

COMMISSION DECISION

of 14.07.2010

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the
European Union and Article 53 of the EEA Agreement**

(Case COMP/39.596 – BA/AA/IB)

(Only the English text is authentic)

(Text with EEA relevance)

NON-CONFIDENTIAL VERSION

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, in particular Article 9(1) thereof, Having regard to Commission Decision of 8 April 2009 to initiate proceedings in this case,

Having expressed concerns in the Statement of Objections of 29 September 2009,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,²

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer in this case³,

WHEREAS:

1. SUBJECT MATTER

- (1) This Decision is addressed to British Airways Plc. (hereinafter referred to as "BA"), American Airlines Inc. (hereinafter referred to as "AA"), and Iberia Líneas Aéreas de España S.A. (hereinafter referred to as "IB").
- (2) This Decision concerns the agreements concluded between BA, AA and IB (hereinafter referred to as "the parties" or, individually, as "the party") in relation to the establishment of a revenue-sharing joint venture covering all passenger air transport services of the parties on the routes between Europe and North America (hereinafter referred to as "transatlantic routes"). The agreements provide for extensive cooperation between the parties on these routes, which includes pricing, capacity and scheduling coordination, as well as sharing of revenues.
- (3) In its Statement of Objections of 29 September 2009, the European Commission (hereinafter referred to as the "Commission") expressed its concerns as to the compatibility of these agreements with Article 101 of the Treaty and Article 53 of

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the TFEU. The two sets of provisions are in substance identical. For the purposes of this Decision references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union". The terminology of the TFEU will be used throughout this Decision.

² OJ C 58, 10.3.2010, p. 20.

³ To be published in the Official Journal of the European Union.

the Agreement on the European Economic Area (hereinafter referred to as "EEA Agreement"). The concerns related to seven routes between Europe and the United States.

2. THE PARTIES

- (4) **BA** is a full-service network airline registered in the United Kingdom and operating airport hubs at London Heathrow and London Gatwick. BA serves around 150 cities in about 75 countries. BA's worldwide turnover in 2009 was GBP 8 992 million (EUR 10 093 million)⁴.
- (5) **AA** is a full-service network airline incorporated in the state of Delaware, with its headquarters in Dallas, Texas. Its major hubs are Dallas/Fort Worth, Chicago and Miami, and it has significant operations at New York, Boston, Los Angeles, Raleigh/Durham and St Louis. AA serves around 250 cities in about 40 countries. AA is one of the three largest U.S. airlines. AA's worldwide turnover in 2009 was USD 19 917 million (EUR 14 279 million)⁵.
- (6) **IB** is a full-service network airline registered in Spain and operating a hub in Madrid. Its primary focus is on routes connecting Spain with the rest of Europe and between Europe and Latin America. IB serves more than 100 cities in 40 countries. IB's worldwide turnover in 2009 was EUR 4 458 million.

3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (7) On 30 January 2009, Virgin Atlantic Airways Limited ("Virgin Atlantic") lodged a complaint with the Commission against the parties' joint venture pursuant to Article 7 of Commission Regulation No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty⁶.
- (8) On 8 April 2009, the Commission opened proceedings concerning the agreements concluded by the parties, in relation to cooperation in passenger air transport services on transatlantic routes. The Commission conducted an extensive investigation, which included requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 sent to the parties and third parties, econometric analysis of data and a passenger survey conducted at London Heathrow airport. On 29 September 2009, the Commission adopted a Statement of Objections setting out competition concerns identified during the investigation. The Statement of Objections was notified to the parties on 1 October 2009. On 9 December 2009, the parties submitted their final joint reply to the Statement of Objections disagreeing with the Commission's provisional findings. The parties waived their right to an Oral Hearing. On 9 December 2009, the parties also submitted a paper

⁴ The annual turnover has been converted at the average rate of the European Central Bank for the year 1 January 2009 to 31 December 2009: EUR 1 = GBP 0.89094.

⁵ The annual turnover has been converted at the average rate of the European Central Bank for the year 1 January 2009 to 31 December 2009: EUR 1 = USD 1.3948.

⁶ OJ L 123, 27.04.2004, p. 18.

on the alleged efficiencies resulting from their cooperation within the meaning of Article 101(3) of the Treaty. On 21 December 2009, the Commission sent the parties a list of questions concerning this paper, to which they replied on 8 January 2010.

- (9) Between 4 December 2009 and 25 January 2010, the parties submitted several commitments proposals to the Commission, seeking to address the identified concerns.
- (10) On 26 January 2010, the Commission launched an informal market test of the commitments proposed by the parties on 25 January 2010 by sending requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 to 11 third parties. On 26 February 2010, in particular in light of the replies received from the third parties, non-confidential versions of which had been then provided to the parties, the parties offered revised commitments (hereinafter referred to as "the Commitments").
- (11) On 10 March 2010, the Commission launched a formal market test by publishing a notice in the Official Journal of the European Union⁷ pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting third parties to submit their observations on the Commitments within one month following publication (hereinafter referred to as "Article 27(4) Notice"). The Commission received comments from five third parties.
- (12) On 15 April 2010, the Commission informed the parties of the observations made by interested third parties on the Commitments following the publication of the Article 27(4) Notice. On 27 April 2010, the parties submitted their observations on the third parties' comments.
- (13) On 12 May 2010, the parties submitted amended commitments.
- (14) On 18 May 2010, the Commission informed Virgin Atlantic, in accordance with Article 7(1) of Regulation (EC) No 773/2004, that it took the preliminary view that, in the event that the commitments offered by the parties would be made binding upon them on the basis of Article 9 of Regulation (EC) No 1/2003, there would not be a sufficient degree of European Union interest for conducting a further investigation into the alleged infringement. On 15 June 2010, Virgin Atlantic submitted further comments.
- (15) On 25 June 2010, the parties submitted further amended commitments (hereinafter referred to as "the Final Commitments"), incorporating one minor change⁸ compared to the commitments of 12 May 2010.
- (16) On 9 July 2010, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 12 July 2010, the Hearing Officer issued his final report.

⁷ OJ C 58, 10.3.2010, p. 20.

⁸ See recital (120).

4. PRELIMINARY ASSESSMENT

4.1. Relevant markets

4.1.1. Origin & Destination (city pair) markets

- (17) Based on its investigation, and following the principles set out in the Commission's 1997 market definition notice⁹, in its Statement of Objections, the Commission defined the relevant market for scheduled passenger air transport services on the basis of the "point of origin/point of destination" (hereinafter "O&D") city pair approach. This market definition corresponds to the demand-side perspective whereby customers consider all possible alternatives of travelling from a city of origin to a city of destination, which they generally do not consider substitutable to a different city pair.
- (18) The Commission took the preliminary view that the O&D city pair market definition was also compatible with the characteristics of corporate customers' demand for air transport services. While the investigation showed that some corporate customers (such as large multinationals) attached particular importance to the geographic coverage of airline networks, the demand for air transport services by corporate customers also focused on and was governed by offers of particular city pairs.
- (19) Consequently, the market investigation confirmed that the relevant market definition in this case was the O&D city pairs (or routes); the use of this definition is consistent with the jurisprudence of the Court of Justice of the European Union and previous antitrust and merger cases in the sector¹⁰.

4.1.2. Distinction between air transport services targeted at premium and non-premium passengers

- (20) In its Statement of Objections, the Commission took the preliminary view that two distinct product markets were relevant to assessing competition on transatlantic

⁹ Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5). This notice clarifies that "demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product". The notice states that supply-side substitutability "may" also be taken into account "when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy". It follows that demand-side factors are more important than supply-side factors in defining markets.

¹⁰ See Commission Decision of 11 February 2004 in Case No COMP/M.3280 *Air France/KLM*, paragraph 9 *et seq.*; Commission Decision of 4 July 2005 in Case No COMP/M.3770 *Lufthansa/Swiss*, OJ C 204 of 20.8.2005, paragraphs 12 *et seq.*; Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078, OJ C 264 of 30.10.2002, pp. 5-9; Commission Decision of 22 June 2009 in Case No COMP/M.5335 – *Lufthansa/SN Airholding*, paragraphs 11 *et seq.*; and Commission Decision of 28 August 2009 in Case No COMP/M.5440 – *Lufthansa/Austrian Airlines*, paragraphs 11 *et seq.* The O&D approach was also confirmed by the European courts such as, for example, in Case 66/86 *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 40, Case T-2/93 *Air France v Commission* [1994] ECR II-323, paragraph 84, and Case T-177/04 *easyJet Airline Co. Ltd v Commission* [2006] ECR II-1931, paragraph 56.

routes: premium passengers (encompassing at least services in First and Business class) and non-premium passengers (encompassing services in restricted Economy class¹¹).

- (21) The Commission's investigation showed that, on transatlantic routes, there are important differences in quality between services offered by airlines in restricted Economy class on the one hand and First and Business classes on the other. These different services appeal to different passenger groups with varying travel needs and price sensitivities. Hence, restricted Economy class tickets appeal to passengers for whom price is the first and most important factor when selecting airlines and flights ("non-premium passengers"). First and Business class tickets appeal to passengers who base their choice of airline and flight on a combination of factors such as travel comfort, ticket flexibility, the availability of frequent non-stop services and attractive flight schedules as well as price ("premium passengers"). The latter group of passengers is less price-sensitive than the first group of passengers.
- (22) When assessed together, this evidence indicated that services in at least First and Business class, on the one hand, and services in restricted Economy, on the other hand, were in different product markets. In the Statement of Objections, the Commission took the preliminary view that the precise boundary between these markets could be left open in this case, as the competitive assessment would not materially differ irrespective of whether services in Premium Economy class¹² and fully flexible Economy class were placed in premium or non-premium markets. In the Statement of Objections, the Commission calculated the airlines' market shares on the basis of a premium market encompassing all tickets except restricted Economy.

4.1.3. Distinction between non-stop and one-stop flights

- (23) In its Statement of Objections, the Commission took the preliminary view that, compared to competing non-stop flights, one-stop flights were remote substitutes for non-stop flights on the transatlantic routes investigated in this case. The competitive constraint of one-stop services depended in particular on the passenger group (such as premium versus non-premium passengers) and the route concerned. Moreover, in the Commission's preliminary view, on many routes from/to London, one-stop services over hubs in the United States imposed more constraints on non-stop flights than one-stop services over hubs in the European Union, since stops in Continental Europe from London required backtracking.
- (24) However, for the purposes of this case, it was not necessary to conclude whether one-stop flights were in the same market as non-stop flights. On all the routes addressed in this Decision, the proposed joint venture eliminated non-stop

¹¹ Restricted Economy class encompasses Economy tickets which carry certain restrictions, such as non-availability of refund or additional fee for a change of flight.

¹² Premium Economy class is offered by some airlines, such as BA and Virgin Atlantic, and normally provides a higher degree of travel comfort and more mileage in an airline's frequent flyer programme than traditional Economy class.

competitors and, therefore, restricted competition between non-stop competitors, which was not sufficiently compensated by the one-stop flights.

- (25) The Commission provisionally concluded that the degree of competitive constraint imposed by one-stop services varied according to the route and assessed the precise impact of competing one-stop flights on the parties' joint venture on a route-by-route basis.

4.1.4. Airport substitution

- (26) Both the case-law of the Court of Justice¹³ and the Commission's established practice¹⁴ require that where passenger air transport services are offered from more than one airport in a city at one end of a route at issue – as is the case for example in London and New York – the substitutability of these airports must be assessed for market definition purposes.
- (27) As concerns London airports, the Commission's investigation showed that demand-side substitution and supply-side substitution between transatlantic flights out of Heathrow and flights out of the other four London airports (Gatwick, London City Airport, Stansted and Luton) were likely to be insufficient to consider that they all belonged to the same relevant market. However, it was not necessary to define the exact boundaries of the relevant market as regards the five London airports since the competitive assessment of the routes investigated in this case remained unchanged whether or not flights from the other London airports were included in the same relevant market as flights from Heathrow. This was due in particular to the fact that, at the time of the Commission's assessment, there were very few services operated on these routes out of London airports other than Heathrow. Moreover, the results of the Commission's investigation indicated airlines' clear preference for London Heathrow for transatlantic services on these routes and did not suggest that services from other airports would be likely to be launched in a relevant time scale.
- (28) The Commission therefore took the preliminary view that, for the purpose of this case, it was not necessary to decide on the exact market definition for the five London airports. In its assessment, the Commission calculated the airlines' market shares on the basis of markets encompassing all five London airports.
- (29) With respect to New York airports, the Commission's investigation showed that Newark and JFK airports formed part of the same relevant market, for both premium and non-premium passengers. This was consistent not only with past Commission decisions¹⁵, in which both airports were found to be substitutable for transatlantic services, but also with the approach taken both by the United States' Department of Justice and the United States' Department of Transportation (hereinafter referred to as "DOT"). This view was shared by corporate customers, travel agents, the parties and all the competitors that responded to the

¹³ Case T-177/04, *easyJet v Commission*, paragraphs 99-102.

¹⁴ See Case No COMP M.3280 *Air France/KLM*, paragraphs 24 *et seq.*

¹⁵ See Case No COMP M.3280 *Air France/KLM*, paragraph 34.

Commission's requests for information, except for the complainant, Virgin Atlantic.

- (30) The Commission therefore took the preliminary view that, for the purpose of this case, Newark and JFK airports should be considered as forming part of the same relevant market.

4.2. Competitive assessment

4.2.1. Application of Article 101(1) of the Treaty

4.2.1.1. Introduction

- (31) In its Statement of Objections, the Commission took the preliminary view that the agreements between the parties are capable of appreciably affecting trade between Member States and the Contracting Parties to the EEA Agreement within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.
- (32) The agreements concluded between BA, AA and IB provided for extensive cooperation in relation to key parameters of airline competition. In particular, the parties agreed to jointly establish fares, regulate capacity, coordinate their respective schedules, and cooperate with respect to sales and marketing. Moreover, the parties decided to share overall revenues and sell each other's products and services without regard to which party is operating the aircraft.
- (33) In its Statement of Objections, the Commission took the preliminary view that these arrangements by their very nature aimed at, and had the potential of, restricting competition. The extensive level of cooperation agreed between BA, AA and IB would eliminate competition between them on prices, capacity and other key parameters. Therefore, the Commission provisionally considered that the agreements between the parties restricted competition by object on several relevant routes and markets, which were the focus of the Commission's investigation. This restriction was appreciable due to the significance of the parties' operations on the markets concerned.
- (34) In addition, in its Statement of Objections the Commission took the preliminary view that the parties' cooperation had actual or potential appreciable anti-competitive effects on these routes. Such effects would likely arise on transatlantic routes where the parties held a strong market position, barriers to entry or expansion were significant and the parties faced a low constraint from actual and potential competitors. In its Statement of Objections, the Commission identified seven such relevant routes:
- London-Dallas (premium and non-premium market);
 - London-Boston (premium and non-premium market);
 - London-Miami (premium and non-premium market);
 - London-Chicago (premium market);
 - London-New York (premium market);

- Madrid-Miami (premium and non-premium market); and
 - Madrid-Chicago (premium and non-premium market).
- (35) Following the Statement of Objections, in light of additional evidence and subsequent events, the Commission considers that its preliminary competition concerns on Madrid-Chicago (both premium and non-premium markets) and Madrid-Miami (non-premium market) are no longer justified. Therefore, these markets are not further discussed in this Decision. On the Madrid-Miami route competition concerns remain for the premium market only.
- (36) The Commission provisionally considered that actual or potential anti-competitive effects from the parties' cooperation would arise on London-Dallas, London-Boston, London-Miami, London-Chicago, London-New York and Madrid-Miami ("the routes of concern") due to (i) restriction of competition between the parties; and/or (ii) restriction of competition between the parties and third parties.

4.2.1.2. Restriction of competition between the parties

- (37) In its Statement of Objections, the Commission took the preliminary view that, due to the extensive level of cooperation, the parties would to a large extent behave as a single entity on the routes covered by the joint venture. Hence, the agreements between the parties would eliminate competition between them on markets where these airlines would otherwise compete.
- (38) In its Statement of Objections, the Commission provisionally considered that on the premium market BA and AA or IB and AA were the closest competitors on the routes of concern, in terms of frequencies, schedules and product quality – parameters which were particularly important to premium customers. Similarly, based on a route-by-route assessment, the Commission provisionally considered that the parties were close or the closest competitors on the non-premium market on London-Dallas, London-Boston and London-Miami. The parties' position was further aligned by their existing cooperation within the oneworld Alliance and their strong brands and presence at each end of the routes of concern, in terms of marketing, Frequent Flyer Programmes (hereinafter referred to as "FFPs") and corporate contracts. Hence, the agreements between the parties would result in loss of competition between two close, or the closest, competitors.
- (39) Additionally, the parties had a strong market position on each of the routes of concern, with their combined market shares ranging from [60-70]¹⁶% to [over 90]% on the premium market and [60-70]% to [80-90]% on the non-premium market. This indicated both the level of market power that the parties would hold *vis-à-vis* consumers and the relative weakness of competitors.
- (40) The Commission provisionally considered that the parties' position was also protected by high barriers to entry and expansion. These barriers included in particular shortages of landing and take-off slots at London Heathrow/Gatwick and New York JFK/Newark airports especially during peak hours. Other identified

¹⁶ Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk or replaced by a summary.

barriers to entry included high frequencies of the parties' services, which were particularly important to premium passengers, the parties' strength in terms of FFPs, corporate contracts and marketing, access to connecting passengers and economies of density, scale and scope of incumbent airlines.

- (41) In its Statement of Objections, the Commission's preliminary finding of actual or potential appreciable negative effects of the agreements between the parties was also based on the economic analysis of data provided by the parties and Virgin Atlantic. The Commission analysed data¹⁷ on a large sample of transatlantic routes on which a change in the number of non-stop competitors occurred in the last five years. The analysis showed that a reduction in the number of non-stop competitors by one, as in this case, resulted in an average increase of prices by 2.2% for Business fully flexible tickets and 5.4% of Economy restricted tickets. This further confirmed the actual or potential negative effects of the parties' agreements.
- (42) Therefore, in its Statement of Objections the Commission took the preliminary view that the agreements between the parties would restrict, or eliminate, competition between the parties, which would result in appreciable anti-competitive effects on the routes of concern.

4.2.1.3. Restriction of competition between the parties and their competitors

- (43) The availability of connecting passengers is of key importance for operations on transatlantic routes. Most airlines would not be able to start or sustain operations on long-haul routes without benefiting from connecting traffic from their own network or the network of their alliance or interline partners at one or both ends of the route.
- (44) The parties can provide competitors on transatlantic routes with access to connecting passengers at their hubs through standard industry interline or special pro-rate agreements.
- (45) Under an interline agreement, other airlines can issue tickets including a segment they operate themselves as well as a segment operated by the parties (for example, a ticket issued by a competitor for Manchester-London-New York, where the Manchester-London segment is operated by BA and the London-New York leg by the issuing competitor). The parties subsequently charge the issuing airline for the segment that they operate.
- (46) The issuing airline and the parties can choose different methods to divide the fare that is collected from the passenger.
- (47) The standard industry method for division of the fare is so-called straight-rate proration (hereinafter referred to as "SRP"). Under SRP, the fare is divided

¹⁷ The observed variables included, among others, airline level characteristics such as O&D revenues and passenger numbers by booking class, flight frequency, average aircraft size, number of slots; route specific characteristics such as the number of competitors, population sizes at the origin and destination cities; and aggregate statistics such as GDP per capita in the respective countries and exchange rates.

between the issuing airline and the parties in proportion to their shares of the total mileage of a journey, with adjustments to take account of differences in unit cost for short-haul flights and long-haul flights. Standard industry interline agreements, however, allow the parties to apply various protection mechanisms to correct the resulting fare division, in particular by setting minimum revenue amounts they wish to receive for the segment they operate.

- (48) The parties can also choose to set the terms and conditions of interlining by a tailor-made, more advantageous agreement (called special pro-rate agreements and hereinafter referred to as "SPAs"). The terms and conditions of SPAs are negotiated separately between the parties to such an agreement and may vary significantly from one agreement to another. SPAs can determine fixed rates for each segment that the parties operate. They can also be based on the standard-industry method SRP, but eliminate the above-mentioned protection mechanisms to correct the resulting fare division or determine protection mechanisms that are more favourable than the industry standard. Furthermore, SPAs can be based on a combination of both fixed rates and SRP arrangements.
- (49) In its Statement of Objections, the Commission's preliminary view was that, given the market power that the parties would gain on the routes of concern, as well as their strong market position on a large number of short and medium-haul routes connecting to their hub airports, the agreements between the parties would result in further actual or potential restrictive effects by means of the parties restricting access to connecting traffic (namely through refusal to conclude interline or special pro-rate agreements and/or limiting access to interline inventory) and thereby foreclosing competitors on certain transatlantic routes. Such a foreclosure strategy would result in further restriction of overall competition on the routes.
- (50) The Commission provisionally considered that the potential of negative effects due to restricting access to connecting traffic would depend on various route-specific factors. In particular, for the routes of concern the Commission assessed the market power of the parties, the importance of connecting passengers (including the connecting passengers from the parties and the competitor's own connecting passengers) for competitor's operations on the route, whether the competitor would be able to replace the parties' connecting passengers with passengers from other airlines and whether overall competition on the route would be appreciably restricted by a successful foreclosure strategy.
- (51) Based on the above considerations, in its Statement of Objections the Commission took the preliminary view that the agreements between the parties would result in further actual or potential restrictive effects by means of the parties restricting access to connecting traffic and thereby foreclosing competitors on the London-Chicago and London-Miami routes. On these routes, the Commission provisionally found that Virgin Atlantic's services were particularly reliant on connecting traffic provided by the parties.

4.2.1.4. Market specific assessment

- (52) The Commission's investigation confirmed preliminary competition concerns on the following routes out of London: London-Dallas (both premium and non-premium markets), London-Boston (both premium and non-premium markets), London-Miami (both premium and non-premium markets), London-Chicago

(premium market only) and London-New York (premium market only), and on the following route out of Madrid: Madrid-Miami (premium market only). These markets are discussed below.

(a) London-Dallas (both premium and non-premium markets)

- (53) Based on the information relied upon in the Statement of Objections,¹⁸ approximately [50 000-100 000] O&D passengers travelled annually on the London-Dallas route, of whom [20-30]% were premium passengers. Between London and Dallas, [30-40]% of non-premium passengers and [10-20]% of premium passengers travelled via a one-stop service. AA and BA offered the only non-stop services on this city pair. AA operated three daily frequencies on the route, whereas BA operated one daily frequency. The parties' combined market share of bookings was [over 90]% (BA: [30-40]% and AA: [50-60]%) in relation to premium passengers and [70-80]% (BA: [30-40]% and AA: [40-50]%) in relation to non-premium passengers.
- (54) The Commission's preliminary finding was that, as the only non-stop service providers, BA and AA were each other's closest competitors for both premium and non-premium passengers. The cooperation would have the effect of eliminating competition between the only two non-stop competitors on the route and reducing the number of non-stop operators from two to one. The effects of the cooperation on competition would likely be appreciable. The Commission provisionally considered that potential non-stop competition was unlikely to exert sufficient competitive pressure on the parties post-cooperation, in particular due to significant barriers to entry, such as slot constraints at London Heathrow. With respect to one-stop services, the Commission took the preliminary view that AA's own one-stop services were the best alternatives to the non-stop services of the parties, both in terms of frequency and additional travel time. The Commission provisionally considered that one-stop services would exercise a low constraint on non-stop services on this route, especially for premium passengers.
- (55) On this basis, the Commission provisionally concluded that the agreements between the parties had the potential to have appreciable negative competitive effects on the London-Dallas route for both premium and non-premium passengers.

(b) London-Boston (both premium and non-premium markets)

- (56) Based on the information relied upon in the Statement of Objections, approximately [250 000-300 000] O&D passengers travelled annually on the London-Boston route, of whom [20-30]% were premium passengers. Between London and Boston, [10-20]% of non-premium passengers and [0-10]% of premium passengers travelled via a one-stop service. AA, BA and Virgin Atlantic were the only non-stop operators on the route. In summer 2009, BA offered three

¹⁸ In the Statement of Objections, the Commission calculated market shares based on the data from Marketing Information Data Tapes (hereinafter referred to as "MIDT") for the full year 2008 and used Official Airline Guide (hereinafter referred to as "OAG") information regarding airlines' frequencies for the International Air Transport Association's (hereinafter referred to as "IATA") summer season 2009.

daily frequencies and AA between two and three daily frequencies. Virgin Atlantic had one daily frequency. The parties' combined market share of bookings was [80-90]% (BA: [60-70]% and AA: [20-30]%) in relation to premium passengers and [60-70]% (BA: [30-40]% and AA: [20-30]%) in relation to non-premium passengers. Virgin Atlantic's market shares were [10-20]% on the premium market and [20-30]% on the non-premium market.

- (57) The Commission took the preliminary view that, on the premium market, BA and AA were the closest competitors, in particular based on offered frequencies and schedules. On the non-premium market, BA, AA and Virgin Atlantic were all close competitors. In the Commission's preliminary view, the only existing non-stop competitor, Virgin Atlantic, would not be able to replicate the competitive constraint that the parties exercised on each other. Competitors' entry or expansion of non-stop services was unlikely due to high barriers to entry. With respect to airlines providing one-stop services, the Commission took the preliminary view that such airlines were remote competitors on this route compared to airlines offering non-stop flights, both for premium and non-premium passengers. According to the Commission's preliminary findings, one-stop services would exercise a very low constraint on non-stop services on this route, especially for premium passengers.
- (58) On this basis, the Commission provisionally concluded that the agreements between the parties had the potential to have appreciable negative competitive effects on the London-Boston route for both premium and non-premium passengers.

(c) London-Miami (both premium and non-premium markets)

- (59) Based on the information relied upon in the Statement of Objections, approximately [250 000-300 000] O&D passengers travelled annually on the London-Miami route, of whom [10-20]% were premium passengers. Between London and Miami, [20-30]% of non-premium passengers and [0-10]% of premium passengers travelled via a one-stop service. The route was served by three non-stop airlines: BA, AA and Virgin Atlantic. BA offered two daily frequencies and each of AA and Virgin Atlantic offered one daily frequency. The parties' combined market share of bookings was [70-80]% (BA: [50-60]% and AA: [10-20]%) in relation to premium passengers and [60-70]% (BA: [30-40]% and AA: [20-30]%) in relation to non-premium passengers. Virgin Atlantic's market shares were [20-30]% and [20-30]% on premium and non-premium markets, respectively.
- (60) The Commission took the preliminary view that, on the premium market, BA and AA were the closest competitors. On the non-premium market, BA, AA and Virgin Atlantic were all close competitors. According to the preliminary assessment, the only existing non-stop competitor, Virgin Atlantic, would not be able to replicate the competitive constraint that the parties exercised on each other. Competitors' entry or expansion of non-stop services was unlikely due to high barriers to entry. With respect to airlines providing one-stop services, the Commission took the preliminary view that such airlines were remote competitors on this route compared to airlines offering non-stop flights both for premium and non-premium passengers. The Commission provisionally considered that existing

one-stop services would exercise a low constraint on non-stop services on this route, especially for premium passengers.

- (61) In its Statement of Objections, the Commission also provisionally found that Virgin Atlantic's services on the London-Miami route were particularly reliant on connecting traffic provided by the parties. The Commission provisionally considered that the agreements between the parties would result in further actual or potential restrictive effects by means of the parties restricting access to connecting traffic and thereby foreclosing Virgin Atlantic's operations on the route.
- (62) On this basis, the Commission provisionally concluded that the agreements between the parties had the potential to have appreciable negative competitive effects on the London-Miami route for both premium and non-premium passengers.

(d) London-Chicago (premium market only)

- (63) Based on the information relied upon in the Statement of Objections, approximately [250 000-300 000] O&D passengers travelled annually on the London-Chicago route, of whom [20-30]% were premium passengers. Between London and Chicago, [10-20]% of non-premium passengers and [0-10]% of premium passengers travelled via a one-stop service. The route was served by four non-stop airlines: BA, AA, United Airlines (hereinafter referred to as "United") and Virgin Atlantic. AA offered four daily frequencies, after it withdrew one daily frequency in the IATA¹⁹ summer season²⁰ 2009. BA offered three daily frequencies but announced suspension of one service for the IATA winter season²¹ 2009/10. United, with a hub at Chicago O'Hare airport, operated three daily non-stop services. Virgin Atlantic, which re-entered the route in 2007 after six years of absence, offered one daily non-stop flight. Virgin Atlantic announced suspension of this service for the IATA winter season 2009/10 but intended to reinstate it in IATA summer season 2010.
- (64) Based on the 2008 MIDT data, the parties' combined market share was [60-70]% (BA: [30-40]% and AA: [20-30]%) in relation to premium passengers. United's and Virgin Atlantic's market shares on the premium market were [20-30] % and [0-10]%, respectively.
- (65) During its preliminary analysis of the premium market, the Commission found that BA and AA were the closest competitors, in particular in terms of offered frequencies and schedules. In the Commission's preliminary view, the existing non-

¹⁹ IATA is an international industry trade body of airlines, created in 1945.

²⁰ The IATA summer season begins on the last Sunday of March and ends on the Saturday before the last Sunday of October. The summer season corresponds to a schedule of summer flights over a period of 7 months.

²¹ The IATA winter season begins on the last Sunday of October and ends on the Saturday before the last Sunday of March. The winter season corresponds to a schedule of winter flights over 5 months.

stop competitors, United and Virgin Atlantic, would not be able to replicate the competitive constraint that the parties exercised on each other in the premium market. While United's services were likely to be sustainable, with three daily frequencies United would be at significant disadvantage, in premium passengers market, against BA and AA together operating seven daily flights. Frequent service and convenient schedule is of great importance to premium passengers. A reorganized schedule, spreading all seven frequencies throughout the day, would increase the attractiveness of the BA/AA joint offering to premium passengers, compared to United's, even further. Virgin Atlantic which returned to the route in 2007 withdrew again for the IATA winter season 2009/10. This raised uncertainty concerning the sustainability of its services. In any event, with a single daily frequency Virgin Atlantic would be a rather remote competitor of the parties on the premium market. With respect to one-stop services, the Commission took the preliminary view that such services were remote competitors on this route compared to non-stop flights for premium passengers. The Commission provisionally considered that one-stop services would exercise a low constraint on non-stop services for premium passengers on this route.

- (66) In its Statement of Objections, the Commission also found that Virgin Atlantic's services on the London-Chicago route were particularly reliant on connecting traffic provided by the parties. The Commission provisionally found that the agreements between the parties would result in further actual or potential restrictive effects by means of the parties restricting access to connecting traffic and thereby foreclosing Virgin Atlantic's operations on the route.
- (67) On this basis, the Commission provisionally concluded that the agreements between the parties had the potential to have appreciable negative competitive effects on the London-Chicago route for premium passengers.

(e) London-New York (premium market only)

- (68) Based on the information relied upon in the Statement of Objections, more than [1 300 000-1 500 000] O&D passengers travelled annually on the London-New York route, of whom [20-30]% were premium passengers. Only [0-10]% of non-premium passengers and [0-10]% of premium passengers travelled between London and New York via a one-stop service.
- (69) The route was served by seven non-stop airlines: BA, AA, Virgin Atlantic, Continental Airlines (hereinafter referred to as "Continental"), Delta Airlines (hereinafter referred to as "Delta") and two fifth-freedom²² airlines, Air India and Kuwait Airlines. BA offered ten daily frequencies, whereas AA offered five daily frequencies. Virgin Atlantic, Continental and Delta operated five, three and two daily frequencies, respectively. Air India offered one daily frequency but later withdrew its service. Kuwait Airlines offered three weekly frequencies.

²² The freedoms of the air are a set of commercial aviation rights granting a country's airline(s) the privilege to enter and land in another country's airspace. Fifth freedom is defined as the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State.

- (70) In the market for premium passengers, the parties' combined market share was [60-70]% (BA: [50-60]% and AA: [10-20]%). The next largest airline was Virgin Atlantic with [20-30]%. Continental had less than [0-10]% and Delta [0-10]% of the premium market.
- (71) On the premium market, the Commission's preliminary analysis found that BA and AA were the closest competitors, in particular based on the offered frequencies, schedules and customers' replies. In the Commission's preliminary view, the existing non-stop competitors would not be able to replicate the competitive constraint that the parties exercised on each other in the premium market. In particular, the parties would enjoy a significant frequency advantage over their competitors. Frequencies are of key importance for premium passengers who represented a large share of traffic on this city pair. With five daily frequencies, the next largest competitor, Virgin Atlantic, would be at significant disadvantage in the market for premium passengers, as compared to BA and AA who together would likely operate more than 10 non-stop flights on the route. A reorganized schedule, spreading their current frequencies throughout the day, would increase even further the attractiveness of the BA/AA joint offering to premium passengers, compared to the services offered by other non-stop competitors (Virgin Atlantic, Continental and Delta). Competitors' entry or expansion of non-stop services was unlikely due to high barriers to entry. With respect to one-stop services, the Commission took the preliminary view that such services were already remote competitors on this route compared to non-stop flights for premium passengers. The Commission provisionally considered that one-stop services would exercise a marginal constraint on non-stop services for premium passengers on this route.
- (72) On this basis, the Commission provisionally concluded that the agreements between the parties had the potential to have appreciable negative competitive effects on the London-New York route for premium passengers.

(f) Madrid-Miami (premium market only)

- (73) Based on the information relied upon in the Statement of Objections, approximately [50 000-100 000] O&D passengers travelled annually on the Madrid-Miami route, of whom [10-20]% were premium passengers. Between Madrid and Miami, [20-30]% of non-premium passengers and [0-10]% of premium passengers travelled via a one-stop service. At the time of the Statement of Objections, IB and AA were the only airlines offering non-stop services on this route. Following the Statement of Objections, in March 2010, Air Europa launched a non-stop service on this route. IB and AA each operated one daily frequency. Air Europa launched five weekly frequencies on the route, [*]. In the premium market, IB's market share was [60-70]% and AA's market share was [30-40]%; the next largest competitors were airlines of the SkyTeam alliance, one of the three global aviation alliances, which provided one-stop services and jointly held [0-10]% of the premium market on this route.
- (74) In its Statement of Objections, the Commission took the preliminary view that, as the only non-stop service providers, IB and AA were each other's closest competitors for premium passengers. This conclusion took into account the announced launch of the non-stop services by Air Europa. In particular, Air Europa [*] and it had little marketing or branding presence in the United States. This made Air Europa a remote competitor to the parties in particular in relation

to high-yield corporate customers. Hence, the parties' cooperation would have the effect of eliminating competition between the two closest competitors on the route for premium passengers.

- (75) With respect to one-stop services, the Commission took into account that only [0-10]% of premium passengers chose to travel one-stop on this route. Moreover, the largest one-stop competitor, SkyTeam Alliance airlines, held only [0-10]% of the premium market. In these circumstances, the Commission took the preliminary view that one-stop services would not prevent the parties from exercising market power in relation to premium passengers.
- (76) On this basis, the Commission provisionally concluded that the agreements between the parties had the potential to have appreciable negative competitive effects on the Madrid-Miami route for premium passengers.

4.2.2. Application of Article 101(3) of the Treaty

- (77) During the proceedings, the parties claimed that their agreements would result in efficiencies for consumers within the meaning of Article 101(3) of the Treaty.
- (78) In particular, the parties alleged that their cooperation would result in lower fares, due to the elimination of double marginalisation and cost savings arising from economies of density. Furthermore, the parties submitted that they would have the ability and incentive to supply a higher quality service in terms of scheduling, reciprocity of FFPs, fare combinability, and joint corporate contracts.
- (79) In the Commission's view the parties' claims required clarification and further development. As a consequence, following the parties' submissions of 9 December 2009 on alleged efficiencies (see recital (8) above), the Commission addressed questions to them. The parties replied in part to these questions on 8 January 2010.
- (80) Accordingly, having assessed the claims made by the parties both before and after the issuance of the Statement of Objections, the Commission provisionally concluded that the parties had not produced sufficient evidence demonstrating that their agreements met all the criteria for application of Article 101(3) of the Treaty.

5. PROPOSED COMMITMENTS

- (81) On 26 February 2010, the parties offered the Commitments in relation to the six routes of concern, namely London-Dallas, London-Boston, London-Miami, London-Chicago, London-New York and Madrid-Miami. The key elements of the Commitments are described in this section below.

5.1. Slot commitments

- (82) Slot commitments involve release of landing and take-off slots by the parties to interested competitors at congested airports. Slot commitments are thus aimed at addressing the lack of slots for competitive services on the routes where competition concerns arise.

- (83) The parties proposed to make slots available at either London Heathrow or London Gatwick – at the competitor's choice – to allow competitors to operate up to 7 additional non-stop frequencies per week on London-Dallas, 14 on London-Boston, 7 on London-Miami and 14 on London-New York. On the London-New York route, the parties also offered to provide the competitor with operating authorizations at New York JFK airport at times matching the slots to be released at the relevant London airport.
- (84) The Commitments stipulated that, under certain conditions, each new service launched by a competitor on the four routes where slot commitments were offered would reduce the number of slots that the parties had to release under the Commitments on that route. The conditions were that (1) the competitor did not use a slot from the parties to start its new service and (2) the new service went beyond the specific number of existing services of competitors that the Commission took into consideration in its preliminary assessment. This provision was subject to confirmation by the Commission that the new service was launched by an airline deemed independent and unconnected to the parties and a viable competitor.
- (85) The commitment to make slots available was subject to a number of conditions, including that the competitor had exhausted all reasonable efforts to obtain the necessary slots through the general slot allocation process²³. In addition, to prevent abuse, the Commitments specified that, to be eligible for receiving slots from the parties, the competitor must have exhausted its own slot portfolio at the airport. Hence, with certain exceptions, a competitor was restricted from receiving slots from the parties if it held slots at the relevant airport without operating them.
- (86) As of IATA summer season 2013, the parties were to make unused slots on the London-Dallas and London-Miami routes, if any, available also to one-stop entrants, although non-stop entrants would retain priority over one-stop entrants.
- (87) The Commitments set out a detailed procedure which applied to the release of slots by the parties. In particular, it was up to the Commission to select the competitor which would receive the slot(s). The Commission was to base its choice on the most effective competitive constraint imposed on the parties. According to this procedure, only if several airlines were found to provide a similarly effective competitive constraint, would the Commission then take into account the parties' preference, which may be based on the level of compensation offered by the competitor. The Commitments also foresaw a number of obligations for the selected airline in order to avoid the risk of misuse of the slots.

5.2. Fare combinability commitment

- (88) The parties also offered to enter into fare combinability agreements with competitors on the six routes of concern. Such agreements provide for the possibility for interested airlines, and travel agents, to offer a return trip comprising a non-stop transatlantic service provided by that interested airline, and

²³ Clause 1.2 of the Commitments package lists the circumstances in which the entrant would be deemed not to have exhausted all reasonable efforts. This would be the case in particular if slots were available at the airport through the general process.

a non-stop service the other way by the parties. The possibility to conclude a fare combinability agreement is intended to allow new entrants to also sell tickets on the parties' flights on routes where the parties' frequency advantage constitutes a barrier to entry or expansion.

- (89) Under the parties' offer of 26 February 2010, competitors can request a fare combinability agreement in case they increase their services on any of the routes of concern. Airlines which do not operate a hub at both ends of that route are eligible. The fare combinability agreement would apply to the new or additional service of that airline on the route in question. The key features of the fare combinability commitment were as follows:
- (a) The combinability of fares on each relevant route was limited to true origin and destination traffic only. In the case of London-Chicago and London-New York, such agreement applied to cover premium passengers only.
 - (b) For eligible airlines, members of a transatlantic joint venture also benefiting from antitrust immunity granted by the DOT²⁴, the agreement was to provide for fare combinability on the basis of published one-way fares. For all other eligible airlines, it would also provide access to the parties' other published fares.
 - (c) The fare combinability agreement was to be subject to standard industry rules²⁵ and/or normal commercial conditions.

5.3. SPA commitment

- (90) The parties also offered to conclude SPAs²⁶ with competitors on the routes of concern. Such agreements allow interested airlines to obtain favourable terms from the parties to carry connecting passengers on flights of the parties on short-haul routes in Europe and North America (and selected other countries) in order to "feed" their own transatlantic services on the routes of concern by transferring these passengers onto their own transatlantic flights.
- (91) The Commitments offered an SPA to competitors that increase their services on the routes of concern, irrespective of whether they obtained slots from the parties. An SPA would also be available for competitors' existing services on London-Miami and London-Chicago. The Commitments provided that airlines were eligible to request an SPA when they did not, alone or through their alliance partners, operate hubs at both ends of the route.
- (92) The possibility to conclude an SPA is intended to facilitate new entrants' access to sufficient connecting traffic provided by the parties on the routes of concern where

²⁴ Under U.S. law, the DOT may grant immunity from the application of U.S. antitrust laws to airlines concluding cooperation agreements on international routes, subject to conditions if necessary.

²⁵ As laid down in the IATA Multilateral Interline Traffic Agreements.

²⁶ See recital (48).

the lack of such access constitutes a barrier to entry or expansion. The availability of an SPA for existing competitor services on London-Miami, London-Chicago and Madrid-Miami is intended to address the Commission's specific concerns in relation to the access that existing competitors on those routes have to connecting traffic provided by the parties and to assist these competitors in sustaining their services on those routes.

- (93) The key features of the SPA commitment were as follows:
- (a) The SPA would cover traffic with a true origin or destination in Europe or Israel and a true origin or destination in North America, Central America, the Caribbean, Colombia, Ecuador or Venezuela, provided that part of the itinerary involved a relevant route;
 - (b) The SPA would cover net fares and published fares, at the request of the interested airlines. If it provided for straight rate proration, it would include provisions for minimum fares and other protection mechanisms;
 - (c) Subject to these aforementioned conditions, the SPA would be concluded on terms at least as favourable as terms agreed with any other airline.

5.4. FFP commitment

- (94) The FFP commitment involves an obligation of the parties to give access to a new entrant, at its request, to their FFPs for the route in question. The purpose of this measure is to allow a new entrant to benefit from the FFPs of the parties, where such FFPs constitute a barrier to entry or expansion.
- (95) The parties proposed to open their FFPs on the routes of concern listed in recital (81) to a competitor launching or expanding a service on the route, if such competitor did not have a comparable programme and did not participate in any of the parties' programmes. The Commitments provided that the terms of the FFP agreement would ensure the same treatment for the new entrant as for the members of the oneworld Alliance other than the parties.

5.5. Reporting obligation

- (96) The parties proposed to permit the DOT to provide the Commission with data concerning the parties' cooperation as of the date of the DOT's final order granting antitrust immunity to the parties' cooperation. AA offered also to permit the DOT to provide the Commission with such data filed with the DOT prior to that date.

5.6. Cooperation with the DOT

- (97) Taking into account the parallel investigation of the case by the DOT and the cooperation between the Commission and the DOT pursuant to Annex II of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand signed on 30 April 2007²⁷, the Commitments provided for close involvement of the

²⁷ Also known to as the EU-US Air Transport Agreement or the "Open Skies" Agreement, OJ L 134, 25.5.2007, p.4, and Decision of the Council and the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 25 April 2007 on the

DOT throughout the procedure. The Commitments stated that the Commission would consult the DOT and take due consideration of its opinion at key steps of the procedure.

6. ASSESSMENT OF THE FINAL COMMITMENTS IN LIGHT OF COMMENTS IN RESPONSE TO COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)

6.1. Introduction

- (98) In response to the publication on 10 March 2010 of the Article 27(4) Notice in the Official Journal, the Commission received five submissions from interested third parties, including the complainant.
- (99) Overall, the observations received did not lead the Commission to identify new competition concerns and contained no points such as to make the Commission reconsider the competition concerns summarised in the Article 27(4) Notice. The respondents did not question the general aim of the Commitments to lower the barriers to entry or expansion on the routes of concern by making slots available on some such routes and providing the possibility to conclude fare combinability, SPA and FFP agreements with the parties on all such routes. The respondents, however, made specific comments concerning the scope and functioning of the Commitments.
- (100) In response to the comments received in the context of the formal market test and to the comments submitted by Virgin Atlantic on 15 June 2010, the parties submitted the Final Commitments on 25 June 2010.
- (101) This section sets out the Commission's assessment of the Final Commitments, in light of the comments received pursuant to the Article 27(4) Notice and in light of the information gathered during the investigation. To that end, section 6.2 describes the comments which have been, fully or partially, addressed by the parties in the Final Commitments and analyses their adequacy. Section 6.3 then sets out the comments on the Article 27(4) Notice which have not led to the amendments of the Commitments by the parties and explains why such amendments were not considered to be necessary.

6.2. Assessment of the Final Commitments

6.2.1. Slot commitments

6.2.1.1. Main comments on Article 27(4) Notice addressed in the Final Commitments

- (102) In its comments on the Article 27(4) Notice, Virgin Atlantic claimed that the number of slots that the parties proposed to make available under the Commitments was insufficient to address competition concerns.

signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand, (2007/339/EC), OJ L 134, 25.5.2007, p.1.

- (103) Furthermore, it argued that the duration of the slot release under the Commitments was too short, given the significant financial investment required by an airline to start a new long-haul service. Virgin Atlantic claimed that there was no legal certainty over the length of the slot release, since after the Commitments' expiry, the renewal of the slot release agreement was uncertain.
- (104) With respect to the clauses intended to prevent abuse contained in the Commitments, Virgin Atlantic noted that an airline was considered not to have exhausted its slot portfolio (and was therefore ineligible for slots under the slot commitments) if it leased out or exchanged slots with other airlines unless, *inter alia*, that lease or exchange was concluded before 18 January 2010 (subject to certain exceptions). It argued that mere renewals after 18 January 2010 of agreements concluded before that date should not be caught by this clause.
- (105) Finally, Virgin Atlantic suggested that the Commitments should specify that the identity of an applicant should not be disclosed to the parties at the time of the slot request, in order to prevent the parties being able to adjust their operations on the route in advance of entry/expansion.

6.2.1.2. *Assessment of the slot commitments*

- (106) In the Commitments, the parties offered to make slots available at London Heathrow or London Gatwick, and if necessary at New York JFK airport, enabling competitors to launch new services on the four routes between London and New York, Boston, Miami and Dallas
- (107) As has been consistently recognised by the European Union judicature and the Commission, the lack of slots at congested airports constitutes the main barrier to entry in the air transport industry²⁸. The investigation in this case has confirmed that the lack of slots is indeed one of the main barriers to entry in this case, especially at London Heathrow, which is one of the most congested airports in the world and has limited, if any, prospects for capacity expansion in the short-to-medium term. Hence, airlines are significantly restricted from launching new or expanding existing services due to the difficulty or inability to obtain slots. The Commitments addressed this barrier by making slots available to competitors on four routes thereby enabling competitors to launch new or expand existing services.
- (108) The Commission observes that the four transatlantic routes on which the slots are offered are some of the largest transatlantic routes in terms of carried passengers. Three of these routes, and to a lesser extent London-Miami, have a significant proportion of high-yield business passengers. This indicates the attractiveness of the routes at issue and the likelihood of competitors picking up the slot commitments.

²⁸ For example, in Case T-177/04, *easyJet v Commission*, paragraph 166, the General Court stated that: "the main barrier to entry in the air transport sector is the lack of available slots at the large airports".

- (109) Furthermore, the parties undertook to release slots at London Heathrow or London Gatwick, at the entrant's choice. The evidence on the file suggests that it is most likely that the slots will be requested at London Heathrow – the largest transatlantic gateway where slots are particularly scarce and valuable. Hence, the Commitments presented an attractive opportunity for competitors to obtain such slots at peak times for free or below the price they would otherwise pay.
- (110) In the course of the Commission's investigation, the parties' main competitors have expressed interest in entry or expansion on the routes where slot commitments are offered, on a non-stop or one-stop basis, provided that slots are available. Some competitors have also indicated the routes that they would be particularly interested in, and the number of frequencies that they, in principle, would be willing to operate. Some of these airlines have a hub or an alliance partner's hub at one or both ends of the route, which increases the likelihood of their entry or expansion. The Commitments enabled such entry or expansion, in particular, by eliminating the main barrier to entry, non-availability of slots. Furthermore, the attractiveness of entry or expansion was increased by the fare combinability, SPA and FFP commitments which would enable the airlines to increase sustainability of their new services by obtaining connecting traffic and increasing attractiveness of their services. In addition, the Commission takes into account the fact that the air transport industry has been facing a dire crisis at the time of the investigation. The Commission considers that the expression of interest by competitors would likely have been stronger in the absence of the crisis. The Commission therefore considers, on the basis of the available information, that the level of interest shown by the competitors in entering the four routes based on the slots which the Commitments make available is credible²⁹.
- (111) The Commission further notes that the Commitments incentivised non-stop entry on London-Miami and London-Dallas by providing that, as of IATA summer season 2013, the slots on these two routes would also become available to one-stop entrants. This increases the likelihood of early non-stop entry on these two routes since, after IATA summer season 2013, there are likely to be requests for slots from one-stop entrants, given the high value of slots and attractiveness for a number of European Union and United States' network airlines to operate services from London via their hub airports.
- (112) The majority of the airlines responding to the related question in the informal market test found the initial commitments of 25 January 2010 likely to be sufficient to ensure an effective competitive constraint on the parties on the four routes where slot commitments are offered. Three quarters of the responding airlines also found that the slot release procedure, as set out in the initial commitments, would allow for a timely and satisfactory slot release which is consistent with the IATA process. Airport Coordination Limited (hereinafter referred to as "ACL")³⁰, the UK slot coordinator, confirmed that the timings in the Commitments were correct

²⁹ See Case T-177/04, *easyJet v Commission*, paragraphs 197-199.

³⁰ ACL is responsible for slot allocation, schedules facilitation and schedule data collection at a large number of varied airports and, in addition, provides a wide range of services to the aviation industry.

and compatible with the seasonal slot allocation process which should allow a potential entrant to obtain slots in a timely manner.

- (113) Following the comments on the Article 27(4) Notice³¹ and Virgin Atlantic's further comments submitted on 15 June 2010, the parties proposed the Final Commitments which include a number of amendments to the slot commitments, discussed in recitals (114) to (121).
- (114) First, the parties have proposed to increase the number of slots they would make available on the London-New York route to allow competitors to operate 21 frequencies per week, as opposed to 14 frequencies per week proposed previously. The Commission considers that this increase in the number of slots significantly improves the effectiveness of the Final Commitments on London-New York by enhancing the number of competitive services that can be launched by third parties and ensuring a sufficient competitive constraint on the parties' operations³².
- (115) Second, the parties have proposed to increase the duration of all agreements to be concluded with competitors under the Final Commitments³³. The Commitments initially provided that the new entrant would be able to benefit from the Commitments for an initial duration of up to five years, which would be guaranteed even if the Decision on the basis of Article 9 of Regulation (EC) No 1/2003 (hereinafter referred to as "Commitment Decision") expired or the parties' cooperation ended, with a right to renew the concluded agreements for further periods of one year until the expiration of the Commitment Decision. In the Final Commitments, the parties have proposed to change this mechanism as follows:
- (a) An entrant taking up any of the commitments (namely slot, fare combinability, SPA or FFP commitments) before IATA winter season 2012/13 would be able to benefit from the relevant commitment for a guaranteed period of 10 years, even if the Commitment Decision expires or the parties' cooperation ends; and
 - (b) An entrant taking up any of the commitments after IATA winter season 2012/13 would be able to benefit from the relevant commitment for a period of up to the end of IATA winter season 2020/21 or, if later, of up to five years, even if the Commitment Decision expires or the parties' cooperation ends.
- (116) The Commission considers that the extension of the guaranteed duration of the agreements to be concluded with competitors significantly increases the certainty for new entrants and their ability to recoup investments when starting a new service, thus enhancing the attractiveness of the Final Commitments. In addition, granting a longer guaranteed duration to any new entrant that takes up a slot

³¹ See section 6.2.1.1 above.

³² The Commission's position on the number of slots proposed to be released on the other relevant routes is set out in recital (161) below.

³³ This amendment relates to slot release agreements, fare combinability agreements, special prorate agreements and FFP agreements.

before IATA winter season 2012/13 increases the incentive to enter these routes as early as possible.

- (117) Furthermore, the parties have proposed to relax the clauses intended to prevent abuse. Hence, the parties' proposal now considers only leases/exchanges of slots that have been concluded by the applicant with third parties after 12 May 2010³⁴ as precluding an applicant from benefiting from the slot commitments (subject to certain exceptions). The Commission considers that this amendment is adequate in order to ensure that the potential entrants that lease or exchange their slots with third parties before the commitments have been finalised are not precluded from benefiting from the Final Commitments. The Commission, however, does not consider that subsequent renewals of such pre-May 12 leases/exchanges should be *a priori* excluded from the scope of the clauses intended to prevent abuse. Such exclusion, without regard to the reasons for renewal, would allow applicants to obtain unjustifiable benefit by renewing their pre-May 12 leases/exchanges and at the same time obtain additional slots from the parties. The Final Commitments rather provide that before being deemed eligible for slots, the applicant which has concluded a new lease or renewed an existing lease after 12 May 2010 would first have to demonstrate that it had *bona fide* reasons for the lease or renewal, such as a lag between the time when slots were obtained for a given future service and the expected delivery of the aircraft ordered to ply it. The Commission finds this condition appropriate.
- (118) Third, the parties have proposed to introduce anonymity for slot applicants in the slot release procedure by specifying that, if the applicant wishes, at the time of the slot request it may ask the Monitoring Trustee³⁵ not to disclose its identity to the parties. Thus, any negotiations concerning the timing of the slots to be released or the types of compensation offered, as envisaged in the Final Commitments, would occur through the Monitoring Trustee.
- (119) The Commission considers that this amendment, giving the applicant an option of anonymity, in combination with the fact that applicants do not need to disclose to the parties the exact routes for which the slots are requested, addresses the concern expressed during the market test in relation to the ability of the parties to prepare for new services of particular competitors.
- (120) Lastly, the parties proposed to relax the misuse clause, to make clear that occasional cancellations for technical or other justified reasons should not be prohibited, in line with the rules set out in the Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, also known as the "Slot Regulation"³⁶.

³⁴ This is the date when the last major changes to the Commitments were proposed by the parties.

³⁵ The Monitoring Trustee is an individual or an institution, independent of the parties, who is approved by the Commission and appointed jointly by the parties and who has the duty to monitor the parties' compliance with the conditions and obligations attached to the Commitment Decision.

³⁶ OJ L 14, 22.1.1993, p.1.

- (121) Overall, the Commission considers the above-mentioned amendments proposed by the parties in their Final Commitments to significantly improve their scope and effectiveness.

6.2.2. Fare combinability commitment

6.2.2.1. Main comments on Article 27(4) Notice addressed in the Final Commitments

- (122) Virgin Atlantic criticised the fact that the Commitments required a competitor to increase its service in order to conclude a fare combinability agreement with the parties. Virgin Atlantic objected to the fact that this requirement meant that fare combinability would not be available on the London-Chicago route, where no slot commitment was proposed, nor on the London-New York route, where slots would not be immediately available due to Continental's newly launched services on that route, as explained under recital (84) of this Decision. It also submitted detailed comments on the terms and conditions of the proposed fare combinability agreement.
- (123) Virgin Atlantic also suggested that the commitments should require the parties to maintain the scope of any existing fare combinability arrangements to the extent they were more favourable³⁷.

6.2.2.2. Assessment of the fare combinability commitment

- (124) During the market investigation, competitors confirmed their potential interest in concluding a fare combinability agreement with the parties. Hence, when asked to comment on the initial commitments of 25 January 2010, [a company] indicated that it considered using the fare combinability commitment on the Madrid-Miami route. This airline indicated that the terms of the commitment as proposed under the initial commitments were sufficient. Moreover, Virgin Atlantic agreed that the possibility of concluding a fare combinability agreement with the parties should incentivise entry or expansion by competitors on those routes, provided that appropriate conditions were agreed as to the scope and terms of these agreements. Virgin Atlantic, however, urged the Commission to insist on further improvements of this part of the commitments.
- (125) Subsequent to the comments received after publication of the Article 27(4) Notice, the parties specified in their Final Commitments that the duration of the fare combinability commitment extends for the term of the Commitment Decision and potentially beyond, as explained in recital (115) above. This provides interested

³⁷ Virgin Atlantic also made a number of technical comments. Hence, it suggested that the fare combinability agreements concluded under the Commitments should provide for fare combinability on the basis of one-way and/or half of the published *return* fares, rather than on the basis of published *one-way* fares, since the latter tend to be considerably higher than most of the published return fares (the Commission notes that another respondent also criticised published one-way fares but without providing concrete reasons). Virgin Atlantic also suggested that the reference to "normal commercial conditions" under which the fare combinability agreement may be concluded was unclear and could be exploited by the parties. It suggested to subject the conclusion of fare combinability agreements to the standard industry rules only as laid down in the IATA Multilateral Interline Traffic Agreements.

airlines with important certainty that they can continue to benefit from a fare combinability agreement on the routes of concern.

- (126) In light of the comments on the Article 27(4) Notice, the parties also proposed to clarify and strengthen several aspects of the fare combinability commitment.
- (127) First, a fare combinability agreement is now also available for existing competitors on the London-Chicago route irrespective of whether they increase services on this route. This allows Virgin Atlantic to reduce a possible frequency disadvantage on this route and strengthen its existing competitive pressure, even without increasing its existing services on the route.
- (128) Secondly, for those competitors that do seek to increase their services on one of the routes of concern, for example on the basis of slots released by the parties, a fare combinability agreement will be available for both their existing and additional services on the route. This is a novel element in the Final Commitments compared to previous cases and should further bolster the incentives for interested airlines to start operating increased services on the routes of concern.
- (129) Thirdly, in response to Virgin Atlantic's comments during the formal market test, the parties have specified that the terms of the fare combinability agreement to be concluded pursuant to the Final Commitments cannot be less favourable than the terms of any existing fare combinability agreement between one of the parties and the relevant competitor.
- (130) Fourthly, the parties have included technical clarifications to the fare combinability commitment, which should further enhance its attractiveness for interested airlines³⁸.
- (131) The Commission concludes that the fare combinability commitment, as amended by the parties, is adequate and sufficient. The Commission considers the terms and conditions of the fare combinability commitment attractive enough to encourage actual take-up of the commitment. The Commission concludes that the fare combinability commitment lowers the barriers to entry or expansion³⁹ on the routes of concern and addresses its concerns in this regard.

³⁸ The parties have, for example, clarified that, where an interested airline is not a member of a transatlantic joint venture that enjoys antitrust immunity from the DOT, a return fare on the relevant routes can be comprised of half the round-trip fare of the relevant party and half the round-trip fare of the interested airline. The parties have also specified that any fare combinability agreement shall be concluded on pre-defined standard industry terms as laid down in the IATA Multilateral Interline Traffic Agreements. Accordingly, the parties no longer have the possibility to subject the agreement to "normal commercial conditions", which should increase the certainty of interested airlines as to the exact content of their fare combinability commitment and should address Virgin Atlantic's concern to the formal market test.

³⁹ See recital (40).

6.2.3. SPA commitment

6.2.3.1. *Main comments on Article 27(4) Notice addressed in the Final Commitments*

- (132) Virgin Atlantic submitted that the terms and conditions of the SPA that is to be concluded are not clear enough and leave too much discretion to the parties to define the content of the commitment. It indicated that the Commitments specified that the SPA should be on terms that are at least as favourable as the terms granted to any other airline. In Virgin Atlantic's opinion, the effect of the SPA commitment was significantly undermined by the possibility for the parties to exclude SPAs for comparison purposes on the basis that these agreements were entered into on excessively favourable terms in order to gain access to the other relevant airline's network.
- (133) Virgin Atlantic also suggested to further clarify the geographic scope of the SPA commitment and to include additional city-pairs in its scope.
- (134) Virgin Atlantic also stated that an SPA cannot be concluded without a corresponding interline agreement and that such interline agreements should be made available under the Commitments. Accordingly, the Commitments should provide that the parties cannot withdraw from existing interline agreements on the routes connecting to the routes of concern (hereinafter referred to as "feeder routes") that are not covered by any SPA entered into under the Commitments.

6.2.3.2. *Assessment of the SPA commitment*

- (135) During the market investigation competitors confirmed their potential interest in concluding an SPA with the parties. Hence, during the informal market test concerning the initial commitments of 25 January 2010, [*a company*] indicated that it would consider making use of the SPA commitment on the Madrid-Miami route. This airline indicated that the terms of the SPA commitment, as proposed under the initial commitments, were sufficient. Also, Virgin Atlantic agreed that the possibility of concluding an SPA with the parties should incentivise entry or expansion by competitors on the routes of concern, provided that appropriate conditions were agreed as to the scope and terms of these agreements. Virgin Atlantic, however, urged the Commission to insist on further improvements of this part of the commitments⁴⁰.
- (136) Subsequent to the comments received after publication of the Article 27(4) Notice, the parties specified in their Final Commitments that the duration of the SPA commitment extends for the term of the Commitment Decision and potentially beyond, as explained in recital (115) above. This provides interested airlines with important certainty that they have continued access to connecting traffic provided by the parties.

⁴⁰ The Commission notes that many of Virgin Atlantic's proposals, in particular concerning technical aspects of the SPA commitment, were implemented by the parties in the Commitments already prior to the publication of the Article 27(4) Notice in the Official Journal. These changes clarified and enhanced the attractiveness of the Commitments.

- (137) Pursuant to comments received after publication of the Article 27(4) Notice, the parties also further clarified the terms and conditions of the SPA commitment:
- (a) First, the parties made it explicit that interested airlines can benefit from the most favourable terms and conditions on a feeder-route by feeder-route basis⁴¹.
 - (b) Secondly, the Final Commitments specify that interested airlines can at least benefit from the most favourable terms that each of the parties offer to any other airline as at 12 May 2010 (subject to certain exceptions as described in point (d)). The Final Commitments, however, leave open the possibility for improvements of such terms. Thus, interested airlines can obtain more favourable terms, in case the parties offer more favourable terms and conditions to any other airline throughout the time period during which the Final Commitments are effective.
 - (c) Thirdly, the parties specified that any term that is included in the SPA offered pursuant to the Final Commitments cannot be less favourable than the corresponding term in an SPA between one of the parties and the interested airlines as at 12 May 2010. This allows interested airlines to continue to benefit from favourable arrangements in SPAs in existence at that date.
 - (d) Fourthly, the parties have clarified and limited the possibility for exclusion of agreements as benchmarks for the purposes of determining the terms of SPAs with new entrants. The parties have now clarified that SPAs offer the most favourable terms granted to any other airline on each of the feeder routes requested by new entrants, provided that the SPAs that are on SRP terms are subject to certain protection mechanisms. Using this clarified benchmark to conclude SPAs with new entrants, the Commission considers it suitable and proportionate to envisage the possibility of excluding agreements and individual terms that are on exceedingly favourable terms.
- (138) The aim of the parties' amendments was to clarify that the possibility of excluding agreements is to be interpreted narrowly. SPAs may no longer be excluded as benchmarks on the basis that they were entered into on excessively favourable terms in order to gain access to the other relevant airline's network. It is now clear that agreements or terms in those agreements can only be excluded as benchmarks where the Commission, as advised by the Monitoring Trustee, finds that their terms are exceedingly favourable due to exceptional circumstances.

⁴¹ This means that for net fares, the parties commit to offer the best fixed rate offered to any other airline (excluding airlines' part of the oneworld Alliance) on each of the feeder routes requested by the applicant. Interested airlines can seek to include in the SPA the maximum number of fare classes that is available to any of those other airlines. For published fares on the feeder routes covered by the SPA, an interested airline effectively has a choice. It can either choose to benefit from the lowest fixed rate offered to any other airline on each of the feeder routes requested or to opt for straight-rate proration terms. In the latter case, the applicant can benefit from the lowest minimum fares offered to any other airline (except airlines' part of the oneworld Alliance) on each of the feeder routes requested. SRP cannot be used for net fares because these fares are confidential (so they cannot be split between airlines). There is therefore a need for a separate benchmark for these fares.

- (139) As such, the Commission considers that few agreements or terms in those agreements will be excluded on the basis of such exceedingly favourable terms. Given that airlines generally enter into favourable SPAs to obtain access to other airlines' networks, the Commission considers that this in itself does not constitute an exceptional circumstance that merits the exclusion of a SPA for comparison purposes. Nevertheless, the Commission considers that an SPA concluded on unreasonably favourable terms in order to preserve the rights to fly to, from or over a country might fall within this clause. A term included in an existing SPA might also be unreasonably favourable if it is contained only in that agreement. This might be the case, for example, if out of all a party's SPAs only one contains a high number of fare classes which are accessible to competitors. As amended, this clause should protect interested airlines from potential abuse of the SPA commitment by the parties and should address Virgin Atlantic's concerns⁴².
- (140) Moreover, the parties have responded to the comment that a general interline agreement under which the parties agree to carry connecting passengers is indispensable to render the SPA operational. The parties have addressed this concern by clarifying that they will not withdraw from existing interline agreements underlying the SPA commitment. The Commission considers that this amendment addresses the expressed concern.
- (141) Finally, the parties now also agree to continue interlining on other feeder routes than those covered by the SPA commitment, provided that the amounts they recoup under these agreements are sufficient to cover their marginal cost of carriage of a passenger. This amendment should ensure that interested airlines also have continued access to the parties' connecting traffic on other feeder routes than those covered by the SPA.
- (142) The Commission concludes that the SPA commitment, as amended by the parties, is adequate and sufficient. The Commission concludes that the possibility to conclude an SPA on favourable terms together with the clause preserving existing interline agreements on feeder routes that are not covered by the SPA should, in conjunction with the slot commitments and other commitments, further reduce barriers to entry or expansion on the routes of concern. The amendments should also encourage timely and likely entry on those routes. The Commission also concludes that the availability of the same commitments in relation to existing competitor services on the London-Miami and London-Chicago routes should assist the competitors concerned to sustain their services on those routes and should address its concerns on those routes.

⁴² In addition, with respect to geographic scope, the parties have specified that an interested airline may select up to 15 behind/beyond routes operated by the relevant party to be included in the SPA. Furthermore, the parties have added Peru in the geographic scope of the SPA commitment. The Commission considers these amendments clarify the SPA commitment and make it more attractive to competitors. The Commission takes the view that the geographic scope of the SPA commitment is appropriate and sufficient. For further discussion concerning the geographic scope of the SPA commitments, see section 6.3.6.1 below.

6.2.4. FFP commitment

- (143) The parties offered to allow new entrants that had commenced or increased services on the routes of concern under the Commitments to be hosted in the parties' FFPs. This commitment only applies to competitors that do not have a comparable programme and do not participate in the parties' programmes. This remains the case in the Final Commitments.
- (144) FFPs induce customer loyalty and their availability may affect the choice of airline by a passenger on a given route. In its Statement of Objections, the Commission provisionally found that the strong FFPs of the parties constituted a barrier to entry or expansion on the routes of concern⁴³. The FFP commitment proposed by the parties removes or reduces this barrier. The Commission considers that the proposed access to the parties' FFP is appropriate and necessary as it enables competitors to strengthen the attractiveness of their services to passengers on these routes and therefore enhances the likelihood of entry or expansion under the Final Commitments.

6.2.5. Reporting obligation

- (145) As noted in recital (96) above, the parties undertake to provide the Commission with data which relate to the parties' operations as of the date of the DOT's final order granting antitrust immunity to the parties' cooperation. AA, which, as an American airline, is already required to report data to the DOT, also offers to give access to existing data.
- (146) The Commission takes the view that such a reporting obligation is appropriate and necessary, since it will provide the Commission with access to detailed data allowing it to monitor the parties' cooperation and assess its impact in the future.

6.2.6. Review clause

- (147) In their Final Commitments, the parties propose to insert a review clause. Pursuant to this clause, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the parties accept the Commission's right to review these commitments five years after the adoption of this Decision, for instance in light of the competitive situation on the routes of concern and the market conditions.
- (148) The Commission takes the view that this review clause is appropriate and necessary. It provides an additional safeguard enabling the Commission to assess how the market has evolved in light of these commitments after five years. In order not to disincentivise entry during the first five years, the Final Commitments make clear that such a review will not affect any of the agreements that may have been concluded in the meantime on the basis of the Final Commitments.

6.2.7. Conclusion

- (149) Following third parties' comments on the Article 27(4) Notice, in their Final Commitments the parties proposed the following amendments:

⁴³ See recital (40) above.

- (a) to increase the number of slots to be released on the London-New York route to enable 21 (instead of 14) weekly frequencies;
 - (b) to change the duration of the agreements concluded under the Final Commitments, in particular extending the guaranteed duration to 10 years if a relevant commitment is entered into before IATA winter season 2012/13;
 - (c) to exclude the slot releases/exchanges with third parties signed before the 12 May 2010 from the clauses intended to prevent abuse;
 - (d) to grant anonymity to the applicants for slots if the applicant so requests;
 - (e) to introduce a number of amendments into the fare combinability and SPA commitments; and
 - (f) to introduce a review clause enabling the Commission to review the Final Commitments after five years of operation.
- (150) The Final Commitments facilitate entry or expansion on the routes of concern by lowering the barriers to entry or expansion and strengthening the services of existing or new competitors with connecting traffic. The Commission notes that the amendments proposed by the parties following the Article 27(4) Notice significantly reinforce the Final Commitments, increase their attractiveness and, therefore, facilitate their take-up.
- (151) Considering all the elements set out in sections 6.2.1-6.2.6 and, in particular, the amendments proposed by the parties to increase the attractiveness of the Final Commitments following the market test, there is a sufficient likelihood that these Commitments will lead to entry or expansion by competitors on the routes of concern in a timely manner and strengthen the existing or new services of competitors.
- (152) Therefore, the Final Commitments are sufficient to address the concerns identified by the Commission in its preliminary assessment.

6.3. Comments to Article 27(4) Notice which did not lead to amendments of the Commitments

- (153) This section addresses the comments made by interested third parties in response to the Article 27(4) Notice, which did not lead to amendments of the Commitments. The respondents' points have been grouped in seven categories which are addressed in turn: the "fix-it-first" approach advocated by Virgin Atlantic (section 6.3.1), vertical concerns in relation to travel agents (section 6.3.2), comments relating to the alleged insufficient availability of slots (section 6.3.3), comments relating to the conditions attached to the slots that are made available (section 6.3.4), the fare combinability commitment (section 6.3.5), the SPA commitment (section 6.3.6), and the FFP commitment (section 6.3.7). Most of these comments were made by Virgin Atlantic.

6.3.1. "Fix-it-first" approach

- (154) Virgin Atlantic argued that the Commission should require that the Commitments are taken up as a precondition to the implementation of the parties' cooperation on the routes on which slot commitments are offered (referred to as a "fix-it-first" approach).
- (155) As held by the General Court in the *easyJet* judgment in relation to a merger case, it is not necessary to identify in advance a new entrant on the markets if there has been sufficient indication of interest in entry⁴⁴. As described in recital (110) above, in this case, the Commission has received indications of interest from third party airlines concerning their interest in entry or expansion on the routes on which the parties offer slots. The likelihood of entry is further indicated by other relevant circumstances, as set out in section 6.2.1.2 above. The Commission concludes that it is sufficiently likely that competitors will make use of the Final Commitments to enter or expand on these routes in a timely manner.
- (156) Therefore, given the likelihood of timely entry, the Commission takes the view that, in line with its previous airline antitrust and merger cases, the "fix-it-first/up-front entry" condition is neither necessary nor proportionate in this case.

6.3.2. Commitments in relation to travel agents

- (157) [*Two associations of travel agents*] argued that the Commission should also have examined vertical effects of the parties' cooperation affecting the distribution of air tickets. They criticised that the Commitments (1) neither contained a commitment which would restrict the ability of the parties to collectively negotiate incentive agreements with travel agents, (2) nor a commitment ensuring that the parties did not apply unfair or discriminatory practices or restrict the access of travel agents to their fares.
- (158) The Commission considers that the commitments are designed to ensure a sufficient level of competition between airlines on the routes of concern and will be effective in doing so. Addressing this horizontal concern also addresses any relevant vertical issues. The Final Commitments are therefore suitable to address the competitive concerns identified by the Commission, without the need for specific provisions on distribution.

6.3.3. Availability of slots

6.3.3.1. Scope of slot commitments

- (159) Virgin Atlantic criticised the scope of the Commitments as insufficient, claiming that they did not allow a sufficient level of new entry to offset the competitive harm. First, Virgin Atlantic questioned the number of routes on which the slots were available since the Commitments did not provide for any slots to be released on the London-Chicago route. Secondly, it disagreed with the number of slots to be released by the parties on the routes where slots were offered, noting that it was

⁴⁴ Case T-177/04, *easyJet v Commission*.

less than the number of incremental services that the parties combined would be able to operate.

- (160) With respect to the London-Chicago route, as set out in recitals (63) to (67) above, in the Statement of Objections the Commission considered that the parties' cooperation raised preliminary concerns in the premium market. In assessing the ability of the Final Commitments to address these concerns, the Commission took into consideration in particular the presence of two non-stop competitors on the route, United and Virgin Atlantic. United currently operates several non-stop daily frequencies between London and Chicago. In addition, United has a very strong position in Chicago where it operates its largest hub, even larger than AA's, and can also rely on its alliance partner British Midland Airways ("bmi") hub at the London end of the route. Thus, United faces lower barriers for expansion of its existing services on this route. The Commission's competition concerns are met, in particular, by the fare combinability commitment, which would mitigate the lower attractiveness of Virgin Atlantic's services because of the lower number of frequencies, and the SPA commitment, which would provide access to connecting traffic to the third competitor, Virgin Atlantic. Such commitments would thus secure and potentially strengthen Virgin Atlantic's existing services and the competitive constraint it imposes on the parties. The Commission therefore considers that no slot commitments are necessary on the London-Chicago route.
- (161) With respect to the number of slots to be released, the Commission notes that the commitments are generally considered to be adequate to address the competition concerns if they enable competitors to operate sufficient frequencies to constrain the parties. The overlap serves merely as a first proxy for determining this number. The Commission has assessed the effectiveness of the Final Commitments in particular in light of the characteristics and competitive situation on each relevant route. The Commission's assessment showed the following:
- (a) With respect to the London-Boston route, given the characteristics and competitive situation on this route, the Commission considers that making available two daily slots is sufficient to meet its concerns on this route. The Commission notes that this corresponds to the overlap between the parties for the IATA winter season 2008/09 as well as parts of the IATA summer season 2009⁴⁵.
 - (b) On the London-New York route, based on the situation at the time of its preliminary assessment, the Commission took into consideration that after implementation of the parties' cooperation there would be four non-stop competitors with daily services on the route (the parties, Virgin Atlantic with five daily flights, Continental with three daily flights and Delta with two daily flights). As explained in recital (114) above, following the comments on the Article 27(4) Notice, the parties proposed to increase the number of slots to be released on this route to enable 21 (as opposed to 14) weekly services. Given the residual competition on the route, the Commission takes the view that making slots available for 21 additional

⁴⁵ Also, the overlap was two frequencies for the whole year 2007 and 2008.

weekly flights (or three daily) is sufficient to meet the competition concerns on this route.

- (c) Finally, as regards the London-Miami and London-Dallas routes, the Commission considers that making one slot available on each of these routes, which corresponds to the overlap, is sufficient to meet the competition concerns on these routes.

6.3.3.2. Release of slots to be used to any North-American gateway

- (162) [A company] argued that the Commitments only addressed competition concerns identified on specific city pairs. The Commitments did not address the concerns that arose elsewhere from the proposed alliance, such as other routes on which the parties overlap and hold allegedly high combined market shares. To address those other concerns, the parties should divest slots which could then be used on any route between London Heathrow and a North American gateway.
- (163) The Commission notes that it has identified the relevant product markets to be O&D city pairs. The remedies therefore need to address the competition concerns on these O&D markets. Slots which can be operated other than on the O&D market where concerns arise are not suitable to remove the competition concerns identified by the Commission in its Statement of Objections. As the proposed slot remedy would therefore not be effective, the Commission did not consider the above-mentioned comment to be pertinent.

6.3.3.3. "Counting against" of new services

- (164) Virgin Atlantic argued against the clause in the Commitments pursuant to which the number of slots to be released on a relevant route would be reduced by the number of new flights started by competitors on that route without using the slots under the Commitments. With respect to the London-New York route, it stated that, given the recent announcement by Continental of the launch of two new services, in practice the parties would not be obliged to release any slots on this route under the Commitments.
- (165) In this case, the Commission analysed the suitability of the Final Commitments to address its concerns, which were based on the competitive conditions on the routes of concern at the time of the preliminary assessment. To address these concerns, it is necessary in particular to ensure a sufficient number of competitive frequencies on these routes. However, to that end, it is irrelevant whether new services, compared to the situation when the concerns were identified, are started using the slots obtained under the Final Commitments or from other sources, provided that such services are operated by a viable competitor which is independent and unconnected to the parties. If the number of competitive services operated in aggregate by competitors is subsequently reduced, for any reason, then the parties will have to make slots available accordingly.
- (166) As explained in recital (161) above, and with the additional slots proposed by the parties to be released on the London-New York route, the Commission considers that the number of services that can be launched using the slots currently proposed by the parties is sufficient to offset competitive harm on the four routes where slot commitments are offered. The Commission is aware that, on the London-New York route, Continental has been able to obtain slots and launch a new service in

IATA summer season 2010, with another service scheduled to begin in IATA winter season 2010/11. Moreover, on 11 May 2010, Delta announced the launch of an additional frequency on the London-New York route as from IATA winter season 2010/11. Since Continental and Delta are independent and unconnected to the parties and can be held to be viable competitors, the Commission sees no reason for not taking account of these three new services, even if they are operated on the basis of slots obtained outside of the slots commitments offered by the parties in this case.

- (167) In light of these considerations, the Commission takes the view that the clause counting each new service of competitors, compared to the situation at the time of the preliminary assessment, against those that could be launched using the slots from the parties is adequate and necessary to ensure the proportionality of the Final Commitments⁴⁶.

6.3.3.4. Availability of slots for one-stop services from IATA summer season 2013

- (168) Virgin Atlantic claimed that allowing slots to be taken up by one-stop entrants on the London-Miami and London-Dallas routes as of IATA summer season 2013 would not address the competitive harm identified by the Commission. Virgin Atlantic also argued that IATA summer season 2013 was too early to open up the Commitments to one-stop competitors. In contrast, [*a company*] argued that services operated via a well situated hub in the United States could potentially discipline the parties.
- (169) The Commission considers that Virgin Atlantic misconstrues the main purpose of the Final Commitment allowing one-stop entry as of IATA summer season 2013. As explained in recital (111) above, by reserving slots exclusively to non-stop entrants during the first four consecutive IATA seasons, while opening the possibility of one-stop entry afterwards, the Final Commitments aim at increasing the likelihood of non-stop entry as early as possible during the first two years. It is only in the situation where no such non-stop entry has taken place that one-stop entry might be allowed. The Commission does not contest, as it provisionally found in its Statement of Objections, that one-stop entry generally provides a lower competitive constraint than non-stop entry, although the actual extent of competitive constraint varies on a route-by-route basis, depending on various factors such as the distance between the two relevant cities or the number of non-stop competitors. It must be noted in that respect that, among the routes of concern, the London-Dallas and London-Miami routes are precisely those where one-stop services currently carry the highest proportion of passengers and where the one-stop services therefore constitute a more significant competitive constraint (see above, recitals (53) and (59) respectively).
- (170) The Commission also notes that the Final Commitments reserve exclusivity for non-stop service providers to apply for slots for four IATA seasons, with priority

⁴⁶ The Commission notes that a similar provision was included in previous airline cases, see, for example, Commission Decision of 28 August 2009 in Case No COMP/M.5440 Lufthansa/Austrian Airlines

thereafter⁴⁷. Hence, the Final Commitments allow a non-stop entrant to pick up the slots, without any competition from one-stop applicants, during a two year period. In addition, during IATA summer season 2013, the first season during which a one-stop entrant could apply for a slot, non-stop entrants would still have priority. In effect, this means that non-stop entrants have five seasons to enter without the risk that the slot is taken by a one-stop entrant. On balance, keeping in mind that the main purpose of this specific commitment is precisely to foster entry as early as possible, this appears to be an adequate time period in this sector, even in light of the economic crisis.

- (171) The Commission therefore considers that reserving the slots to non-stop entrants until IATA summer season 2013 is adequate.

6.3.3.5. Retiming of slots

- (172) One respondent argued that the proposed Commitments would not solve the more general issue of access to slots at London Heathrow for airlines holding a limited slot portfolio at that airport. This respondent thus suggested a retiming mechanism to enhance slot flexibility for prospective entrants. An entrant would be able to retime its existing slots at the airport by exchanging its existing slots with slots from the parties.
- (173) The Commission considers that, to the extent that further entry on a relevant route is needed, it should be rather done by making the slots available to any new entrant on the route, regardless of whether it already holds slots at Heathrow at other times. This would also allow the selection of the most competitive service. The proposed remedy is therefore not suitable.
- (174) Furthermore, the Commission considers that the Final Commitments already ensure that a sufficient number of services by competitors can be launched on the routes of concern. Therefore, as no further remedy is necessary, an inclusion of the proposed retiming mechanism would be disproportionate.

6.3.4. Conditions attached to slots

6.3.4.1. Temporary versus permanent releases of slots

- (175) Virgin Atlantic opined that leases are an inappropriate mechanism for slot releases under the commitments. In particular, it argued that the proposed duration of the lease was too short, given that there are significant investments and risks involved in starting a new transatlantic service. It therefore called for a permanent divestment of slots, instead of leases limited in duration.
- (176) As explained in recital (115) above, following the comments to the Article 27(4) Notice, the parties revised their proposal to the effect that an entrant may operate the released slot (i) for a guaranteed period of 10 years, if the slot is picked up before IATA winter season 2012/13, or (ii) for a period of up to the end of IATA winter season 2020/21 or, if later, of up to five years, if the slot is picked up

⁴⁷ Hence, if the slot is picked up for a one-stop service and later is returned to the parties, a non-stop entrant would again be able to pick up this slot having a priority during the selection process.

afterwards. It is important to note that the aforementioned guaranteed period is ensured for the new entrant even if the parties' cooperation ends or the Commitment Decision expires, thus providing additional certainty to the entrant.

- (177) The results of the Commission's investigation have not indicated that this period for operation of slots guaranteed under the Final Commitments is insufficient to enable airlines to enter on the routes where slot commitments are offered. This is notably the case as there has been entry on long-haul routes on the basis of slots leased at London Heathrow for a duration of five years or less.
- (178) Consequently, the Commission considers that non-permanent releases of slots, pursuant to the revised mechanism contained in the Final Commitments, are sufficient to provide the necessary certainty for competitors and enable entry on these routes. The Commission notes that, in light of the principle of proportionality and given the non-permanent nature of the parties' cooperation, a permanent release of slots could only be imposed if it were the least onerous measure to ensure the remedy's effectiveness. However, in light of the above, it would be disproportionate to require permanent releases of slots in this case.

6.3.4.2. *Grandfathering rights*

- (179) Virgin Atlantic argued that the recipient of slots should obtain full grandfathering rights, namely be able to operate the slots on any route, in order to have the ability to respond to network changes and challenges by the parties over time.
- (180) The Commission notes that when an airline has grandfathering rights over a slot, it can operate the slot to any destination. Grandfathering of slots therefore carries a significant risk of abuse, namely a possibility that the entrant may obtain valuable slots under the Final Commitments and use them for services on other routes, without resolving the competition concerns on the relevant market. Such a remedy may therefore be made binding only in cases where, in the absence of grandfathering rights, the likelihood of entry or expansion would be very low. This can be the case in particular on short-haul routes where new entrants need significant flexibility to adjust their networks. Grandfathering rights have been used in recent merger cases to increase the attractiveness of the slot commitments for new entrants, subject to certain conditions. Such rights were granted only after the entrant had utilised the slots on the route of concern for a certain period of time. This utilisation period was adjusted for each route depending on the value of slots at the relevant airport. Hence, in recent merger cases⁴⁸, the utilisation period was eight IATA seasons or four years for slots at Frankfurt airport, and shorter where slots are less valuable.
- (181) In this case, the peak time slots available under the Final Commitments are extremely valuable, with slots at London Heathrow far exceeding the value of slots at Frankfurt.⁴⁹ Hence, if the Final Commitments provided for grandfathering, in

⁴⁸ Commission Decision of 22 June 2009 in Case No COMP/M.5335 Lufthansa/SN Airholding and Commission Decision of 28 August 2009 in Case No COMP/M.5440 Lufthansa/Austrian Airlines.

⁴⁹ Slots at London Heathrow are very scarce and there is limited prospect of capacity increase. This results in very high prices for peak time slots. For example, Continental paid a record USD 209

order to eliminate the risk of abuse, it would be necessary to set a significant utilisation period which would likely be longer than the four years used for Frankfurt slots, given the relative value of slots at London Heathrow. This would significantly decrease the attractiveness of slot commitments associated with grandfathering.

- (182) Furthermore, as explained in recitals (108) to (112) above, in this case the slot commitments are already sufficiently attractive for potential entrants. In particular, the routes where slot commitments are offered are large and have a significant amount of high-yield business passengers. The slots to be released by the parties are very scarce and valuable and the Final Commitments provide an attractive opportunity for competitors to receive them. Several likely entrants already have a hub or a partner's alliance hub at least at one end of each relevant route and are thus well-placed to launch new services. Finally, the Commission has received indication of interest in entering these routes from some of the parties' competitors.
- (183) In light of all these elements, the Commission considers that given the sufficient attractiveness of the slot commitments and likelihood of entry, the current conditions for slot usage are more suitable for remedying the competitive concerns, since they provide for operation of the services on the route of concern for the whole period of the Final Commitments.

6.3.4.3. No restrictions on the parties in terms of existing services

- (184) Virgin Atlantic also argued that the Commitments were not sufficiently attractive nor viable since the parties were not required to make available the slots they currently used to operate on the routes in question, but instead could operate together the full aggregate number of services. Virgin Atlantic noted that this would require the new entrant to take up a slot commitment by adding capacity to the route when there was no indication that there would be a substantial increase in demand, in particular in the current economic climate.
- (185) The Commission observes that the Final Commitments aim in particular at enabling the launch of new services by eliminating or lowering the barriers to entry or expansion. The Commission notes that the restrictions suggested by Virgin Atlantic, such as frequency caps or reduction, would have the effect of limiting capacity on the route and would therefore potentially be detrimental to consumers. Moreover, the Final Commitments provide for the availability of SPAs on favourable terms to new entrants which would help to fill their planes with connecting passengers.
- (186) Therefore, the Commission considers that, to meet its concerns, it is neither necessary nor suitable to restrict the parties' operations in the way suggested in the above-mentioned comment.

million for four slot pairs at London Heathrow in 2007 (see Continental Airlines' 2007 Form 10-K).

6.3.4.4. *Compensation*

- (187) Virgin Atlantic and *[another company]* claimed that the ability of the parties to obtain compensation for slots may deter their take-up.
- (188) The Commission considers that the respondents overestimate the importance of compensation in the slot application mechanism foreseen in the Final Commitments. It is correct that compensation for slots is not excluded by the Final Commitments. Considering that slots are a particularly scarce resource, notably at Heathrow where slots are undoubtedly valuable, the Commission takes the view that there is no reason to exclude compensation as a matter of principle⁵⁰.
- (189) However, as appears clearly from the slot application procedure under the Final Commitments, compensation plays only a marginal role, if any, during the selection process. In fact, there is no obligation on the applicant to offer any compensation. Under the Final Commitments, the main criterion for selection of the entrant by the Commission is the strength of the competitive constraint that it would exercise on the parties. Hence, the applicant may propose no compensation and still receive slots. It is only in circumstances where two or more applicants would be deemed by the Commission to provide similarly effective constraints on a given city pair that the level of compensation offered, if any, may be relevant.
- (190) The Commission therefore takes the view that the theoretical ability of the parties to receive compensation for slots released under the Final Commitments, if offered by applicants, does not affect the likelihood or effectiveness of entry or expansion. The Commission considers that it would not be proportionate to exclude as a matter of principle the mere possibility of compensation.

6.3.4.5. *Time window for releasing requested slots*

- (191) Virgin Atlantic considered the time window of +/- 60 minutes within which the parties have to grant slots to the entrant to be too wide. It suggested that the parties have to make the slots available within the slot hour requested in order to be able to replicate the parties' schedule and provide meaningful competition. It also claimed that it is much harder for a new entrant to retime slots within a time window of +/- 60 minutes than within a given slot hour.
- (192) The Commission observes that the parties have proposed a time window of +/- 60 minutes which is narrower than the time-window offered in earlier antitrust and merger cases in relation to long-haul routes. Indeed, in the previous merger cases

⁵⁰ In its Communication COM(2008)227 final on the application of Regulation No 95/93 on common rules for the allocation of slots at Community airports, as amended, dated 30 April 2008, the Commission stated: "The text of [Regulation No 95/93, as amended] is silent on the question of exchanges with monetary and other consideration to reflect differences in value between slots at different times of day and other factors. Given that there is no clear and explicit prohibition of such exchanges, the Commission does not intend to pursue infringement proceedings against Member States where such exchanges take place in a transparent manner, respecting all the other administrative requirements for the allocation of slots set out in the applicable legislation." (p. 6).

on long-haul routes the relevant parties were required to make slots available within +/- 90 minutes of the time requested by an applicant⁵¹.

- (193) The Commission notes that for long-haul services a precise schedule time is less important than on short-haul flights for which shorter time windows have accordingly been offered in recent cases. In this case, if it so requests, the entrant is certain of receiving a slot from the parties within the peak hours, which airlines generally consider to be from 5:00 to 10:00 am local time for arrivals from the United States East Coast. The Commission also notes that, unlike in previous cases, under the Final Commitments the entrant is allowed to retime the slots received from the parties within +/- 60 minutes, which is likely to enable it to operate even closer to the desired time.
- (194) Finally, the Commission's investigation has not confirmed Virgin Atlantic's argument that retiming within an hour band is much easier. While retiming outside the slot hour may admittedly be more difficult than within the hour at London Heathrow, the responses of third parties indicate that this is still possible. This has in particular been confirmed by the UK slot coordinator, ACL⁵².
- (195) Based on these reasons, the Commission considers that the +/- 60 minute time window proposed by the parties is adequate and it would be disproportionate to require release of slots within a slot hour.

6.3.4.6. *Restrictions on early morning arrival slots*

- (196) Virgin Atlantic and [*two associations of travel agents*] argued that the restrictions in the Commitments concerning the early morning arrival slots could deter entry. These restrictions are two-fold:
- (a) The parties could refuse to offer any arrival slots at London Heathrow before 6:20 am. Hence, if an applicant requests an arrival slot for a time before 6:20, the parties could offer a slot between 6:20 and 7:20 am.
 - (b) The parties are not obliged to release more than three daily arrival slots at London Heathrow in the period prior to 8:20 am.
- (197) In relation to point (a) above, the Commission first notes that slots before 6:20 am are governed by a different regulatory regime, which requires allocation of night movement and noise quotas. In addition, the Commission has no indication from any airline except Virgin Atlantic that the above-mentioned restriction on the release of slots before 6:20 am would materially affect the effectiveness of the Final Commitments. [*No airline has*] provided any concrete indication that it would plan to operate a flight before 6:20 am.

⁵¹ See, for example, Commission Decision of 4 July 2005 in Case No COMP/M.3770 Lufthansa/Swiss, OJ C 204 of 20.8.2005; and Commission Decision of 11 February 2004 in Case No COMP/M.3280 Air France/KLM.

⁵² According to ACL: "[...] retiming within hours can be easier than between hours, however hourly time changes are often possible [...]" (ACL's response of 28 January 2010).

- (198) The Commission also notes that the parties, which hold only six such daily early slots between 5:00 am and 6:20 am, are only using one of them on the routes of concern, the others being used for arrivals of flights from the Far East, Australia and Africa, due to the time difference and/or local curfew restrictions. There is no evidence that arrivals before 6:20 am are necessary for competitive services on the routes of concern and in fact such arrivals appear to be very early for most passengers. Thus, currently only two transatlantic flights arrive before 6:20 am: BA's flight from Boston at 5:15 am and United's flight from Washington at 5:55 am.
- (199) As a result, the Commission takes the view that the fact that no slots are made available by the parties before 6:20 am does not have a negative impact on the likelihood of entry. This has also to be assessed in the light of the fact that the number of slots that the parties hold before 6:20 am is significantly lower than in other hour bands; therefore, imposing an obligation to release slots before 6:20 am, where there is no indication that this would increase the likelihood of entry or expansion, would not appear to be the least onerous measure to remedy the Commission's concerns.
- (200) In relation to point (b) in recital (196), the question is whether the limitation of three slots before 8:20 am for the four routes where slot commitments are offered is such that it would affect the effectiveness of the remedies. The Commission first notes that, in the framework of the informal market test carried out at the end of January 2010, six out of nine airlines informed the Commission that such a restriction would have no material impact on the effectiveness of the remedy.
- (201) Furthermore, the Final Commitments provide that if the slot request cannot be accommodated before 8:20 am, the parties will offer the entrant the next closest slot to the time requested. Such would be the case either in a situation where one applicant requests more than three slots before 8:20 am or in a situation where several applicants request in total more than three slots before 8:20 am. Hence, even if the three pre-8:20 am slots were released to entrants under the Final Commitments, any other entrant still has the certainty of obtaining the next closest slots.
- (202) In addition, considering the slot portfolio of and the flights operated by other airlines, the Commission notes that there is no indication that entry or expansion on the routes of concern would necessarily have to be before 8:20 am, so that all slots would have to be provided by the parties during that hour range. Airlines may rather choose to complement their existing services by adding services at other hours of the morning or of the day. Finally, the Commission notes that the peak hours for transatlantic arrivals at London Heathrow extend until 10:00 am. As the commitments make clear, there are no limitations on the number of slots to be released by the parties after 8:20 am. Consequently, in the absence of evidence that lifting such a restriction is necessary to make entry or expansion more likely, the Commission takes the view that removing the above-mentioned restriction on release of slots before 8:20 am is not necessary to ensure the effectiveness of the remedy.

6.3.5. Fare combinability commitment

6.3.5.1. *Extension of fare combinability to existing services on the London-Dallas, London-Boston and London-New York routes*

- (203) Virgin Atlantic criticised the Commitments for failure to provide for a commitment for the parties to offer fare combinability agreements in relation to the existing services of competitors on the London-Dallas, London-Boston and London-New York routes, irrespective of whether the airlines that offer these services increase service on those routes.
- (204) On those routes, competitors are able to increase their services by using the parties' slot commitments. Under the Final Commitments, these competitors can then conclude a fare combinability agreement that covers both their new and their existing services on the routes. This contrasts with the London-Chicago route, where the Commission concluded that no slot commitments were necessary, and where the parties accordingly offered a fare combinability remedy for Virgin Atlantic's existing services⁵³.
- (205) The Commission considers that the commitment by the parties to conclude a fare combinability agreement, on the routes where slot commitments are offered, with existing competitors that choose not to increase their services would not be appropriate nor proportionate to address its competition concerns on those routes. The Commission finds that, contrary to what Virgin Atlantic suggests, accepting such a commitment from the parties would also be inconsistent with the very purpose of the slot commitments, which is to encourage entry on the routes where they are offered.
- (206) Indeed, competitors that also have existing services on these routes may be disincentivised from increasing their services if they can instead opt for a fare combinability agreement in relation to their existing services. Instead, the prospect of being able to conclude a fare combinability agreement both for its existing and new services should bolster the incentives of potential entrants to increase their services, in particular on the basis of the slot commitments. The fare combinability commitment is construed to exactly have that intended effect, so that there should be full consistency between the various elements of the commitments.
- (207) The Commission concludes that it is not suitable nor proportionate to commit the parties to fare combinability in relation to the existing services of competitors on the London-Dallas, London-Boston and London-New York routes, irrespective of whether the airlines that offer these services increase service on those routes.

6.3.5.2. *Extension of fare combinability to non-premium passengers on the London-Chicago and London-New York routes*

- (208) Virgin Atlantic and [two associations of travel agents] submitted that, on the London-Chicago and London-New York routes, fare combinability agreements should also cover fares for non-premium passengers.

⁵³ See recital (160).

- (209) It should be borne in mind that the Commission's preliminary concerns on the London-Chicago and London-New York routes were limited to premium passengers only. In order to address these concerns, the parties offer fare combinability that should assist interested airlines in offering more frequencies to exactly those passengers who value the availability of a high level of non-stop frequencies. The Commission cannot agree with the respondents that the availability of a fare combinability agreement that also encompasses non-premium passengers is indispensable to increase the attractiveness of its services on London-Chicago and London-New York for premium passengers.
- (210) Furthermore, the Commission has not identified separate competition concerns in relation to non-premium passengers on the London-Chicago and London-New York routes. The Commission did not see a need to revise its concerns in light of the comments it received pursuant to the Article 27(4) Notice. An extension of the fare combinability commitment to include non-premium fares can therefore not be justified on this basis.
- (211) Under these circumstances, the Commission concludes that it is not appropriate or proportionate to extend the availability of fare combinability to non-premium passengers on London-Chicago and London-New York.

6.3.6. SPA commitment

6.3.6.1. Extension of the geographic scope of the SPA commitment

- (212) Virgin Atlantic submitted that the geographic scope of the SPA commitment should be extended to include certain other destinations from/to which there is often significant feeder traffic.
- (213) The Commission finds that a further extension of the geographic scope of the SPA commitment is not needed. The geographic scope offered by the parties includes the most important feeder routes for the routes of concern. The fact that certain, more remote, destinations in Europe or South America are not included in the geographic scope of the SPA therefore cannot be expected to undermine the effectiveness of the remedy. Moreover, on the routes to and from these more remote destinations, interested airlines can now benefit from the parties' commitment not to withdraw from existing interline arrangements for the carriage of their connecting passengers. In light of all of these factors combined, the Commission concludes that a further extension of the geographic scope of the SPA commitment would be neither appropriate nor necessary.

6.3.6.2. Terms and conditions of the SPA

- (214) Virgin Atlantic argued that the terms of the SPAs under the Commitments should be at least as favourable as the SPA terms agreed between the parties themselves.
- (215) The Commission considers that Virgin Atlantic's proposed alternative benchmark for the commercial terms and conditions of the SPA that the parties offer is not appropriate.
- (216) Benchmarking the SPA terms to the terms that the parties grant each other after the implementation of their joint venture would go far beyond the commitments

that have been accepted in past cases in the aviation sector, under which SPA terms should reflect the average treatment of alliance partners⁵⁴. Moreover, the Commission finds that allowing competitors to carry connecting passengers under the exact same conditions as the parties to a joint venture under which they revenue share on both the transatlantic routes and the behind and beyond routes connected to those routes, in effect propelling these competitors into membership of that joint venture insofar as the carriage of connecting passengers is concerned, would be neither suitable nor proportionate to address the Commission's competition concerns.

- (217) The Final Commitments offered in this case contain important safeguards to ensure that interested airlines can enjoy continued access to favourable SPA terms.
- (218) The parties offer to conclude an SPA on terms that are at least as favourable as those granted to any other airline. An SPA that is based on so-called SRP would, however, be subject to a number of protection mechanisms. The Commission considers these clauses adequate and proportionate⁵⁵. As set out above, the Final Commitments exclude SPAs that are on SRP terms without these protection mechanisms as a benchmark for the SPA the parties need to offer. As set out in section 6.2.3.2 above, the parties have now further clarified the terms and conditions on which the SPA needs to be concluded. In particular, the parties have specified that interested airlines can benefit from the most favourable terms and conditions that the parties grant to any other airline on each of the feeder routes

⁵⁴ See, for example, Commission Decision of 11 February 2004 in Case No COMP/M.3280 Air France/KLM, Commission Decision of 22 June 2009 in Case No COMP/M.5335 Lufthansa/SN Airholding; Commission Decision of 28 August 2009 in Case No COMP/M.5440 Lufthansa/Austrian Airlines.

⁵⁵ As concerns the commercial terms and conditions of the SPA that interested airlines can seek to conclude, the parties offer SPA terms and conditions that are at least as favourable as those granted to any airline, with so-called SRP being subject to certain protection mechanisms.

Under SRP, airlines split the fare for a connecting itinerary according to distance of the different travel segments, with a correction for the different costs of short-haul and long-haul flights. The Commission agrees with the parties' observation that using this method of proration without any further protection exposes the parties to various unreasonable commercial risks and potential abuses of the Commitments by interested airlines. First, SRP without any protection can expose the parties to the risk that an interested airline files a very low fare for travel on its services. When such a fare is straight rate-prorated without any further corrections beyond those for the travel distance of the segments involved, the amount accruing to the parties can actually be below their marginal cost of carriage, namely below their actual cost to fly a passenger. Protection mechanisms such as the application of minimum fares that the parties would need to receive from any interested airline could address this concern. Second, without appropriate protection mechanisms for the parties, an applicant is able to file a low fare into a high booking class of the parties. This would expose the parties to a significant risk of yield dilution, as the connecting passengers of the interested airline that the parties would carry would displace the parties' own higher-yielding traffic. Appropriate rules that prescribe the parties' booking classes in which the interested airline should file its own fares could address this concern. Third, the parties have clarified that if an agreement is on SRP terms, it should include arrangements for the proration and remittance of fuel surcharges and other surcharges.

The Commitments provide that such reasonable protection mechanisms should be in place if the SPA is concluded on SRP terms.

requested by the interested airlines. The parties have clarified that the exception according to which agreements and terms that can be excluded for comparison purposes should be interpreted narrowly. The Final Commitments now also provide that interested airlines can continue to benefit from favourable terms in SPAs that they have in place with any of the parties as at 12 May 2010. The Commission considers the terms and conditions on which the SPA needs to be concluded to be sufficiently attractive and, hence, proportionate.

- (219) The Final Commitments also specify that interested airlines can benefit at least from the most favourable terms that each of the parties offer to any other airline (subject to certain restrictions as described in recital (137)(d)) as at 12 May 2010. Interested airlines can, however, obtain more favourable terms, if the parties offer more favourable terms and conditions to any of those other airlines throughout the effective duration of the Final Commitments. This should ensure that interested airlines have continued access to favourable SPA terms.
- (220) In previous cases in the aviation sector, the "average treatment" of alliance partners was used as a benchmark for the SPA that the parties to those cases needed to conclude with interested airlines⁵⁶. The Commission observes that the acceptance of this benchmark in previous cases served two purposes, namely (i) that interested airlines can benefit from favourable SPA terms and (ii) that this access to favourable terms will continue over time⁵⁷. As the benchmark for the SPA to be concluded by the parties to this case achieves both purposes, the Commission also considers the SPA commitment in this case to be adequate and proportionate.

6.3.6.3. Availability of SPA commitment for existing competitor services on the London-Dallas, London-Boston and London-New York routes

- (221) Virgin Atlantic submitted that the parties should also commit to enter into SPAs for existing competitor services on the London-Dallas, London-Boston and London-New York routes.
- (222) On those routes, and contrary to the routes on which an SPA remedy is offered to existing competitors even if they do not increase service⁵⁸, the Commission has found that competitors' services rely on connecting passengers from the parties only to a limited extent. Nor has the Commission identified that the agreements between the parties would result in further actual or potential restrictive effects by means of the parties restricting access to connecting traffic travelling on those

⁵⁶ See, for example, Commission Decision of 11 February 2004 in Case No COMP/M.3280 Air France/KLM; Commission Decision of 22 June 2009 in Case No COMP/M.5335 Lufthansa/SN Airholding; and Commission Decision of 28 August 2009 in Case No COMP/M.5440 Lufthansa/Austrian Airlines.

⁵⁷ The assumption is that the parties to those cases have a continued strategic interest in offering favourable terms to their alliance partners, which should ultimately benefit interested airlines that seek to conclude a SPA pursuant to the remedies accepted in those previous cases.

⁵⁸ London-Chicago, London-Miami and Madrid-Miami.

routes. The Commission did not see a need to revise its concerns in light of the comments it received pursuant to the Article 27(4) Notice. An extension of the commitment to existing competitor services on those routes is therefore unjustified on that basis.

- (223) The Commission also finds that a commitment from the parties to conclude a SPA commitment for existing competitor services on the London-Dallas, London-Boston and London-New York routes is unjustified because it would lower the barrier to expansion of these services. On those routes, competitors are able to increase their services by using the parties' slot commitments. Under the Final Commitments, competitors who increase their services on these routes can then conclude an SPA that covers both their new and their existing services on the routes. The Commission considers that commitment from the parties to conclude an SPA with existing competitors on those routes that choose not to increase their services would not be appropriate nor proportionate to address its competition concerns on those routes.
- (224) The Commission's view is that, contrary to what Virgin Atlantic suggests, accepting such a commitment would be also inconsistent with the very purpose of the slot commitments, which is to encourage entry on the routes where they are offered. Indeed, competitors that also have existing services on these routes may be disincentivised from increasing their services if they can instead opt for an SPA (possibly in combination with fare combinability) in relation to their existing services. Instead, the prospect of being able to conclude a SPA both for its existing and new services acts to bolster the parties' competitors' incentives to increase their services, in particular on the basis of the slot commitments. The SPA commitment is construed to exactly have that intended effect, so that there is full consistency between the various elements of the Final Commitments.
- (225) The Commission concludes that it is not appropriate or proportionate for the parties to also offer an SPA for existing competitor services on the London-Dallas, London-Boston and London-New York routes.

6.3.7. FFP commitment

- (226) [*Two associations of travel agents*] criticised the limitation of the FFP commitment to new non-stop airlines that do not have a comparable FFP and do not participate in any of the parties' FFP. Therefore, in their opinion, the scope of this commitment will be very limited.
- (227) The Commission notes that the FFP commitment aims to provide access to the parties' FFPs and, thus, remove this barrier to entry or expansion, identified in the Statement of Objections. The Commission takes the view that, for competitors having comparable FFPs or those participating in one of the parties' FFPs, this barrier does not prevent entry or expansion. Therefore, in line with pertinent precedents⁵⁹, the Commission considers that the scope of the FFP commitment as

⁵⁹ See for example, Commission Decision of 4 July 2005 in Case No COMP/M.3770 LH/Swiss; Commission Decision of 11 February 2004 in Case No COMP/M.3280 Air France/KLM.

proposed by the parties is adequate. A further extension of its scope would be disproportionate.

7. CONCLUSION

- (228) According to settled case law, the principle of proportionality requires that the measures adopted by European Union institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued⁶⁰. Although Article 9 of Regulation (EC) No 1/2003, unlike Article 7 of that Regulation, "*does not expressly refer to proportionality, the principle of proportionality, as a general principle of European Union law, is none the less a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority*"⁶¹. The "*application of the principle of proportionality by the Commission in the context of Article 9 of Regulation No 1/2003 is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties.*"⁶²
- (229) The Commission takes the view that the Final Commitments are appropriate and necessary to address the concerns identified in the Statement of Objections without being disproportionate. In this respect, the Commission considers that it must evaluate the whole package of the Final Commitments and not only its individual elements.
- (230) The Commission has already examined the appropriateness and necessity of the Final Commitments in section 6 above. However, recitals (231) to (238) below set out the Commission's main points in this regard.
- (231) The parties propose to make slots available at London Heathrow, London Gatwick and New York JFK airports. Non-availability of slots has been recognized to constitute the main barrier to entry or expansion in aviation cases⁶³ and release of slots has been the main remedy to address competition concerns in merger and antitrust cases. In this case, making slots available at London Heathrow, which is characterized by extreme congestion and high value of slots, is particularly attractive for competitors. The Commission considers that the number of slots proposed to be released by the parties is appropriate to address the identified concerns, given the characteristics and competitive situation on each relevant route.

⁶⁰ See for instance, Case T-260/94, *Air Inter v Commission* [1997], ECR II-997, paragraph 144; and Case T-65/98, *Van den Bergh Foods v Commission* [2003], ECR II-4653, paragraph 201.

⁶¹ Case C-441/07 P, *Commission v. Alrosa*, [2010], not yet reported, paragraph 36.

⁶² *Ibidem*, paragraph 41.

⁶³ See Case T-177/04, *easyJet v Commission* [2006], ECR II-1931, paragraph 166.

- (232) Under the Final Commitments, the release of slots is subject to a number of conditions. In particular, to be eligible for slots from the parties, the applicant has first to exhaust its own slot portfolio at the relevant airport. The Commission considers that, since the Final Commitments aim at enabling entry by providing a potential entrant with access to necessary slots which it does not itself have, such condition is justified. In particular, it precludes an entrant from obtaining slots from the parties if it does not need such slots and can obtain them from its own portfolio. This condition thus ensures proportionality of the Final Commitments. Furthermore, as discussed in section 6.3.4 above, the Commission considers that also the other conditions attached to slots (including non-permanent releases of slots, restriction of operation of slots to the routes for which they are released, non-exclusion of compensation, +/- 60 minutes time window and restrictions on early morning arrival slots) are necessary to ensure proportionality and do not compromise the effectiveness of the Final Commitments.
- (233) The parties also propose to address the other barriers to entry or expansion identified in the Statement of Objections. In particular, the parties offer to enter into fare combinability agreements, allowing the new entrant to offset the parties' frequency advantage, and into SPAs, enabling the entrant to obtain connecting passengers for their services. Furthermore, existing competitors would also be able to benefit from the SPA under reasonable terms on the London-Chicago, London-Miami and Madrid-Miami routes. The fare combinability and SPA commitments are appropriate and necessary also to address the concern identified in the Statement of Objections in relation to the further actual or potential restrictive effects resulting from the parties' agreements by means of the parties restricting access to connecting traffic. As explained in sections 6.2.2 and 6.2.3 above, the Commission finds the proposed terms of the fare combinability agreements and SPAs to be proportionate and not to compromise the effectiveness of the Final Commitments.
- (234) Furthermore, the parties propose to provide access to their FFPs on the routes of concern to eligible airlines. In line with previous cases⁶⁴, the Final Commitments thus remove this barrier to entry or expansion identified in the Statement of Objections. Access to the parties' FFPs should be granted only to airlines without a comparable FFP, since the airlines with similarly attractive FFPs are not disadvantaged in this respect. Thus, exclusion of competitors with comparable FFPs ensures proportionality of the Final Commitments without compromising their effectiveness.
- (235) In addition, the Final Commitments contain a reporting obligation, enabling the Commission to obtain data concerning the parties' cooperation which the parties would be required to provide to the DOT. As explained in section 6.2.5 above, the Commission considers this obligation to be appropriate and necessary. This commitment does not place any material burden on the parties since they are only required to provide data which they would have to provide to DOT in any event.

⁶⁴ See for example, Commission Decision of 4 July 2005 in Case No COMP/M.3770 LH/Swiss; Commission Decision of 11 February 2004 in Case No COMP/M.3280 Air France/KLM.

- (236) Finally, the parties propose to include in the Final Commitments a clause enabling the Commission, on its own initiative, to review the Final Commitments after five years. Such a review clause is appropriate and necessary for the Commission to be able to assess the market evolution after five years, without putting any disproportionate burden on the parties. In addition, such a clause does not affect the effectiveness of the Final Commitments since it specifies that agreements already concluded on the basis of the Final Commitments will not be affected by such a review.
- (237) The Final Commitments will be made binding on the parties for a total period of ten years. The Commission considers this appropriate and necessary, in light of dynamics and business planning in the industry⁶⁵. The Commission takes into consideration that the duration of the Final Commitments may be adjusted pursuant to the review clause contained in the Final Commitments. If necessary, the Final Commitments may also be renewed, or similar remedies imposed on the parties, after the expiry of the ten year period.
- (238) In addition, as explained in recital (115) above, the parties proposed that the duration of the agreements concluded under the Final Commitments may go beyond the duration of the Final Commitments in order to guarantee the possibility for a competitor to benefit from the relevant commitment(s) for a minimum period of five years. The Commission accepts this mechanism as appropriate and necessary to ensure that the Final Commitments are effective and sufficiently attractive for competitors to take advantage of them also in the final years of the Final Commitments. In the absence of such a clause, new entry would be very unlikely in the last years of validity of this Decision, which would undermine the effectiveness of the Final Commitments.
- (239) As a general conclusion, by adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (240) In the light of the Final Commitments offered, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

⁶⁵ In particular, as explained in section 6.2.1, a relatively long duration is necessary in order to give sufficient certainty to the new entrant. Nonetheless, the airline industry is rather dynamic and the situation on given markets can change quickly, so that a duration of more than 10 years would not be suitable.

(241) The Commission retains full discretion to investigate and open proceedings under Articles 101 or 102 of the Treaty and Articles 53 or 54 of the EEA Agreement as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The commitments listed in the Annex shall be binding on British Airways Plc., American Airlines Inc. and Iberia Líneas Aéreas de España S.A. for a period of ten years from the date of adoption of this Decision.

Article 2

The proceedings in this case shall be brought to an end.

Article 3

This Decision is addressed to:

British Airways Plc.

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For the Commission

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