COMMISSION OF THE EUROPEAN COMMUNITIES

NON-CONFIDENTIAL VERSION*

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Virgin Atlantic Airways Limited
The Office
Manor Royal
Crawley, RH10 9NU
United Kingdom
Att. […]
General Counsel

Subject: **Case COMP/39.596 – British Airways/American Airlines/Iberia**
Decision rejecting Virgin Atlantic's complaint of 30 January 2009
(Please quote this reference in all correspondence)

Dear […],

1. INTRODUCTION

(1) This decision concerns the complaint of Virgin Atlantic Airways (hereinafter referred to as "Virgin Atlantic") dated 30 January 2009 lodged with the European Commission (hereinafter referred to as "the Commission") against 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"). This complaint refers to alleged violations of Article 101 of the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaty")[1] in connection with the intention of BA, AA and IB (hereinafter jointly referred to as "the parties") to set up a revenue-sharing joint venture covering all their passenger air transport services on the routes between

* This version of the Commission Decision of 20 June 2011 does not contain any business secrets or other confidential information.

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

Europe and North America (hereinafter referred to as “transatlantic routes”). This decision also refers to the other submissions made by Virgin Atlantic by which it provided additional information/explanations on the above matter, in particular Virgin Atlantic's main contributions listed in the table below.

No	Document	Date
1	Virgin Atlantic's presentation to the case-team	02-Oct-08
2	Virgin Atlantic's response to Commission's request for information ("RFI") of 14 October 2008	03-Nov-08
3	Virgin Atlantic's response to RFI of 13 October 2008	19-Nov-08
4	Virgin Atlantic's OAG data update	05-Dec-08
5	Virgin Atlantic's submission re Form C	30-Jan-09
6	Virgin Atlantic's response to RFI of 5 March 2009	08-Apr-09
7	Virgin Atlantic's response to RFI of 9 June 2009	18-Jun-09
8	Virgin Atlantic's submission re Frontier Economic Analysis	25-Jun-09
9	Virgin Atlantic's response to RFI of 24 June 2009	15-Jul-09
10	Virgin Atlantic's considerations of potential remedies	31-Jul-09
11	Virgin Atlantic's submission of paper re New York JFK and Newark airports	18-Aug-09
12	Virgin Atlantic's letter re Iberia's minimum connecting time	18-Aug-09
13	Virgin Atlantic's letter re renegotiated Iberia's minimum connecting time	7-Sep-09
14	Virgin Atlantic's letter re use of MIDT data	22-Oct-09
15	Virgin Atlantic's comments on the Statement of Objections	12-Nov-09
16	Virgin Atlantic's submission re New York airports and report of the Port Authority of New York and New Jersey ("PANYNJ")	18-Dec-09
17	Virgin Atlantic's response to informal market test	02-Feb-10
18	Virgin Atlantic's response to Commission's question of 3 February 2010 and comments on the parties' special prorate agreements paper	08-Feb-10
19	Virgin Atlantic's submission re follow-up to 9 February meeting	12-Feb-10
20	Letter from [Virgin Atlantic] to [Commission]	18-Feb-10
21	Virgin Atlantic's submission re analytical approach behind proposed commitments	02-Mar-10
22	Letter from [Virgin Atlantic] to [Commission]	10-Mar-10
23	Letter from [Virgin Atlantic] to [Commission] re Article 9	07-Apr-10
24	Virgin Atlantic's response to formal market test	09-Apr-10

25	Letter from [Virgin Atlantic] to [Commission] re interim measures	21-Apr-10
26	Virgin Atlantic's response to Commission's question on fare combinability and SPAs of 16 April 2010	1-May-10
27	Virgin Atlantic's letter requesting access to additional documents/information	4-Jun-10
28	Virgin Atlantic's response to the Article 7(1) letter	15-Jun-10
29	Virgin Atlantic's submission of GLA report on London airports	2-Jul-10

(2) By letter of 12 May 2010, the Commission has informed Virgin Atlantic of the Commission's intent to reject the complaint, pursuant to Article 7(1) of Commission Regulation (EC) No 773/2004[2] (hereinafter referred to as "the Article 7(1) letter"). Virgin Atlantic replied on 15 June 2010.

(3) For the reasons set out below, the Commission considers that there is no sufficient degree of European Union interest for conducting a further investigation into the alleged infringements and rejects Virgin Atlantic's complaint pursuant to Article 7(2) of Regulation (EC) No 773/2004.

2. SUMMARY OF THE COMPLAINT AND LATER SUBMISSIONS OF VIRGIN ATLANTIC

(4) In its complaint Virgin Atlantic alleges that the revenue-sharing joint venture between BA, AA and IB covering all their passenger air transport services on transatlantic routes infringes Article 101 of the Treaty.

(5) The complaint outlines that BA, AA and IB agreed to implement a Joint Business Agreement (hereinafter referred to as "JBA") which provides for extensive scheduling and pricing coordination on transatlantic routes, including revenue sharing. The complaint alleges that in effect BA and AA intend to merge their transatlantic operations.

(6) The complaint states that the geographic scope of the proposed cooperation includes the six transatlantic routes on which BA and AA currently offer competing non-stop service, namely London Heathrow-New York John F. Kennedy International Airport (hereinafter referred to as "JFK"), London Heathrow-Chicago, London Heathrow-Los Angeles, London Heathrow-Boston, London Heathrow-Miami and London Heathrow-Dallas/Fort Worth. In that respect, the complaint alleges that London Heathrow is a separate market from other London airports for time-sensitive passengers. Time-sensitive passengers are defined in the complaint as passengers who are primarily sensitive to time. The complaint alleges that the best way to measure time-sensitive passengers is identifying the passengers travelling for business purposes. The complaint further alleges that New York Newark Liberty International Airport (hereinafter referred

[2] Commission Regulation (EC) 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 Treaty, OJ L 123, 27.04.2004, p. 18.

to as "Newark") and New York JFK airport are also separate markets. It also alleges that non-stop services are the only relevant competitive services for time-sensitive passengers on London Heathrow-U.S. routes. The complaint furthermore alleges that restrictions of competition also exist on the corporate deals market in London and the wider London Heathrow market, with potential impact on all routes to the U.S. served from London Heathrow.

(7) The complaint alleges that the proposed cooperation would have a detrimental effect on competition, as it would (1) create or strengthen the parties' dominant position, in terms of capacity shares, frequency shares and/or passenger shares, on the six transatlantic routes on which BA and AA currently compete and overlap, (2) strengthen BA's and AA's dominant position on the wider London Heathrow market brought about by BA/AA's combined slot holdings at London Heathrow, making BA/AA by far the largest player on London Heathrow-U.S. routes, and (3) create a dominant position on the corporate deals market in London.

(8) The complaint further outlines in this respect that BA's and AA's joint market position will be disproportionately strong in respect of two key passenger groups that are vital to commercially viable operation on transatlantic routes. These are (1) time-sensitive passengers, who have greater price elasticity and generate higher yields and who place particular value on network reach, schedule and frequency, and (2) connecting passengers who form a substantial proportion of passengers on many transatlantic routes, and who enable carriers to operate services to additional destinations and at greater frequencies than point-to-point traffic volumes would allow for, and thereby make these carriers' networks and schedules more attractive to time-sensitive passengers.

(9) The complaint outlines that the central constraint on any potential competition is the lack of slots at London Heathrow, the most important airport for EU-U.S. traffic, in particular at commercially viable times for transatlantic services.

(10) The complaint alleges that this market power will enable BA and AA to raise fares, lessen service levels, and inhibit innovation. Furthermore, it will enable BA and AA to raise rivals' costs for two reasons: (1) BA and AA will have a greater network reach and frequencies which other carriers will need to compensate for, and (2) it will enable BA and AA to negatively influence their contracts with competitors, for example by only providing access to connecting passengers at commercially disadvantageous terms or not at all. In particular, the complaint refers to the likelihood of the parties restricting access to connecting traffic for Virgin Atlantic. The complaint alleges that this raising of rivals' costs would have further detrimental impact on the viability of competitors, in turn enhancing BA's and AA's market power.

(11) The complaint finally argues that alleged efficiencies do not outweigh the appreciable restrictive effects of the JBA and the agreements do not merit exemption under Article 101(3) of the Treaty.

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

(12) On 30 January 2009, Virgin Atlantic lodged a complaint with the Commission against the parties' joint venture pursuant to Article 7 of Regulation (EC) No 773/2004.

(13) 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 Council Regulation (EC) No 1/2003[3] sent to the parties and third parties, econometric analysis of data and a passenger survey conducted at London Heathrow airport.

(14) On 31 July 2009, Virgin Atlantic submitted a Remedies Paper with its proposals for commitments from the parties. As set out in further detail below, many of Virgin Atlantic's proposals were taken into account in the commitment proposal subsequently made by the parties.

(15) 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. A non-confidential version of the Statement of Objections was sent to Virgin Atlantic on 13 October 2009. Virgin Atlantic provided comments on the Statement of Objections on 12 November 2009.

(16) 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 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.

(17) Between 4 December 2009 and 25 January 2010, the parties submitted several commitments proposals to the Commission, seeking to address the identified concerns.

(18) 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, including Virgin Atlantic. On 26 February 2010, in particular in light of the replies received from Virgin Atlantic and other 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").

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[3] 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 Treaty Official Journal L 1, 04.01.2003, p. 1-25.

(19) On 10 March 2010, the Commission launched a formal market test by publishing a notice in the Official Journal of the European Union[4] 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"). Virgin Atlantic submitted its observations on 9 April 2010.

(20) 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.

(21) On 12 May 2010, the parties submitted amended commitments.

(22) 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.

(23) On 25 June 2010, the parties submitted further amended commitments (hereinafter referred to as "the Final Commitments"), incorporating one minor change[5] compared to the commitments of 12 May 2010.

(24) 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.

(25) On 14 July 2010, the Commission adopted a decision pursuant to Article 9 of Regulation (EC) No 1/2003 (hereinafter referred to as "the Article 9 decision") making the Final Commitments binding upon the parties. On the same day, the Commission published a full version of the Final Commitments on its webpage[6]. On 3 August 2010, a copy of the Article 9 decision was sent to Virgin Atlantic. A summary of the Article 9 decision was published in the Official Journal of the European Union[7]. On 19 October 2010, the full non-confidential version of the decision was published on the Commission's webpage[8].

(26) In line with Article 27(1) of Regulation 1/2003, Virgin Atlantic was closely associated with the proceedings. In particular, it was provided with numerous opportunities to express its views (for example, through replies to requests for

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4 OJ C 58, 10.3.2010, p. 20.

5 See recital (136).

6 http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_3882_2.pdf.

7 OJ C 278, 15.10.2010, p. 14.

8 http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39596.

information, spontaneous submissions, comments on the Statement of Objections and draft commitments, meetings with the case team) at different stages of the case. The Commission has taken into consideration Virgin Atlantic's views, many of which have been reflected in the Article 9 decision and the Final Commitments.

4. RELEVANT CONSIDERATIONS FOR ASSESSMENT OF COMPLAINTS

(27) According to settled case law of the courts of the European Union, the Commission is not required to conduct an investigation in each complaint it receives[9]. The courts of the European Union have also recognized that the Commission has discretion in its treatment of complaints[10]. In particular, the Commission is entitled to give differing degrees of priority and refer to the European Union interest in order to determine the degree of priority to be applied to the various complaints brought before it[11].

(28) The assessment of the European Union interest raised by a complaint depends on the circumstances of each individual case. The courts of the European Union have recognised that the number of criteria of assessment to which the Commission may refer is not limited, nor is the Commission required to have recourse exclusively to certain criteria[12]. In particular, the Commission may decide that it is not appropriate to investigate a complaint due to the commitment of the undertakings concerned to change their conduct in such a way that it can be considered that there is no longer a sufficient European Union interest to intervene[13].

(29) Under Article 9 of Regulation (EC) No 1/2003, where the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission, the Commission may by decision make those commitments binding on the undertakings. Such a decision shall conclude that there are no longer grounds for action by the Commission. In such a case, a complaint can be rejected in light of the commitments accepted by the Commission.

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9 See Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 76.

10 See Cases C-119/97 P *Ufex* v *Commission* [1999] ECR I-1341, paragraph 88; T-193/02 *Laurent Piau* v *Commission* [2005] ECR II-209, paragraphs 44 and 80.

11 Case T-24/90 *Automec* v *Commission*, paragraphs 77 and 85.

12 Case C-119/97 P *Ufex* v *Commission* [1999] ECR I-1341, paragraphs 79-80; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65, paragraph 43.

13 Case T-110/95 *International Express Carriers (IECC)* v *Commission* [1998] ECR II-3605, paragraph 57, upheld by Case 449/98 P *International Express Carriers (IECC)* v *Commission* [2001] ECR I-3875, paragraphs 44-47; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65, paragraph 44.

5. PRELIMINARY ASSESSMENT OF THE PARTIES' COOPERATION

(30) The Commission has conducted an in-depth investigation of the parties' cooperation. In the course of this investigation, in addition to the extensive market information, the Commission has also analysed numerous submissions and arguments made by Virgin Atlantic. Based on this analysis, the Commission has identified a number of preliminary competition concerns expressed to the parties in the Statement of Objections, many of which were shared by Virgin Atlantic. These preliminary concerns are described in detail in the Statement of Objections, a non-confidential copy of which was sent to Virgin Atlantic on 13 October 2009, and are summarized in this section below.

5.1. Relevant markets

(31) The Commission has examined the effects of the parties' cooperation in scheduled passenger air services on routes within the geographic scope of the JBA, in particular all transatlantic routes between the EU and North America, mentioned in Virgin Atlantic's complaint.

5.1.1. Origin & Destination (city pair) markets

(32) Based on its investigation, and following the principles set out in the Commission's 1997 market definition notice[14], 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 referred to as "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. [CONFIDENTIAL]

(33) 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.

(34) 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

[14] 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.

is consistent with the jurisprudence of the Court of Justice of the European Union and previous antitrust and merger cases in the sector[15].

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

(35) In its Statement of Objections[16], the Commission took the preliminary view that two distinct product markets were relevant to assessing competition on transatlantic routes: premium passengers (encompassing at least services in First and Business class) and non-premium passengers (encompassing services in restricted Economy class[17]).

(36) The Commission's investigation, described in the Statement of Objections[18], 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.

(37) 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

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15 See Commission Decision of 11 February 2004 in Case No COMP/M.3280 Air France/KLM, OJ C 60, 9.3.2004, p. 5, paragraphs 9 *et seq*.; Commission Decision of 4 July 2005 in Case No COMP/M.3770 Lufthansa/Swiss, OJ C 204, 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 — procedure under Article 85 of the Treaty (ex Article 89)), OJ C 264, 30.10.2002, pp. 5-9; Commission Decision of 22 June 2009 in Case No COMP/M.5335 Lufthansa/SN Airholding, paragraphs 12 *et seq*.; 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, 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.

16 See section 5.3.2 of the Statement of Objections.

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

18 See section 5.3.2 of the Statement of Objections.

materially differ irrespective of whether services in Premium Economy class[19] 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.

(38) In its comments on the Statement of Objections, Virgin Atlantic supported the Commission's findings in relation to the need to distinguish between non-premium and premium passengers.

(39) The Commission recalls that the distinction between premium and non-premium markets on the basis of fare and cabin classes is intended to serve as a proxy to capture the different characteristics and preferences of premium and non-premium passengers. The Commission's investigation confirmed that fare and cabin classes provide for an appropriate proxy to capture these different characteristics and preferences. The Commission did not consider the purpose of travel as the relevant proxy for distinguishing the two passenger groups. In addition to the findings in the Statement of Objections, the Commission further notes that the airlines typically base their pricing structures on fare classes and cannot normally distinguish passengers based on the purpose of travel at the time of purchase. Moreover, as explained in section 8.3 below, no reliable data is available to estimate the number of passengers based on their purpose of travel. Therefore, the Commission considers that, for the purposes of this case, fare and cabin classes provided the most reliable basis for distinguishing between premium and non-premium markets.

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

(40) In its Statement of Objections[20], 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[21].

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

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[19] 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.

[20] See section 5.3.3 of the Statement of Objections.

[21] See paragraphs 221 and 241 of the Statement of Objections.

(42) 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.

5.1.4. Airport substitution

(43) Both the case-law of the Court of Justice[22] and the Commission's established practice[23] 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.

(44) 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[24]. 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 did not suggest that services from other airports would be likely to be launched in a relevant time scale.

(45) 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.

(46) With respect to New York airports, as explained in the Statement of Objections[25], the Commission's investigation showed that, in particular due to their geographic proximity, 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 decisions[26], 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"). As described in the Statement

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22 See, for example, T-177/04, e*asyJet* v *Commission,* paragraphs 99-102.

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

24 See section 5.3.4.2 of the Statement of Objections. This preliminary finding is also in line with Virgin Atlantic's submission of 2 July 2010 containing the GLA report on London airports.

25 See section 5.3.4.3 of the Statement of Objections.

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

of Objections[27], this view was shared by corporate customers[28], travel agents, the parties and all the competitors that responded to the Commission's requests for information, except Virgin Atlantic.

(47) The Commission carefully assessed Virgin Atlantic's arguments and evidence purporting to show why Newark and JFK airports should not be considered substitutable. However, none of these submissions was convincing. For example, both the point of sale analysis referred to in Virgin Atlantic's comments on the Statement of Objections of 12 November 2009 and the PANYNJ report submitted on 18 December 2009 were based on past behaviour of passengers, and did not give an indication of their likely behaviour in reaction to a 5-10 % increase in price[29]. Thus, it was not appropriate to base the market definition on this evidence. Furthermore, in the PANYNJ report, the proportions of passengers flying to JFK appear to be not very different from those flying to Newark, which does not allow any meaningful conclusion to be drawn. For example, 54 % of passengers originating outside of the United States (e.g., Europe) chose to fly to JFK, while 42 % chose Newark. While the Newark proportion is smaller, the difference in size is not of such significance as to confirm Virgin Atlantic's contention that UK passengers have a preference for JFK, especially given that there are more flights offered by more carriers to JFK than to Newark.

(48) On the basis of the above, the Commission 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.

5.2. Competitive assessment

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

5.2.1.1. Introduction

(49) In its Statement of Objections[30], the Commission took the preliminary view that the agreements between the parties are capable of appreciably affecting trade

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27 See paragraphs 292-297 of the Statement of Objections.

28 In its response to the Article 7(1) letter of 15 June 2010, Virgin Atlantic argued that fewer than half of the corporate customers responded with an unqualified "yes" to the question whether JFK and Newark airports were substitutable (paragraph 7.16). While it is true that less than half of all corporate respondents (10 out of 28) found EWR and JFK to be clearly substitutable, half that number of corporate clients (5 out of 28) indicated that the two airports were clearly not substitutable. Hence, in any event there is more evidence from corporate customers in support of the substitutability of JFK and Newark than otherwise.

29 As explained in the Commission Market Definition Notice, one of the main tools that the Commission uses to assess the demand side-substitution for the purpose of market definition is the so-called 'SSNP' test. The SSNIP test determines whether the customers would switch to readily available substitutes in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase of the product/service in question (para. 17 of the Commission notice on the definition of the relevant market for the purposes of Community competition law, Official Journal C 372, 9.12.1997, p. 5-13).

30 See section 5.6 of the Statement of Objections.

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.

(50) 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.

(51) In its Statement of Objections[31], 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.

(52) In addition, in its Statement of Objections[32] 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[33], 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).

(53) Following the Statement of Objections, in light of additional evidence and subsequent events, the Commission considered that its preliminary competition

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[31] See section 5.7.2 of the Statement of Objections.

[32] See section 5.7.3 of the Statement of Objections.

[33] See paragraphs 404-405 of the Statement of Objections.

concerns on Madrid-Chicago (both premium and non-premium markets) and Madrid-Miami (non-premium market) were no longer justified. The two Madrid routes are not discussed in detail in this decision since they were not the subject of Virgin Atlantic's complaint[34].

(54) 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.

5.2.1.2. Restriction of competition between the parties

(55) In its Statement of Objections[35], 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.

(56) In its Statement of Objections[36], 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[37]. 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.

(57) Additionally, the parties had a strong market position on each of the routes of concern, with their combined market shares ranging from [60-70] % 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.

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34 See, for example, footnote 8 of Virgin Atlantic's submission of 2 March 2010 noting that "there have been changes in the competitive dynamic on these two city pairs since the issue of the SO which mean that the Commission's concerns have fallen away" and that "Virgin Atlantic does not operate on these city pairs and therefore does not have any experience of the competitive conditions of these city pairs".

35 See section 5.7.3.3 of the Statement of Objections.

36 See paragraph 417 of the Statement of Objections.

37 See paragraph 425 of the Statement of Objections.

(58) The Commission provisionally considered that the parties' position was also protected by high barriers to entry and expansion[38]. 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 barriers to entry included high frequencies of the parties' services, which were particularly important to premium passengers[39], 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.

(59) In its Statement of Objections[40], 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 data[41] 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.

(60) 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.

5.2.1.3. Restriction of competition between the parties and their competitors

(61) 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.

(62) 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.

(63) 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,

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38 See section 5.4 of the Statement of Objections.

39 See section 3.6.3 of the Statement of Objections.

40 See Annex 6 to the Statement of Objections.

41 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.

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.

(64) The issuing airline and the parties can choose different methods to divide the fare that is collected from the passenger.

(65) 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 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.

(66) 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.

(67) In its Statement of Objections[42], 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.

(68) 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.

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[42] See section 5.7.3.4 of the Statement of Objections.

(69) 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.

5.2.1.4. Market specific assessment

(70) 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). These concerns, which have been described in detail in the Statement of Objections[43], are briefly summarized below. Concerns on the above-mentioned markets were also shared by Virgin Atlantic.

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

(71) Based on the information relied upon in the Statement of Objections,[44] 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.

(72) 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

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43 See section 5.8 of the Statement of Objections.

44 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.

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.

(73) 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)

(74) 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 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.

(75) 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.

(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 London-Boston route for both premium and non-premium passengers.

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

(77) 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.

(78) 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.

(79) 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.

(80) 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)

(81) 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 IATA[45] summer season[46] 2009. BA offered three daily frequencies but announced suspension of one service for the IATA winter

[45] IATA is an international industry trade body of airlines, created in 1945.

[46] 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.

season[47] 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.

(82) 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.

(83) 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-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.

(84) 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.

(85) 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)

(86) 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

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[47] 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.

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.

(87) 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-freedom[48] 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.

(88) 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.

(89) 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.

(90) 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.

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[48] 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.

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

(91) 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.

(92) 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.

(93) In the Commission's view the parties' claims required clarification and further development. As a consequence, following the parties' submission of 9 December 2009 on alleged efficiencies (see recital (16) above), the Commission addressed questions to them. The parties replied in part to these questions on 8 January 2010.

(94) 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.

6. PROPOSED COMMITMENTS

(95) 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.

6.1. Slot commitments

(96) 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.

(97) 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.

(98) 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.

(99) 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 process[49]. 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.

(100) 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.

(101) 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 to be imposed on the parties[50]. 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.

6.2. Fare combinability commitment

(102) 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 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.

(103) Under the parties' offer of 26 February 2010, competitors could request a fare combinability agreement in case they increased their services on any of the routes of concern. Airlines which did not operate a hub at both ends of that route were eligible. The fare combinability agreement would apply to the new or additional

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[49] Clause 1.2 of the Final Commitments 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.

[50] Virgin Atlantic expressed a concern that "there is no mechanism […] for a carrier's slot application to be rejected on the basis of its business plan if it is the only applicant for a particular slot" (Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraph 4.80). The Commission notes that this view is erroneous: under the Commitments the Commission first confirms the viability of applicants *inter alia* based on their business plans, and then proceeds with an evaluation of the bids of only those applicants which meet this test (see clause 1.3.9 of the Final Commitments). Hence, applicants with a weak business plan are excluded from further consideration.

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 DOT[51], 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 rules[52] and/or normal commercial conditions.

6.3. SPA commitment

(104) The parties also offered to conclude SPAs[53] 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.

(105) 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.

(106) 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 the lack of such access constitutes a barrier to entry or expansion. The availability of an SPA for existing competitor services on London-Miami and London-Chicago 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.

(107) The key features of the SPA commitment were as follows:

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[51] 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.

[52] As laid down in the IATA Multilateral Interline Traffic Agreements.

[53] For description of an SPA, see recital (66) above.

(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 route of concern;

(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 – this requirement is also referred to as the "most favoured nation" benchmark.

6.4. FFP commitment

(108) 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 of concern 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.

(109) The parties proposed to open their FFPs on the routes of concern listed in recital (95) 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.

6.5. Reporting obligation

(110) 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.

6.6. Cooperation with the DOT

(111) 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 2007[54], the Commitments provided for close involvement of 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.

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[54] Also known 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 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.

7. ASSESSMENT OF THE FINAL COMMITMENTS

7.1. Introduction

(112) Pursuant to Article 9 of Regulation (EC) No 1/2003 the Commission may make binding on the parties to an investigation the proposed commitments which meet the concerns identified by the Commission in its preliminary assessment. In analysing the commitments, the Commission assesses whether they are sufficient to address the identified competition concerns, while respecting the principle of proportionality.

(113) 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 pursued[55]. 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*"[56]. 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*"[57]. Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued[58].

(114) In the present case, 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 Virgin Atlantic. Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010 also contains comments on the Commitments, many of which reiterate previous points made by Virgin Atlantic during the proceedings.

(115) 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,

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55 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.

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

57 *Ibidem*, paragraph 41.

58 Case 265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21, and Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* v *College voor de toelating van bestrijdingsmiddelen* [2006] ECR I-2243, paragraph 28.

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.

(116) In response to the comments received in the context of the formal market test and submitted by Virgin Atlantic on 15 June 2010 in reply to the Article 7(1) letter, the parties submitted the Final Commitments on 25 June 2010.

(117) This section sets out the Commission's assessment of the Final Commitments, in particular in light of the comments received pursuant to the Article 27(4) Notice, Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010 and information gathered during the investigation. To that end, sections 7.2-7.8 describe the comments which have been, fully or partially, addressed by the parties in the Final Commitments and analyses their adequacy. Virgin Atlantic's comments and arguments which have not been confirmed by the Commission's assessment are described in section 8.

7.2. Slot commitments

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

(118) 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.

(119) 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.

(120) 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[59].

(121) 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

[59] With respect to the anti-abuse clauses, Virgin Atlantic also argued that it should be clarified that it is only where an applicant has reduced or cancelled a service on an individual route for which it subsequently requests slots from the parties (rather than on any of the Identified City Pairs) that it should be deemed not to have exhausted its slot portfolio (Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 4.37-4.38). The Commission believes that this is a misunderstanding of the Commitments. Clause 1.2.2(c)(i) of the Final Commitments already prevents the applicant from applying for slots "on the same Identified City Pair" on which the applicant has recently reduced or cancelled a service.

request, in order to prevent the parties being able to adjust their operations on the route in advance of entry/expansion.

7.2.2. Assessment of the slot commitments

(122) 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.

(123) 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 industry[60]. 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[61]. 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.

(124) 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. Moreover, these routes, in particular London-New York and London-Boston, have a considerable number of point-to-point passengers, which would facilitate entry even if a competitor does not have a strong network. Taken together, this indicates the attractiveness of the routes at issue and the likelihood of competitors picking up the slot commitments.

(125) 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.

(126) 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

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[60] 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".

[61] See section 5.4.2.1 of the Statement of Objections.

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 was 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 credible[62].

(127) 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.

(128) 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. The UK slot coordinator, Airport Coordination Limited (hereinafter referred to as "ACL")[63], confirmed that the timings in the Commitments were correct and compatible with the seasonal slot allocation process which should allow a potential entrant to obtain slots in a timely manner.

(129) The Commission notes that the parties proposed a number of changes to the slot commitment in response to Virgin Atlantic's arguments already before the publication of the Article 27(4) Notice[64]. These amendments increased the attractiveness of the Commitments and addressed a number of concerns of Virgin Atlantic. Furthermore, following the comments on the Article 27(4) Notice[65] and Virgin Atlantic's further comments submitted on 15 June 2010, the parties

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

63 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.

64 In particular, the following changes have been proposed by the parties in response to the submissions of Virgin Atlantic prior to the Article 27(4) Notice: relaxation of the restrictions on release of the early morning arrival slots ensuring that an entrant is able to receive slots before 8:30, increasing flexibility of slot timing by allowing the entrant to re-time slots within +/- 60 minutes, ensuring that the parties do not know the exact routes for which the slots are requested to avoid the risk of retaliation, etc.

65 See section 7.2.1 above.

proposed the Final Commitments which include a number of amendments to the slot commitments, discussed in recitals (130) to (137) below.

(130) 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' operations[66].

(131) Second, the parties have proposed to increase the duration of all agreements to be concluded with competitors under the Final Commitments[67]. 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 Article 9 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 Article 9 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 Article 9 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 Article 9 decision expires or the parties' cooperation ends.

(132) 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. This addresses Virgin Atlantic's concerns regarding insufficient duration of the slot releases in a manner which is proportionate for the parties[68]. In addition, granting a longer guaranteed duration to any new entrant that takes up a slot before IATA winter season 2012/13 increases the incentive to enter these routes as early as possible.

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66 The Commission's position on the number of slots proposed to be released on the other relevant routes is set out in recital (209) below.

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

68 See section 8.4.3.1 below for discussion of why permanent slot releases would be disproportionate in the present case.

(133) Furthermore, the parties have proposed to relax the clauses intended to prevent abuse. Hence, the parties' final proposal considers only leases/exchanges of slots that have been concluded by the applicant with third parties after 12 May 2010[69] 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 obtaining 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.

(134) Third, as requested by Virgin Atlantic, 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 Trustee[70] 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.

(135) 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 Virgin Atlantic's concern in relation to the ability of the parties to prepare for new services of particular competitors.

(136) Lastly, in reply to Virgin Atlantic’s comment expressed in its response to the Article 7(1) letter, the parties proposed to relax the misuse clause, to make clear that occasional cancellations of flights by an entrant 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"[71].

(137) This last change to the commitments illustrates that Virgin Atlantic's concerns have been taken into consideration and addressed in the parties' commitment

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

70 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 Article 9 decision.

71 OJ L 14, 22.1.1993, p.1.

proposals up to the last stage of these proceedings. Overall, the Commission considers the above-mentioned amendments proposed by the parties in their Final Commitments to significantly improve their scope and effectiveness.

7.3. Fare combinability commitment

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

(138) Virgin Atlantic criticised the fact that the Commitments required a competitor to increase its services 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 and Delta's newly launched services on that route, as explained in recital (98) of this Decision. It also submitted detailed comments on the terms and conditions of the proposed fare combinability agreement.

(139) 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 favourable[72].

7.3.2. Assessment of the fare combinability commitment

(140) 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. Virgin Atlantic considered itself the most likely applicant for a fare combinability agreement for relevant routes out of London[73]. 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, which the Commission did.

(141) 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

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[72] 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. 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.

[73] Section 1.4 of Virgin Atlantic's comments of 9 April 2010 on the Article 27(4) Notice.

fare combinability commitment extends for the term of the Article 9 decision and potentially beyond, as explained in recital (131) above. This provides interested airlines with important certainty that they can continue to benefit from a fare combinability agreement on the routes of concern.

(142) In light of Virgin Atlantic's comments on the Article 27(4) Notice, the parties also proposed to clarify and strengthen several aspects of the fare combinability commitment.

(143) First, in reaction to Virgin Atlantic's request, 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.

(144) 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.

(145) 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.

(146) Fourthly, the parties have included technical clarifications to the fare combinability commitment, which should further enhance its attractiveness for interested airlines[74].

(147) 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 expansion[75] on the

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[74] 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. Eligible competitors will thus have access not only to the published one-way fares, but also to published round-trip fares of the parties. 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.

[75] See recital (58).

routes of concern and enables Virgin Atlantic to sustain its existing services on London-Chicago. It therefore addresses the Commission's concerns in this regard.

7.4. SPA commitment

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

(148) 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.

(149) Virgin Atlantic also suggested to further clarify the geographic scope of the SPA commitment and to include additional city-pairs in its scope.

(150) 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.

7.4.2. Assessment of the SPA commitment

(151) 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. Virgin Atlantic considered itself the most likely applicant for an SPA for relevant routes out of London[76], and in fact entered into negotiations regarding conclusion of such agreements with the parties following adoption of the Article 9 decision (see recital (168) below). 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 commitments[77], which the Commission did.

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[76] Section 1.4 of Virgin Atlantic's comments of 9 April 2010 on the Article 27(4) Notice.

[77] 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

(152) 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 Article 9 decision and potentially beyond, as explained in recital (131) above. This provides interested airlines with important certainty that they have continued access to connecting traffic provided by the parties.

(153) 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 basis[78]. This constitutes an important improvement of the SPA commitment.

(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) below). 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 relevant competitor 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. As mentioned, this constitutes an important improvement for the SPA commitment.

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to the publication of the Article 27(4) Notice in the Official Journal. These changes clarified and enhanced the attractiveness of the Commitments.

[78] 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.

Using this clarified benchmark to conclude SPAs with new entrants, and in light of he significant improvement to the SPA commitment that it entails, the Commission considers it suitable and proportionate to envisage the possibility of excluding agreements and individual terms that are on exceedingly favourable terms.

(154) 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.

(155) 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 an 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 addresses Virgin Atlantic's concerns[79].

(156) Moreover, the parties have responded to Virgin Atlantic's 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.

(157) 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 re-coup 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.

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[79] 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 8.4.5.1 below.

(158) 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 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 and should address its concerns on those routes.

7.5. FFP commitment

(159) 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.

(160) 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 concern[80]. 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.

7.6. Reporting obligation

(161) As noted in recital (110) above, the parties undertake to provide the Commission with data which relates 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.

(162) 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.

7.7. Review clause

(163) In their Final Commitments, the parties proposed 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.

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[80] See recital (58) above.

(164) 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.

7.8. Conclusion

(165) To address the concerns of Virgin Atlantic and other third parties expressed in their comments on the Article 27(4) Notice and Virgin Atlantic's response to the Article 7(1) letter, in their Final Commitments the parties proposed the following amendments:

(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 relax the misuse clause to make clear that occasional cancellations of services by the competitors for technical or other justified reasons are not prohibited under the Final Commitments;

(f) to introduce a number of substantive and technical amendments into the fare combinability and SPA commitments; and

(g) to introduce a review clause enabling the Commission to review the Final Commitments after five years of operation.

(166) 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.

(167) Considering all the elements set out in sections 7.2-7.7 and, in particular, the amendments proposed by the parties to increase the attractiveness of the Final Commitments following the market test, there is sufficient likelihood that the Final 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.

(168) Therefore, the Final Commitments are sufficient to address the concerns identified by the Commission in its preliminary assessment.

(169) Incidentally, the Commission notes that its assessment of the Final Commitments has been subsequently confirmed by the interest expressed by competitors. Hence, after the adoption of the Article 9 decision on 14 July 2010, Delta applied for both available slots on London-Boston and the available slot on London-Miami. Other airlines also applied but, unlike Delta which issued a press release, requested that their identity not be disclosed. Following the assessment of the various applications, the Commission approved the release of slots by the parties to Delta. On 26 March 2011, Delta launched new daily non-stop services based on these slots on London-Boston and London-Miami[81]. Furthermore, Virgin Atlantic entered into negotiations with BA, AA and IB to conclude SPAs on London-Chicago and London-Miami, despite the concerns expressed by Virgin Atlantic regarding the terms of the SPA during the proceedings[82]. Virgin Atlantic subsequently signed the SPAs with IB, on 8 March 2011, and with BA, on 10 March 2011. Virgin Atlantic and AA have also agreed the terms of their SPA and have executed the agreement on a preliminary basis. This agreement is currently in the process of review by the Monitoring Trustee, following which the Commission will decide on its approval. Overall, this confirms the attractiveness of the Final Commitments, in line with the Commission's assessment.

8. ASSESSMENT OF VIRGIN ATLANTIC'S POINTS NOT REFLECTED IN THE PRELIMINARY ASSESSMENT AND FINAL COMMITMENTS

(170) This section describes the arguments put forward by Virgin Atlantic, which were not confirmed or were not accepted by the Commission during its investigation and preliminary assessment for the reasons explained below.

8.1. Virgin Atlantic's position on the commitment procedure under Article 9 of Regulation (EC) No 1/2003

(171) Virgin Atlantic argued that a commitment decision under Article 9 of Regulation (EC) No 1/2003 is not the appropriate procedure for the Commission to follow in this case. Virgin Atlantic claimed that the agreements between the parties are similar to a merger since the parties intend to behave as a single entity on the relevant routes. Furthermore, Virgin Atlantic stated that the Commission has not examined in detail whether there are actual consumer benefits that would arise from the parties' cooperation. According to Virgin Atlantic, the Commission would not adopt a merger decision in such a case without considering the efficiencies or benefits that would arise from it. In any event, Virgin Atlantic considered that the parties' cooperation does not result in efficiencies necessary to meet the criteria for application of Article 101(3) of the Treaty.

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[81] See Delta's press releases "Delta Boosts International Flights in 2011" (dated 16 November 2010), and "Delta, Air France, KLM Launch Florida International Expansion" (dated 25 March 2011). In the event that Delta decides to withdraw any of these services in the future, the relevant slots will again become available to competitors pursuant to the Commitments.

[82] Virgin's Atlantic's main concerns regarding the SPA commitment are described in section 8.4.5 below.

(172) In the present case the cooperation among BA, AA and IB does not amount to a concentration within the meaning of the Council Regulation (EC) No 139/2004[83]. Virgin Atlantic does not contest this. Consequently, it was appropriate to conduct investigation of the cooperation between the parties under Article 101 of the Treaty. In its proceedings, the Commission only takes into account efficiencies if they are put forward by the undertakings concerned, which bear the burden of proof.

(173) Pursuant to Article 9 of Regulation (EC) No 1/2003, if the parties to proceedings under Article 101/102 of the Treaty offer commitments that meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may make such commitments binding on the parties. There is no legal obstacle preventing the Commission from adopting a commitment decision in the present case[84].

(174) The decision under Article 9 of Regulation (EC) No 1/2003 does not establish whether or not there has been or still is an infringement of competition rules[85]. 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. In line with the aim of procedural economy, the Commission is not required to adopt a definitive view on whether, for example, the investigated agreement falls within Article 101(1) of the Treaty or whether it meets the criteria of and is exempted under Article 101(3) of the Treaty due to countervailing consumer benefits. The decision under Article 9 of Regulation (EC) No 1/2003 only concludes that there are no longer grounds for action by the Commission since the commitments meet the underlying competition concerns identified in the preliminary assessment.

(175) In light of the above, the Commission disagrees with the arguments raised by Virgin Atlantic concerning inappropriateness of the procedure under Article 9 of Regulation (EC) No 1/2003 in the present case, irrespective of the existence of the claimed efficiencies, which the Commission is not required to decide upon if the parties' commitments address its competition concerns.

8.2. Virgin Atlantic's position on the relevant markets

(176) Virgin Atlantic's view concerning the definition of the relevant markets differed from that expressed by the Commission in its Statement of Objections in a number of respects. Notably, Virgin Atlantic submitted that: (i) there exists a corporate customer market and a wider market for travel to/from London

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83 Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings, OJ L 24, 19.1.2004, p. 1.

84 In particular, under recital (13) of the preamble of Regulation (EC) No 1/2003, commitment decisions are not appropriate in cases where the Commission intends to impose a fine (e.g., cartels). No such intention has been expressed by the Commission in the Statement of Objections.

85 Recital (13) of the preamble of Regulation (EC) No 1/2003.

Heathrow[86]; (ii) the distinction between premium and non-premium passengers should be based on the purpose of travel rather than on fare classes[87]; (iii) non-stop services are in a different market from one-stop services, especially for premium passengers[88]; and (iv) London Heathrow and London Gatwick (especially for premium passengers), as well as New York JFK and Newark, are in separate markets[89].

(177) The Commission maintains its view concerning the market definition as expressed in the Statement of Objections[90], which has not been altered by subsequent submissions of Virgin Atlantic. Based on its assessment and the reasons explained in sections 5.1.1-5.1.4 above, the Commission therefore considers that it would be disproportionate to further investigate the above-mentioned allegations of Virgin Atlantic.

8.3. Virgin Atlantic's position on competitive assessment

8.3.1. MIDT versus CAA data

(178) Virgin Atlantic argued that to assess the relevant markets the Commission should use the survey of the UK Civil Aviation Authority (hereinafter referred to as "CAA"), which is more appropriate to estimate the size of the premium market, in particular since it registers the passenger's purpose of travel[91].

(179) As in previous antitrust and merger cases[92], to estimate the market shares on the relevant markets, the Commission used MIDT booking data, which distinguishes bookings based on fare and cabin class. Airlines traditionally use MIDT data to analyse air travel patterns. MIDT data captures the bookings of airline tickets made through the Global Distribution Systems and does not contain the bookings made directly via the airline web-sites. However, in the present case involving network carriers and long-haul routes which depend heavily on the ticket distribution through the Global Distribution Systems, the Commission considers that MIDT data particularly provides the best available proxy for estimating the market shares.

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86 See in particular Virgin Atlantic's submission of 19 November 2008, paragraphs 86-95 and section 2.5.

87 See in particular Virgin Atlantic's submission of 19 November 2008, paragraphs 117-121.

88 See in particular Virgin Atlantic's submission of 19 November 2008, paragraphs 61-68 and Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, paragraph 10.

89 See in particular Virgin Atlantic's submission of 19 November 2008, paragraphs 69-80 and 81-85; Virgin Atlantic's submission of 18 August 2009; Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, paragraphs 21-29; Virgin Atlantic's submission of 18 December 2009; and Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 7.14-7.17.

90 See sections 5.3.1-5.3.4 of the Statement of Objections and summary in section 5.1 above.

91 See in particular Virgin Atlantic's submission of 19 November 2008, section 2.3.

92 See, for example, Case M.3280 Air France/KLM; Case M.3770 Lufthansa/Swiss; Case M.5335 Lufthansa/SN Airholding; Case M.5440 Lufthansa/Austrian Airlines.

(180) Although Virgin Atlantic correctly pointed out that, contrary to what was stated in the Article 7(1) letter, the CAA data does distinguish between O&D and connecting passengers[93], this was not the only reason that led the Commission to decide not to rely on the CAA survey. The CAA data is based only on a sample of data derived from a passenger survey. The sample is then weighted to total traffic levels, which, depending on the number of surveyed passengers or methodology, may result in certain inaccuracies. By contrast, MIDT reports actual bookings. Furthermore, the CAA survey does not distinguish between different classes of tickets and therefore is not appropriate for calculating market shares in premium and non-premium markets. As explained in recital (39) above, the Commission does not consider that the purpose of passengers' travel, which the CAA data reports, is appropriate for distinguishing between these two markets.

(181) Therefore, in its assessment in the present case the Commission used MIDT booking data, rather than the data obtained from the CAA survey.

8.3.2. Virgin Atlantic's concerns on additional markets

(182) Contrary to the allegations of Virgin Atlantic, the Commission has not identified competition concerns on the markets discussed below, neither in its Statement of Objections nor based on the subsequent evidence.

8.3.2.1. London-Chicago (no concerns on non-premium market)

(183) Virgin Atlantic argued that, in addition to the premium market, the parties' agreements were likely to produce anticompetitive effects also on the non-premium market on the London-Chicago route[94]. The Commission's investigation did not confirm these concerns.

(184) The overview of the competitive situation on London-Chicago is provided in paragraphs (81) and (82) above. In addition, based on the 2008 MIDT data, the parties' combined market share was [40-50] % (AA: [20-30] % and BA: [20-30] %) in relation to non-premium passengers. United's and Virgin Atlantic's market shares on the non-premium market were [20-30] % and [0-10] %, respectively.

(185) The Commission maintains its view, taken at the time of the Statement of Objections and not altered by subsequent evidence, that in the non-premium market the existing competitors are likely to impose a sufficient competitive constraint on the parties' operations, so that the parties would likely be prevented from having the power to raise prices or deteriorate service level.

(186) Since frequencies are of lesser importance for non-premium passengers[95], United with its three daily non-stop flights on the London-Chicago route would serve as an important alternative for these passengers. As acknowledged in the Statement

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93 Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraph 7.6.

94 See in particular Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, section 2.2 and Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 7.4-7.13.

95 See section 3.6.3 of the Statement of Objections.

of Objections, having a large hub at Chicago and the hub of its alliance partner, British Midland Airways ("bmi"), at London Heathrow, United faces lower barriers to expansion than other carriers. United also has a strong network to feed its services on the U.S. side. Furthermore, in the event of exercise of market power by the parties, United is likely to be able to expand its capacity for non-premium passengers, for example by deploying a larger aircraft. Similarly, due to the lower importance of frequent service to non-premium passengers, with its one frequency, Virgin Atlantic will also provide a competitive constraint.

(187) In any event, even if there were concerns on the non-premium market, these would be also likely met by the proposed Commitments of the parties, in particular, to enter into fare combinability agreements (including for Virgin Atlantic's existing services) and to provide access to connecting traffic, which contributes to the viability of the carrier's services, both in relation to premium and non-premium passengers (see section 6 above).

(188) In these circumstances, the Commission is of the view that it would be disproportionate to further investigate the existence of alleged competition concerns on the non-premium market on London-Chicago.

8.3.2.2. London-New York (no concerns on non-premium market)

(189) Virgin Atlantic argued that, in addition to the premium market, the parties' agreements were likely to produce anticompetitive effects also on the non-premium market on the London-New York route[96]. The Commission's investigation did not confirm these concerns.

(190) The overview of the competitive situation on London-New York is provided in paragraphs (86)-(88) above. In addition, based on the 2008 MIDT data, on the market for non-premium passengers the parties' combined market share was [40-50] % (BA: [30-40] % and AA: [10-20] %). The next largest airline was Virgin Atlantic with [20-30] %. Continental had [0-10] % and Delta [0-10] % of the non-premium market.

(191) The Commission maintains its view, taken at the time of the Statement of Objections and not altered by subsequent evidence, that in the non-premium market the services of the existing non-stop competitors are likely to impose a sufficient competitive constraint on the parties, so that the parties would likely be prevented from having the power to raise prices or deteriorate service level. This is particularly true for the services of Virgin Atlantic, Continental and Delta, which each have multiple daily frequencies and a hub or a base at one end of the route. Considering the new services recently launched by Delta and Continental[97], passengers have a choice of 13 daily flights of competitors on this route, which, depending on the season, is either equal or very close to the number of services

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[96] See in particular Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, paragraphs 38-52 and Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 7.18-7.44.

[97] See recital (214) below.

operated by the parties[98]. The lower number of frequencies operated individually by each non-stop competitor compared to the parties would be of lesser disadvantage on the non-premium market, as opposed to the premium market. As mentioned above, for non-premium passengers frequent service is of lesser importance.

(192) In any event, even if there were concerns on the non-premium market, these would be also likely met by the proposed Commitments of the parties, in particular, to release slots at both ends of the route which would enable competitors to launch additional services (see section 6 above).

(193) In these circumstances, the Commission is of the view that it would be disproportionate to further investigate the existence of alleged competition concerns on the non-premium market on London-New York.

8.3.2.3. London-Los Angeles (no concerns on premium and non-premium markets)

(194) At the preliminary stage of the investigation, Virgin Atlantic argued that the parties' agreements were likely to produce anticompetitive effects also on the London-Los Angeles route[99]. The Commission's investigation did not confirm these concerns.

(195) In 2008, more than [450 000-500 000] O&D passengers travelled on the London-Los Angeles route, of whom [10-20] % were premium passengers. Between London and Los Angeles, [10-20] % of non-premium passengers and [0-10] % of premium passengers travelled via a one-stop service.

(196) Overall non-stop services were offered by five carriers. In winter 2008/2009, BA and Virgin Atlantic each offered two daily services; AA, United and Air New Zealand each offered one daily service. Both BA and AA increased their non-stop offering by one daily frequency in summer season (three frequencies for BA and two for AA). Air France introduced one daily frequency during the summer 2008 season, but withdrew it only after one season.

(197) In 2008, the parties' market shares were [40-50] % for premium passengers (BA: [30-40] %, AA: [10-20] %) and [30-40] % for non-premium passengers (BA: [20-30] %, AA: [0-10] %). Virgin Atlantic's market shares were [20-30] % and [20-30] % on premium and non-premium markets, respectively. Finally, United and Air New Zealand had [10-20] % and [10-20] %, respectively, on the premium market, and [10-20] % and [0-10] %, respectively, on the non-premium market.

(198) The Commission maintains its view, taken at the time of the Statement of Objections and not altered by subsequent evidence, that there is likely to be

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98 In IATA summer season 2009 the parties operated 14 services, while in IATA winter season 2009/10 they had 13 services (Source: OAG data).

99 See in particular Virgin Atlantic's submission of 19 November 2008, section 2.4.3. Virgin Atlantic did not address this point in its comments on the Statement of Objections of 12 November 2009 nor in its response to the Article 7(1) letter of 15 June 2010.

sufficient competition on the route even after implementation of the parties' agreement. This view is based on the market position of the competitors on this route. In particular, three existing competitors on the route, Virgin Atlantic, United and Air New Zealand, which together offer a similar number of frequencies as the parties, are likely to provide a sufficient constraint on both the premium and non-premium markets. United in particular benefits from having a hub at Los Angeles and the hub of an alliance partner at London Heathrow, thus having lower barriers for expansion. The Commission takes the view that the level of competition post-cooperation on the route is likely to discipline the parties and prevent them from having power to raise prices or deteriorate service level.

(199) In these circumstances, the Commission is of the view that it would be disproportionate to further investigate the existence of alleged competition concerns on the London-Los Angeles route.

8.4. Comments to Article 27(4) Notice and Article 7(1) letter which did not lead to amendments of the Commitments

(200) This section addresses the comments made by Virgin Atlantic in response to the Article 27(4) Notice and the Article 7(1) letter, which did not lead to amendments of the Commitments. Virgin Atlantic's comments have been grouped in seven categories which are addressed in turn: the "fix-it-first" approach (section 8.4.1), comments relating to the alleged insufficient availability of slots (section 8.4.2), comments relating to the conditions attached to the slots that are made available (section 8.4.3), the fare combinability commitment (section 8.4.4) and the SPA commitment (section 8.4.5).

8.4.1. "Fix-it-first" approach

(201) 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)[100]. Virgin Atlantic claimed that there would be a considerable lag between the timing of the Article 9 decision and the time at which new entry would occur, referring to the parties' intention to implement full joint schedules in April 2011[101].

(202) 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 entry[102]. As described in recital (126) 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

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[100] See in particular Virgin Atlantic's submission of 31 July 2009, section 3; Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, section 6; Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 4.94-4.105.

[101] Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 4.94-4.105.

[102] Case T-177/04, *easyJet* v *Commission* , paragraphs 197 and 206.

which the parties offer slots. The likelihood of entry is further indicated by other relevant circumstances, as set out in section 7.2.2 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.

(203) Furthermore, the Commission notes that following the Article 9 decision competitors have been able to receive slots from the parties and start new services as from the end of March 2011 (i.e. the start of IATA summer season 2011). Hence, there was no time lag with the parties' launch of the full joint schedule, planned for April 2011.

(204) Finally, the procedure for the slot release under the Final Commitments ensures that an entrant is able to receive slots as early as three months before the new operating season, which enables the entrant to commence marketing of its services sufficiently in advance.

(205) 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.

(206) This assessment has been confirmed following the adoption of the Article 9 decision: on 26 March 2011, Delta launched new daily non-stop services on London-Boston and London-Miami based on the slots received under the Final Commitments[103].

8.4.2. Availability of slots

8.4.2.1. Scope of slot commitments

(207) 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[104]. 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 less than the number of incremental services that the parties combined would be able to operate[105]. Furthermore, according to Virgin Atlantic, even if the available slots were taken up, the cooperation would still lead to a significant increase in concentration on the routes of concern and the parties' market power would not be effectively counterbalanced[106].

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[103] See recital (169) above.

[104] See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraphs 4.4-4.6: Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 3.19-3.22.

[105] See in particular Virgin Atlantic's submission of 2 March 2010, paragraph 2.2.1; Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraph 4.9; Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 3.2-3.9.

[106] Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraphs 3.2-3.9.

(208) The appropriateness of the commitments needs to be assessed on the basis of the competition concerns identified on each of the routes of concern individually. With respect to the London-Chicago route, as set out in recitals (81) to (85) 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 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. Such commitments would moreover be disproportionate in light of the concerns identified on this route.

(209) With respect to the number of slots to be released on the other routes of concern, the Commission notes that 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 (i.e. number of competing services lost as the result of the agreement) serves merely as a first proxy for determining this number and may not necessarily correspond to it.

(210) The Commission has therefore assessed the effectiveness of the Final Commitments comprehensively 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 2009[107].

(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 (130) above, following the

[107] Also, the overlap was two frequencies for the whole year 2007 and 2008.

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. This enables operation of 13 daily services by competitors on this route as compared to 14 daily services by the parties in IATA summer season 2009. Given the residual competition on the route, the Commission takes the view that making slots available for 21 additional weekly flights (or three daily) is sufficient to meet the competition concerns on this route.

(c) Finally, on each of the London-Miami and London-Dallas routes the Final Commitments provide for release of one slot. In addition, on London-Miami the Final Commitments support the sustainability of the existing services of Virgin Atlantic by extending to them the SPA commitment. Given the characteristics and competitive situation on London-Miami and London-Dallas, 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.

(211) Consequently, the Commission concludes that the scope of the slot commitments is sufficient to meet the competition concerns arising form the parties' agreements.

8.4.2.2. "Counting against" of new services

(212) 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 and Delta of the launch of three new services, in practice the parties would not be obliged to release any slots on this route under the Commitments.[108]

(213) In this case, the Commission analysed the suitability of the Final Commitments to address its concerns, which were based on the competitive conditions on each of 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[109]. 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.

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[108] See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraph 4.12 and Virgin Atlantic's comments to the Article 7(1) letter of 15 June 2010, paragraph 3.17.

[109] Under Clause 1.1.3 of the Final Commitments, the Commission has to confirm the independence and viability of the competitor, before the new services can be counted against the slots to be released by the parties.

(214) As explained in recital (209) 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 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 new service launched in IATA winter season 2010/11. Moreover, on 11 May 2010, Delta announced, and subsequently launched 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[110], 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.

(215) 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 Commitments[111].

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

(216) 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[112].

(217) 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 (127) 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

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110 Following completion of the merger between Continental and United in October 2010, the new Continental/United and Delta became the first and third largest airlines in the world, respectively. They are likely to be able to upgauge their services on the London-New York route, if necessary.

111 The Commission notes that a similar provision was included in previous airline cases, see, for example, Case No COMP/M.5440 Lufthansa/Austrian Airlines.

112 See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraphs 4.48-4.50; Virgin Atlantic's comments to the Article 7(1) letter of 15 June 2010, paragraphs 4.81-4.87.

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 (71) and (77) respectively). If neither the non-stop entry materialises nor one-stop services ensure sufficient competition, pursuant to the review clause of the Final Commitments the Commission will be able to re-assess the competitive situation after five years.

(218) 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 thereafter[113]. 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.

(219) The Commission therefore considers that permitting one-stop entrants to apply for slots on London-Miami and London-Dallas as of IATA summer season 2013 is adequate.

(220) In any event, as regards London-Miami, Delta has requested - and obtained - under the Final Commitments a slot to operate a non-stop service.

8.4.3. Conditions attached to slots

8.4.3.1. Temporary versus permanent releases of slots

(221) Virgin Atlantic argued 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[114].

(222) As explained in recital (131) above, following the comments of Virgin Atlantic and other third parties on 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

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[113] 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.

[114] See in particular Virgin Atlantic's submission of 31 July 2009, section 2; Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, section 3.5.1; Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraphs 4.17-4.29; and Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, paragraph 3.16.

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 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 Article 9 decision expires, thus providing additional certainty to the entrant.

(223) 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. The Commission does not disagree with Virgin Atlantic's argument that the costs for commencing a new long-haul service are significant. [CONFIDENTIAL[115]] Moreover, the Commission's investigation confirmed that there has been entry on long-haul routes on the basis of slots leased at London Heathrow for a duration of five years[116] or less.

(224) 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.

(225) Subsidiarily, the Commission notes that the various applications for slots received following the Final Commitments confirm the appropriateness of a long-term lease to start operating a new long-haul service.

8.4.3.2. Grandfathering rights

(226) 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[117].

(227) 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

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115 [CONFIDENTIAL]

116 [CONFIDENTIAL]

117 See in particular Virgin Atlantic's submission of 31 July 2009, paragraph 2.8; Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, section 3.55; Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraphs 4.30-4.32; and Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, paragraphs 4.30-4.36.

significant flexibility to adjust their networks. Grandfathering rights have been used in recent merger cases concerning short-haul routes 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 cases[118], the utilisation period was eight IATA seasons or four years for slots at Frankfurt airport, and shorter where slots are less valuable.

(228) 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[119]. Hence, if the Final Commitments provided for grandfathering, in 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.

(229) Furthermore, as explained in recitals (124) to (128) 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.

(230) 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.

(231) Incidentally, the Commission notes that the various applications for slots received following the Final Commitments confirm that grandfathering rights were not a pre-condition to raise sufficient interest from third parties.

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

(232) 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

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[118] Case No COMP/M.5335 Lufthansa/SN Airholding; Case No COMP/M.5440 Lufthansa/Austrian Airlines.

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

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[120].

(233) 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. Finally, the Commission took into consideration the reported increase in passenger traffic following the economic crisis[121].

(234) 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.

8.4.3.4. Compensation

(235) Virgin Atlantic claimed that the ability of the parties to obtain compensation for slots may deter their take-up[122].

(236) The Commission considers that Virgin Atlantic overestimates 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 principle[123].

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120 See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraph 4.9, 4.15 and 4.16.

121 See IATA's reports and forecasts of the first half of the 2010 regarding increased air passenger traffic at http://www.iata.org/pressroom/pr/Pages/index.aspx.

122 See in particular Virgin Atlantic's submission of 31 July 2009, paragraph 2.3; Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, section 3.5.2; Virgin Atlantic's response to the informal market test of 2 February 2010, pp. 25-26; Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraph 4.109.1.

123 In its Communication COM(2008)227 final on the application of Regulation (EC) 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 (EC) 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).

(237) 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.

(238) The Commission therefore takes the view that the theoretical possibility for 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.

(239) As a matter of fact, the Commission notes that airlines have requested slots on the basis of the Final Commitments. This confirms the Commission's assessment that, in this case, compensation does not negatively affect the effectiveness of remedies.

8.4.3.5. Time window for releasing requested slots

(240) 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[124].

(241) 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 on long-haul routes the relevant parties were required to make slots available within +/- 90 minutes of the time requested by an applicant[125]. This, therefore, represents a significant improvement compared to the precedents.

(242) The Commission notes that for long-haul services a precise schedule time is less important than for 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 have been defined by Virgin Atlantic to be from 5:00 to 10:00 am local time for

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[124] See in particular Virgin Atlantic's submission of 31 July 2009, paragraph 2.5-2.6; Virgin Atlantic's comments on the Statement of Objections of 12 November 2009, section 3.5.4; Virgin Atlantic's response to the informal market test of 2 February 2010, question 4; and Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraphs 4.41-4.43.

[125] See, for example, Case No COMP/M.3770 Lufthansa/Swiss; Case No COMP/M.3280 Air France/KLM.

arrivals from the United States East Coast[126]. 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 and thus offer an attractive schedule[127].

(243) 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, ACL[128].

(244) 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.

8.4.3.6. Restrictions on early morning arrival slots

(245) Virgin Atlantic argued that the restrictions in the Commitments concerning the early morning arrival slots could deter entry[129]. 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 am, 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.

(246) 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. [CONFIDENTIAL]

(247) 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

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126 Virgin Atlantic's submission of 19 November 2008, paragraph 258.

127 Virgin Atlantic claimed that retiming "is further complicated by the fact that the slot to be retimed is leased rather than owned and that any retiming could therefore not be done on a permanent basis" (Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, paragraph 4.56). The Commission notes that this interpretation is incorrect and that the Commitments do not prohibit retiming of the slots received from the parties on a permanent basis.

128 According to ACL: "[…] retiming within hours can be easier than between hours, however hourly time changes are often possible, particularly if there is complementary demand from other air carriers in the opposite direction" (ACL's response of 28 January 2010).

129 See in particular Virgin Atlantic's response to the informal market test of 2 February 2010, questions 5 and 7; Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraphs 4.39-4.40 and 4.44.

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 too early for most passengers. Thus, only two transatlantic flights arrive at London Heathrow before 6:20 am: BA's flight from Boston at 5:15 am and United's flight from Washington at 5:55 am.

(248) 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.

(249) In relation to point (b) above, 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.

(250) 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.

(251) 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[130]. In any event, the Commission notes that the peak hours for transatlantic arrivals at London Heathrow extend until

[130] For instance, Virgin Atlantic already operates one daily frequency arriving from Boston at 7:20 am. Should Virgin Atlantic wish to take benefit of the slot commitment to add a frequency, it is unlikely that it would necessarily need a slot in the range between 6:20 am to 8:20 am. Similarly, on London-New York, Virgin Atlantic already operates two of its four morning flights arriving at 6:35 am and 7:50 am (source: OAG, Summer 2010). Similar conclusions apply for the timetables of the other existing competitors, Delta and Continental. Also, on London-New York, two out of the three flights that have been introduced by these two companies on their own without the benefit of the slot commitment arrive at London Heathrow after 10 am or 11 am. Finally, one out of three arrival slots released to Delta on the basis of the Final Commitments is a slot at Heathrow from Boston at 10:35 am. This confirms that a requirement that all slots are made available before 8:20 am was neither necessary nor proportionate.

10:00 am[131]. As the commitments make clear, there are no limitations on the number of slots to be released by the parties after 8:20 am.

(252) Finally, as Virgin Atlantic noted in its response to the Article 7(1) letter[132], given the new services on London-New York by Continental and Delta, only four slots are available to competitors in the first season of allocation (i.e. IATA summer season 2011). Thus, even if all of these four slots were requested before 8:20 am, the parties would be able to grant only one of them after 8:20 am. At the same time, early arrivals matter less on London-Dallas: given the longer flight duration on this route, arrival to London before 8:20 am appears to be of lesser attractiveness to passengers, since it would require early afternoon departure from the U.S.[133] Moreover, if in the future slots on the London-New York route become available, it is not obvious that they would be requested before 8:20 am at least by the existing competitors which already all have arrivals from New York before 8:20 am[134]. Taken together, this further confirms that any effect of the limitation on the release of slots before 8:20 am is likely to be marginal.

(253) 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.

8.4.4. Fare combinability commitment

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

(254) Virgin Atlantic criticised the Commitments since the parties failed 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[135].

(255) 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

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131 See Statement of Objections, paragraph 62 and Virgin Atlantic's submission of 19 November 2008, paragraph 258.

132 Virgin Atlantic's response to the Article 7(1) letter of 15 June 2010, paragraph 4.44.

133 This is reflected in the schedule of existing flights. For example, in IATA summer season 2009, three out of the four existing daily non-stop flights on London-Dallas arrived to London after 8:20 am: 7:50 am (AA), 8:40 am (BA), 10:45 am (AA) and 12:25 pm (AA) (source: OAG data).

134 In IATA summer season 2010, Virgin Atlantic had arrivals from New York at 6:35 am and 7:50 am, Continental at 6:45 am and Delta at 7:05 am (source: OAG data).

135 See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraphs 3.7-3.8; Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, paragraphs 5.5-5.16.

where the parties accordingly offered a fare combinability remedy for Virgin Atlantic's existing services[136].

(256) 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.

(257) 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.

(258) 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.

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

(259) Virgin Atlantic submitted that, on the London-Chicago and London-New York routes, fare combinability agreements should also cover fares for non-premium passengers[137].

(260) 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 Virgin Atlantic 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.

(261) Furthermore, the Commission has not identified separate competition concerns in relation to non-premium passengers on the London-Chicago and London-New

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[136] See recital (208).

[137] See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraph 3.10; Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, paragraphs 5.17-5.18.

York routes. The Commission did not see a need to revise its concerns in lights 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.

(262) 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.

8.4.4.3. Extension of fare combinability to connecting passengers on the Identified City pairs

(263) Virgin Atlantic submitted that any fare combinability agreement entered into under the Commitments should apply to all traffic on the Identified City Pair and not only to true origin and destination traffic on the Identified City Pair[138].

(264) As the Commission already stated in its Article 7(1) letter to Virgin Atlantic[139], the Commission is still of the view that it is neither suitable nor proportionate to offer this possibility to interested carriers. For example, if Virgin Atlantic's proposal were to be followed, interested carriers would be able to collect a fare for a connecting itinerary where three out of four segments would be operated by the parties. Despite the Commission's request, Virgin Atlantic has not offered any evidence to sustain its former assertion that this possibility would constitute standard industry practice.

(265) The Commission considers that the current commitment, which does not include this type of arrangement, is appropriate and sufficient.

8.4.4.4. Need for a mechanism for agreeing the matching of the fare categories between the parties and the Eligible Non-stop Air Service Provider

(266) To make Clause 2.4 of the Commitments workable, Virgin Atlantic submitted that there should be some guarantee that the third party carrier is receiving at least as favourable access to the parties' fares as they are offering to each other[140]. Furthermore, Virgin Atlantic argued that in order to prevent exploitation of Clause 2.4 of the Commitments by the parties, there needs to be a mechanism for agreement as to how the fare categories between the parties and the third party carrier match up. This should be subject to determination by the Monitoring Trustee[141].

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138 See Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraph 3.11.3; Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, Annex 1; Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, paragraph 5.19.2; Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, Annex 1.

139 See Article 7(1) letter, recitals (230)-(231).

140 Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, Annex 1.

141 *Ibidem.*

(267) The Commission considers that Virgin Atlantic's proposed alternative wording for the commercial terms and conditions of the fare combinability agreement that the parties offer is not appropriate.

(268) First, the Commission considers that allowing competitors to enter into fare combinability agreements with the parties 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 granting these competitors the benefits of membership in that joint venture insofar as fare combinability is concerned, would be neither suitable nor proportionate to address the Commission's competition concerns.

(269) Secondly, the Final Commitments already contain sufficient safeguards to ensure that interested airlines can enjoy continued access to favourable and reasonable fare combinability terms. The terms on which the fare combinability agreement should be concluded are in line with precedent

(270) In any event, the Eligible Non-stop Air Service Provider is free to negotiate the precise terms of the fare mapping with the parties. This provider is moreover free to argue that a fare mapping arrangement is indispensable to make the commitment operational. In that case the Commission, as advised by the Monitoring Trustee, could require such a fare mapping arrangement and assess the reasonableness of the proposed terms.

(271) The Commission therefore concludes that it is neither appropriate nor proportionate to introduce an enhanced mechanism for the matching of the fare categories between the parties and the Eligible Non-stop Air Service Provider.

8.4.5. SPA commitment

8.4.5.1. Extension of the geographic scope of the SPA commitment

(272) 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[142].

(273) 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.

[142] See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraph 1 of Annex 2.

(274) In light of these factors, the Commission concludes that a further extension of the geographic scope of the SPA commitment would be neither appropriate nor necessary.

8.4.5.2. Benchmark for the terms and conditions of the SPA

(275) 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[143].

(276) 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.

(277) 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 granting these competitors the benefits of membership in 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. In addition, 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 partners[144].

(278) The Final Commitments offered in this case contain important safeguards to ensure that interested airlines can enjoy continued access to favourable SPA terms.

(279) The parties offer to conclude an SPA on terms that are at least as favourable as those granted to any other airline on each of the feeder routes requested by new entrants. As mentioned above, this constitutes an important improvement of the SPA commitment. 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 proportionate[145]. The Final Commitments exclude SPAs that

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143 See in particular Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, paragraph 3.17-3.19.

144 See, for example, Case No COMP/M.3280 Air France/KLM, Case No COMP/M.5335 Lufthansa/SN Airholding, Case No COMP/M.5440 Lufthansa/Austrian Airlines.

145 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

are on SRP terms without these protection mechanisms as a benchmark for the SPA the parties need to offer. 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 proportionate.

(280) 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 at 12 May 2010, as described in recitals (153) (c) and (d). 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.

(281) 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 airlines[146]. 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 time[147]. 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.

8.4.5.3. Terms and conditions of the SPA have been diluted

(282) Prior to the formal market test, the parties offered an SPA on terms that are at least as favourable as the terms granted to any other carrier, excluding oneworld carriers. Interested carriers had the choice to opt for an SPA on so-called straight

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

146 See, for example, Case No COMP/M.3280 Air France/KLM; Case No COMP/M.5335 Lufthansa/SN Airholding; Case No COMP/M.5440 Lufthansa/Austrian Airlines.

147 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 an SPA pursuant to the remedies accepted in those previous cases.

rate prorate terms, an SPA containing fixed rates, or a combination of both. This was not altered after the formal market test. After the formal market test, the parties further specified that the terms of the SPA shall be at least as favourable as those agreed by the relevant party under an existing SPA for the same route and in the same fare class (excluding code-share terms). The parties also clarified that if the SPA is on SRP terms, minimum fares shall be at least as favourable as those granted to any other carrier under an existing SPA. The parties have finally tightened the wording of the clause that allows them to exclude certain agreements from the pool of reference agreements.

(283) Virgin Atlantic considers that these clarifications have substantially diminished the extent to which favourable SPA terms are available.

(284) According to Virgin Atlantic, the provision that the terms of the SPA shall be at least as favourable as those agreed in existing SPAs for the same route and the same fare class (excluding code-share terms) reduces the pool of agreements to which the remedy SPA can be compared[148].

(285) Virgin Atlantic considers that the provision that minimum fares shall be at least as favourable as those granted to any other carrier under an existing special prorate agreement improves the parties' position compared to the previous version of the commitments, which would have simply guaranteed that the parties would recover their marginal cost of carriage[149].

(286) Finally, Virgin Atlantic continues to object to the clause under which the proposed SPA commitment need not reflect terms included in any agreement which is "obsolete" or "exceedingly favourable". According to Virgin Atlantic, the parties could invoke this clause to exclude the terms that they grant to each other and their oneworld alliance partners. This would in turn make it impossible for competing carriers to offer competitive fares to connecting passengers travelling on our routes of concern[150].

(287) The Commission is of the view that all the changes to the Commitments since the market test clarify and strengthen the package. There is no basis for Virgin Atlantic to claim that they have been "diluted".

(288) First, the Final Commitments do specify that the SPA shall be on terms that are at least as favourable as those agreed under an existing SPA for the same route and the same fare class, excluding code-share terms. This constitutes a clarification of the SPA commitment, which should work to the benefit of interested carriers. The previous commitment allowed the parties to only offer SPAs that, viewed as a whole, were at least as favourable as SPAs agreed with other carriers, excluding oneworld carriers. The commitment now specifies that the "most favoured nation" benchmark should be applied on a route-by-route and term-by-term basis. This

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148 Virgin Atlantic's response to Article 7(1) letter of 15 June 2010, paragraph 5.43.

149 *Ibidem*, paragraph 5.44.

150 *Ibidem*, paragraphs 5.45 to 5.48.

should allow interested carriers to obtain more favourable terms than the terms that would have followed from the previous commitment.

(289) Second, the exclusion of code-share terms does not reduce the pool of existing SPAs which are the basis for determining the terms of the SPA requested by a competitor. If a feeder route or fare class is not included, the rate will be re-calculated on the basis of a rate on a comparable route. The pool of agreements will therefore still include the relevant SPA with the – non-applicable – code-share terms. Code-share terms have been excluded, as a cooperation based on code-share agreements has a different nature than a cooperation based on SPAs. It would not have been appropriate to effectively grant competitors a code-share cooperation with the parties, if the aim only was to allow for the conclusion of SPAs.

(290) Third, the Commission considers that Virgin Atlantic's reading of the previous commitments, according to which the minimum rates should have been set at the parties' marginal cost of carriage, is not correct. The previous package specified both that the rates had to (i) enable the parties to recover the marginal cost of carriage and (ii) be at least as favourable as the terms given to any other carrier. As such, there was no obligation on the parties to give rates more favourable than the terms given to other carriers, even if they were higher than the marginal cost of carriage. The reference to "marginal cost of carriage" was therefore giving more protection to the parties, in that a rate present in an existing SPA, but lower than the marginal cost of carriage, would have been excluded. In the new version, the rates given to the new entrant are based on the most favourable rates given to other carriers. The removal of the "marginal cost of carriage" provision is therefore favourable to the new entrant, contrary to Virgin Atlantic's interpretation.

(291) Fourth, although the Final Commitments continue to specify that the SPA commitment need not reflect terms that are included in any agreement which is "obsolete" or "exceedingly favourable", as set out in section 7.4.2 above, the Final Commitments now specify that the parties can only seek to exclude agreements that "due to unique circumstances" have been concluded on exceedingly favourable terms. Furthermore, the "most favoured nation" benchmark which should be applied on a feeder route by feeder route basis should allow competitors to obtain more favourable terms than in the previous version of the commitments. It therefore significantly increases the attractiveness of the SPA commitment. Given this considerable improvement of the SPA commitment it is proportionate to have some limitations on the operation of the "most favoured nation" benchmark. Overall, the terms of the SPA are attractive.

(292) The Commission concludes that none of above-mentioned comments of Virgin Atlantic is founded, and that they therefore do not challenge the adequacy and the proportionality of the Final Commitments.

(293) The Commission notes that this assessment is confirmed by the fact that, after adoption of the Article 9 decision in the present case, Virgin Atlantic has concluded SPAs with BA and IB, and at the time of writing is finalizing its SPA with AA, on the basis of the Final Commitments.

8.4.5.4. Coverage of a sufficient number and spread of fare classes

(294) Virgin Atlantic considers that the procedure for determining the number and identity of fare classes available under an SPA is unclear and, in practice, likely to be cumbersome and subject to the possibility of manipulation by the parties[151]. Virgin Atlantic puts forward four arguments in support of its position.

(295) First, it is unclear why the number of fare classes should be limited by reference to prior agreements concluded by the parties[152]. Second, it is unclear how the fare classes would be selected in instances where the parties do not have any SPA on the route concerned[153]. Third, fare classes that are available under existing agreements may change over time. Accordingly, a potential entrant would have no means of knowing the fare classes that are available under an SPA in advance. Virgin Atlantic considers that the commitments instead must oblige the parties to make available a specific number of fare classes with a reasonable spread of fare classes across all cabins[154]. Fourth, Virgin Atlantic is concerned that the spread of fare classes which could be obtained under the SPA would not be favourable[155].

(296) The Commission disagrees with these points.

(297) First, there is nothing novel in the fact that the commitment package foresees that SPA terms are defined by reference to existing agreements that the parties have concluded with other carriers. Indeed, SPA terms in previous cases were also built on that principle[156]. What matters is that the basket of agreements used as a benchmark in the Final Commitments is likely to include agreements which are favourable to new entrants. The Commission considers that to be the case.

(298) Second, contrary to what Virgin Atlantic claims, the fare classes are not defined on a route by route basis. The entrant can choose any fare class that is included in a pre-existing agreement, and apply it to all routes, regardless of whether that fare class has been included in an existing SPA on a given route[157].

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151 *Ibidem*, paragraph 5.36.

152 *Ibidem*, paragraph 5.38.

153 *Ibidem*, paragraph 5.39.

154 *Ibidem*, paragraph 5.41.

155 *Ibidem*, paragraph 5.39.

156 Case No COMP/M.3280 Air France/KLM, Commitments Package, Clause 8; Case No COMP/M.3770 Lufthansa/Swiss, Commitments Package, Clause 9*;* Case No COMP/M.5335 Lufthansa/SN Airholding, Commitments Package, Clause 5; Case No COMP/M.5440 Lufthansa/Austrian Airlines, Commitments Package, Clause 5.

157 Pursuant to the commitment package, the entrant can choose any fare class that is included in a pre-existing agreement. In case pre-existing agreements for the feeder route concerned provide for fare classes other than the ones requested by the entrant, the applicable rate would be calculated by applying a ratio of the average difference in fares as between the fare class selected by the entrant and the fare class that is available to another party.

(299) Third, the Final Commitments also address the fact that fare classes that are available under pre-existing agreements may change over time. The entrant has the choice between (i) continuing to have access to the fare classes available at the date of the commitments, irrespective of whether the fare classes that are available under the agreements used as benchmark later change over time, and (ii) gaining access to additional or more attractive fare classes, should such fare classes be included in agreements with other carriers during the lifetime of the commitments. This is actually more favourable than Virgin Atlantic's suggestion that those fare classes would be fixed throughout the lifetime of the Final Commitments. That would make it impossible for interested carriers to gain access to additional or more attractive fare classes, should such fare classes be included in agreements with other carriers during the lifetime of the Final Commitments.

(300) Fourth, under the Final Commitments, and contrary to what it seems to argue, Virgin Atlantic can benefit from the most favourable spread of fare classes that each of the parties grants to any other carrier. Its concerns on this point are therefore unfounded.

(301) The Commission concludes that none of the above-mentioned comments of Virgin Atlantic is founded, and that they therefore do not challenge the adequacy and the proportionality of the Final Commitments.

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

(302) 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[158].

(303) On those routes, and contrary to the routes on which an SPA remedy is offered to existing competitors even if they do not increase service[159], the Commission has found that competitors' services rely on connecting passengers from the parties only to a limited extent. The Commission has not 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 routes. The Commission does not see a need to revise its concerns in light of the comments it received pursuant to the Article 27(4) Notice or the Article 7(1) letter. An extension of the commitment to existing competitor services on those routes is therefore unjustified on that basis.

(304) The Commission also finds that a commitment from the parties to conclude an SPA for existing competitor's services on the London-Dallas, London-Boston and London-New York routes is unjustified because it would disincentivise the launch of new services. On those routes, competitors are able to increase their services by

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158 Virgin Atlantic's response to Article 27(4) Notice of 9 April 2010, sections 3.12 and 3.13; Virgin Atlantic's response to Article 7(1) of 15 June 2010, paragraphs 5.21 – 5.34.

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

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.

(305) 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 an 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.

(306) 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.

9. CONCLUSION

(307) In the light of the Final Commitments offered, the Commission considered that there were no longer grounds for action on its part in this case. Therefore, on 14 July 2010 the Commission brought to an end the proceedings by adopting the Article 9 decision making the Final Commitments binding upon the parties for a period of ten years[160].

(308) The Commission has come to the conclusion that by virtue of the Article 9 decision making the Final Commitments binding upon the parties the identified competition concerns are met in a satisfactory way and there is no sufficient European Union interest in the further investigation of the present complaint. Therefore the Commission rejects the complaint of Virgin Atlantic.

(309) An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 of the Treaty.

Done at Brussels, *SG fills in the date*

For the Commission

Joaquín ALMUNIA
Vice-President

[160] The duration or the scope of the Final Commitments may be adjusted after five years from the date of the adoption of the Article 9 decision 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.