Cargo.[1] Dry leases account for approximately [redacted] of Star Air's leasing business whilst wet leases account for approximately [redacted]

[9] Of the ten Boeing aircraft in Star Air's fleet, 5 are configured as passenger services and 5 as cargo aircraft. The submissions of the merging parties are that all ten of the aircraft are configured as narrow-bodied aircraft.[2]

[10] The 5 passenger configured aircraft are leased to a range of customers including Comair, Mango, Royal Jordanian and wings of Lebanon. The cargo planes are leased to a range of customers including Bid-Air Cargo and South African Airways Cargo.

**Proposed transaction and rationale**

[11] In terms of the sale of shares agreement, Comair intends to acquire 100% of the Star Air's share capital. Subsequent to the implementation of the proposed transaction, Comair will have sole control over Star Air.

[12] In terms of rationale, Comair submitted that Star Air presented an attractive investment opportunity and the transaction would enable Comair to extend its diversification strategy into the leasing of aircraft. [redacted][3]

[13] Star Air submitted that its rationale for the transaction was driven by its founder and shareholder wishing to realise the value of the business through its sale.

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[1] A wet lease involves the provision of the aircraft with crew members, maintenance services and the necessary insurance at a fixed rate per hour flown. A dry lease on the other hand involves the provision of only the aircraft and the customer provides its own maintenance and insurance.
[2] Letter from Webber Wentzel to the Competition Commission *11 December 2019* Merger Record p454 para 13.1.1.
[3] Transcript of proceedings p17 lines 4-6.

## Relevant market and impact on competition

*Relevant market and market share analysis*

[14] The Commission considered the activities of the parties and determined to assess the transaction in the following markets:

14.1 The upstream global market for the provision of aircraft leasing;

14.2 The upstream national market for the provision of aircraft leasing;

14.3 The upstream national market for the provision of aircraft maintenance services; and

14.4 The downstream national market for the provision of scheduled passenger airline services.

[15] In assessing the upstream global and national market for the provision of aircraft leasing, the Commission estimated that the post-merger entity would control less than 1% of the global market and 11% of the national market.

[16] In assessing the upstream national market for the provision of aircraft maintenance services in South Africa, the Commission, using revenue generated as indicator of market share, determined that the post-merger entity would control less than 1% of the national market, with SAA Technical (SOC) Ltd's (SAA) commanding 70-75%.

[17] The Commission, in assessing the downstream national market for the provision of scheduled passenger services in South Africa concluded that, although the merged entity would control approximately 33% of the market, this was as a result of its pre-merger market position through Comair's ownership of Kulula and British Airways and as such, the transaction had not resulted in accretion at this level of the value chain.

[18] On a market share assessment, the Commission concluded that the transaction was unlikely to substantially prevent or lessen competition in any of the markets assessed. We found no reason to disagree.

*Vertical assessment*

[19] The Commission, identifying that the Comair group is active in the market for the provision of scheduled passenger services and the target group is active in the market for aircraft leasing as well aircraft maintenance services, assessed whether the proposed transaction would raise any foreclosure concerns.

[20] This assessment had two parts. The first was to assess whether there was a risk of input or customer foreclosure as a result of Star Air being active in the market for the provision of aircraft leasing services whilst the Comair Group is active in the downstream market for the provision of scheduled passenger services.

[21] The second was to assess whether there was any risk of input or customer foreclosure as a result of Star Air being active in the upstream market for the provision of aircraft maintenance whilst the Comair Group is active in the downstream market for the provision of scheduled passenger services.

<u>Provision of aircraft leasing</u>

[22] In relation to input foreclosure, the Commission assessed whether other parties, competitors of Comair, would be affected by the merger if, post-merger, the merged entity decided to lease all of the aircraft formerly owned by Star Air to the Comair group. It thus assessed whether the merger would grant Comair the ability to foreclose its rivals in the market for the provision of scheduled passenger services.

[23] The Commission found that Star Air's low market share in the national and global market for the leasing of aircraft as well as the competition faced from numerous other providers warranted the conclusion that the merged entity would not have the ability to foreclose downstream rivals and thus there was no need to assess the incentive and potential harm arising from that.

[24] Related to this assessment, the Commission received a concern from a competitor of Comair's in the market for the provision of passenger services. The Competitor submitted that the proposed transaction may result in a lack of availability of aircraft to wet lease from Star Air as post-merger Star Air may discontinue leasing its aircraft in the open market and instead, only lease to Comair.

[25] In response to these concerns, the merging parties submitted that in line with Comair's strategy, there would be no change in the manner in which Star Air operated in the market post-merger. It was submitted that the merged entity would not have a right of first refusal over any of Star Air's aircraft and that Star Air would continue to operate on a first come-first served principle with no preference in terms of availability of aircraft or pricing being given to Comair.[4]

[26] A further point made to allay the concerns raised was that Comair had, prior to the transaction, sold two of the planes it was retiring from its fleet to Star Air and that Comair intended to sell more of its aircraft to star air, thus growing the fleet available for leasing.[5]

[27] We agree with the Commission that, in light of the availability of alternative options available, and considering the indication that there would be no favour to Star Air post transaction, it is unlikely that the transaction will give rise to the merging parties' ability to foreclose downstream rivals.

[28] On the question of customer foreclosure, the Commission assessed the likely impact on the merger on the other parties which currently provide leasing services to Comair. In this regard, the Commission found that Star Air would not have the capacity to supply all of Comair's leasing needs related to passenger configured aircraft. It submitted that Comair group currently leases 15 passenger aircraft from third party leasing companies and one from Star Air. Star Air's fleet is comprised of only five passenger configured aircraft. As a result, the Commission found that the merger was unlikely to raise any

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[4] Transcript of proceedings p18 lines 3-13.
[5] Transcript of proceedings p19 lines 16-21.

customer foreclosure concerns as such related to the upstream market for the provision of aircraft services.

[29] We found no reason to disagree with the Commission's findings on this matter.

Upstream market for the provision of aircraft maintenance

[30] In relation to input foreclosure, the Commission assessed whether there will be competitors of Comair which are likely to be affected by Comair's acquisition of SAM, the maintenance division of Star Air. In this regard, it was submitted by the merging parties that pre-merger, SAM primarily conducted maintenance on the Star Air fleet, and whilst it had the ability to provide maintenance services to third parties, it had only done so on a few occasions in the past.

[31] The Commission determined that even if the merged entity decided to offer maintenance services to third parties, it would control, at most, approximately 1% of the market in which SAA controlled approximately 75%. As such, the Commission found that the merger was not likely to create the ability for the merged entity to foreclose downstream competitors to Comair.

[32] Given the strong presence of SAA, we found no reason to disagree with the Commission's conclusion on this issue.

[33] On the question of customer foreclosure, the Commission assessed the impact of the transaction on those firms which provided maintenance services to Comair pre-merger.

[34] The Commission found that Comair's heavy maintenance is performed by several overseas firms and its local line maintenance is performed by SAA.

[35] SAA, in a letter to the Commission, raised a concern that the merger would result in the loss of Comair as a customer, as Comair would now, through the acquisition of SAM, be able to maintain its own aircraft.

[36] In response to this concern, the merging parties submitted that SAA is the dominant supplier of aircraft maintenance services in South Africa and that the

complaint in respect of this merger serves only as an attempt to preserve a monopoly position.

[37] The Commission found that if Comair decided to solely utilise its newly acquired maintenance providers, SAA technical would lose, at most, 10% of its current share in the market and still remain the largest player but this did not amount to raising any significant customer foreclosure concerns. As such, the Commission thus concluded that the merger was unlikely to raise any customer foreclosure concerns in the upstream market for the provision of aircraft maintenance services and we found no reason to disagree.

*Third party concerns*

[38] One firm, [redacted] raised two concerns with the Commission during its investigation stage. The first was related to a contractual dispute that had arisen between Star Air and [redacted] At the merger hearing representatives for [redacted] attempted to address this issue but were unable to indicate its relevance to a competition assessment of the matter. The Merging Parties indicated, in response to the concern, that they saw no way in which the merger may impact on existing contractual obligations. We see no reason to address the issue further.

[39] The Second concern was that, on [redacted] submissions, the proposed transaction would result in a situation in which Star Air would have an absolute monopoly in respect of domestic cargo transportation services in South Africa.[6] The merging parties indicated that Star Air has never operated in the domestic cargo market and it has no intention of operating in the market, rather, Star Air leases its aircraft to other entities who do operate within the market. Insofar as Comair is concerned, it also has not and would not intend to operate in the domestic cargo transportation market after the merger. The Commission submitted that the concerns of [redacted] may be assessed as foreclosure concerns and given the estimated market shares of the merged entity, the merged entity would not have any ability to engage in any form of foreclosure.

[6] Letter from [redacted] to the Competition Commission *5 September 2019* Merger record p3090 para 55.

[40] We were unable to take [redacted] concerns any further and, in any event, do not share [redacted] fears that the merger would result in a significant lessening of competition in the relevant market.

## Public interest considerations

[41] The merging parties submitted that the proposed transaction raised no public interest concerns and specifically would not have any negative effect on employment as the merging parties had no plans to retrench any employees as a result of the proposed transaction. The Commission investigated the claim and accepted the merging parties' statement in this regard.

[42] We found no reason to disagree with the Commission's finding.

## Conclusion

[43] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issues arise from the proposed transaction. Accordingly, we approve the proposed transaction unconditionally.

**Mr Enver Daniels**

**10 February 2020**
**Date**

**Ms Y Carrim and Ms A Ndoni concurring.**

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| Tribunal Case Manager | : Alistair Dey-van Heerden. |
| For the Merging Parties | : Martin Versfeld *of* Webber Wentzel Attorneys for Comair *and* Jannie Sherman For Star Air. |
| For Flyfofa | : Adv. JL Van Der Merwe *instructed by* JP Van Schalkwyk Attorneys |
| For the Commission | : Zintle Siyo and Mogau Aphane |