



EUROPEAN COMMISSION  
Competition DG

***CASE AT.39964 - Air  
France/KLM/Alitalia/Delta***

(Only the English text is authentic)

**ANTITRUST PROCEDURE  
Council Regulation (EC) 1/2003**

---

Article 9 Regulation (EC) 1/2003

Date: 12/05/2015

This text is made available for information purposes only. A summary of this decision is published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].



EUROPEAN  
COMMISSION

Brussels, 12.5.2015  
C(2015) 3125 final

*PUBLIC VERSION*

**COMMISSION DECISION**

**of 12.5.2015**

**relating to proceedings under Article 101 of the Treaty on the Functioning of the  
European Union**

**Case AT.39964 - Air France/KLM/Alitalia/Delta**

Only the English text is authentic.

## TABLE OF CONTENTS

1.	Subject Matter .....	4
2.	The Parties.....	5
3.	Procedural Steps Under Regulation (EC) No 1/2003 .....	6
4.	Preliminary Assessment .....	7
4.1.	Relevant markets .....	7
4.1.1.	Origin and destination (city pair) markets .....	7
4.1.2.	Premium and non-premium passengers .....	8
4.1.3.	Non-stop and one-stop flights .....	9
4.1.4.	Airport substitution .....	10
4.1.4.1.	New York airports.....	10
4.1.4.2.	Paris airports.....	11
4.2.	Competitive assessment .....	11
4.2.1.	Application of Article 101(1) of the Treaty .....	11
4.2.2.	Route-by-route analysis .....	13
4.2.2.1.	Paris-New York (premium passengers) .....	13
4.2.2.2.	Amsterdam-New York (premium and non-premium passengers) .....	18
4.2.2.3.	Rome-New York (premium and non-premium passengers) .....	22
4.2.2.4.	Effect on trade between Member States.....	26
4.2.3.	Article 101(3) of the Treaty .....	26
5.	Initial Commitments offered by the Parties .....	27
5.1.	Slot release commitments .....	27
5.2.	Fare combinability commitment .....	27
5.3.	Special prorate agreement commitments .....	28
5.4.	Frequent Flyer Programme commitment .....	29
5.5.	Reporting obligation.....	29
5.6.	Duration of agreements concluded under the Initial Commitments and review clause .....	30
6.	Commission Notice Pursuant to Article 27(4).....	30
6.1.	Introduction .....	30
6.2.	Slot release commitments .....	30
6.3.	Fare combinability commitment .....	31
6.4.	Special prorate agreement commitments .....	31
6.5.	Comments in relation to travel agents.....	32
7.	Submission of Final Commitments by the Parties .....	32
8.	Assessment of the Final Commitments in the light of the comments received in response to the market test notice .....	32

8.1.	Slot release commitments .....	32
8.2.	Fare combinability commitment .....	34
8.3.	Special prorata agreement commitments .....	34
8.4.	Frequent flyer programme commitment .....	36
8.5.	Reporting obligation.....	36
8.6.	Review clause.....	36
8.7.	Comments in relation to travel agents.....	37
9.	Proportionality of the commitments.....	37
9.1.	Principles.....	37
9.2.	Application in the present case .....	37
10.	Conclusion.....	38

# COMMISSION DECISION

of 12.5.2015

relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union

**Case AT.39964 - Air France/KLM/Alitalia/Delta**

Only the English text is authentic.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ('the Treaty'),

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty<sup>1</sup>, in particular Article 9(1) thereof,

Having regard to the Commission decision of 23 January 2012 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 26 September 2014,

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

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

Having regard to the final report of the Hearing Officer,

Whereas:

## 1. SUBJECT MATTER

- (1) This Decision concerns a transatlantic joint venture agreement ('the TAJV Agreement') concluded between Société Air France ('Air France'), Alitalia Società Aerea Italiana S.p.A. ('Alitalia')<sup>3</sup>, Delta Air Lines Inc. ('Delta') and Koninklijke Luchtvaart Maatschappij N.V. ('KLM') (together 'the Parties')<sup>4</sup>.
- (2) The TAJV Agreement relates to the establishment of a profit/loss-sharing joint venture ('the TAJV'), which covers, among other things, all passenger air transport services operated by the Parties on routes between Europe and North America<sup>5</sup> ('the Transatlantic Routes'). The TAJV Agreement provides for extensive cooperation between the Parties, including on pricing, capacity, scheduling and revenue management coordination.

---

<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union.

<sup>2</sup> OJ C 376, 23.10.2014, p. 12.

<sup>3</sup> See recital (8) for an explanation of the recent re-organization of Alitalia.

<sup>4</sup> For the purposes of this Decision, the subsidiaries of Air France KLM S.A., Société Air France and KLM N.V. will be treated as two separate parties.

<sup>5</sup> Mexico, U.S.A. and Canada.

- (3) The Commission concentrated on those routes where there was a high probability that the conditions of Article 101(3) of the Treaty would not be met.
- (4) In its preliminary assessment of 26 September 2014 ('the Preliminary Assessment'), the Commission came to the provisional conclusion that the Parties' cooperation in the TAJV raised concerns as to its compatibility with Article 101 of the Treaty, in particular in relation to the Paris-New York premium market and the Amsterdam-New York and Rome-New York premium and non-premium markets (collectively referred to as 'the Routes of Concern').

## 2. THE PARTIES

- (5) Air France, registered in France, is a 100 % subsidiary of Air France KLM S.A. Its main business is passenger air transport and cargo air transport (domestic and international) and its principal hub<sup>6</sup> for international operations is at Paris-Charles de Gaulle airport, France. It also has a significant presence at Paris-Orly, with short-haul, mainly intra-European, flights.
- (6) KLM, registered in the Netherlands, is also a subsidiary of Air France KLM S.A., which holds a 97.5 % share of the capital and a 49 % share of the voting rights in KLM.<sup>7</sup> Its main activities are passenger transport, cargo transport and aircraft maintenance services. KLM's principal hub is at Amsterdam Schiphol airport, the Netherlands.
- (7) Air France and KLM operate together a fleet of 573 aircraft and serve 243 destinations in 103 countries. In 2013, the worldwide turnover of Air France KLM S.A. was EUR 25 520 million.<sup>8</sup>
- (8) Alitalia is the result of a concentration notified to the Commission on 29 September 2014 by Etihad Airways PJSC ('Etihad') and Alitalia Compagnia Aerea Italiana S.p.A. ('Alitalia CAI') pursuant to Article 3(1)(b) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the Merger Regulation')<sup>9</sup>. Under this transaction, the aviation business of Alitalia CAI was transferred to Alitalia Società Aerea Italiana S.p.A. and ownership of 49% of this new entity passed to Etihad and 51% to Alitalia CAI (which became a holding company). The concentration was approved by the Commission with conditions on 14 November 2014.<sup>10</sup> Pursuant to the terms of the transaction, Alitalia succeeded to Alitalia CAI's rights and obligations with effect from 1 January 2015 (including those attached to the TAJV). Alitalia's winter 2014/2015 schedule provided services to 83 destinations, including 26 in Italy and 57 in the rest of the world, and covered 123 routes, with a fleet of 118 aircraft.<sup>11</sup> Its main hub airports are Leonardo da Vinci airport in Rome Fiumicino ('Rome FCO') and Milan Malpensa. In 2013, Alitalia CAI's worldwide turnover was EUR 3 521 million.<sup>12</sup>

---

<sup>6</sup> An airport where an airline concentrates its operations.

<sup>7</sup> See also Consolidated Financial Statements for the year ended 31 March 2009, page 82 ([www.airfranceklm-finance.fr](http://www.airfranceklm-finance.fr)).

<sup>8</sup> See Air France KLM Registration document 2013 – including the annual financial report (<http://corporate.airfrance.com/en/the-company/key-figures/>).

<sup>9</sup> OJ L 24, 29.01.2004, p. 1-22

<sup>10</sup> See Commission Decision in case M.7333 *Alitalia/Etihad*, OJ C 31 of 30.01.2015.

<sup>11</sup> See Alitalia main profile data available at: <http://corporate.alitalia.it/en/company/profile/profile.html>.

<sup>12</sup> See Commission Decision in case M.7333 *Alitalia/Etihad*, OJ C 31 of 30.01.2015.

- (9) Delta is a U.S.-based airline, with its headquarters in Atlanta. It serves 333 destinations in 64 countries, with a fleet of 722 mainline aircraft. Delta operates hubs at the airports of Atlanta, Cincinnati, Detroit, Memphis, Minneapolis-St. Paul, New York LaGuardia, New York John F. Kennedy International Airport ('New York JFK') and Salt Lake City. In 2008, Delta merged with Northwest Airlines, a member of the SkyTeam Alliance.<sup>13</sup> In 2013, Delta had a turnover of USD 37,773 million (approximately EUR 33 068 million).<sup>14</sup>
- (10) The Skyteam Alliance ('SkyTeam') was established in 2000 and is the world's second largest airline alliance by number of member airlines and passengers carried. As of March 2014, SkyTeam had 20 member airlines.<sup>15</sup> In 2013, SkyTeam's member airlines carried over 602 million passengers to over 1000 destinations, in 177 countries.<sup>16</sup> Air France and Delta were founding members of SkyTeam, together with Aeromexico and Korean Air. KLM joined SkyTeam in 2004, after the creation of Air France KLM S.A. Alitalia CAI joined SkyTeam and the TAJV Agreement only later, on 5 July 2010.<sup>17</sup>

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

- (11) On 23 January 2012, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 ('Regulation 1/2003') in relation to the TAJV Agreement.
- (12) During the investigatory phase, the Commission sent several requests for information to the Parties, to their main corporate customers, to travel agents, to the Parties' main competitors on the Routes of Concern and to airports and slot coordinators concerned by the TAJV Agreement. The Commission also held several meetings with the Parties and considered the Parties' written submissions.
- (13) On 26 September 2014, the Commission adopted the Preliminary Assessment pursuant to Article 9(1) of Regulation 1/2003, which set out the Commission's competition concerns. These concerns related to the compatibility of the TAJV Agreement with Article 101 of the Treaty, in particular as regards the Routes of Concern.
- (14) On 3 October 2014, the Parties submitted commitments ("the Initial Commitments") to the Commission in response to the Preliminary Assessment.
- (15) On 23 October 2014, a notice was published in the *Official Journal of the European Union*<sup>18</sup> pursuant to Article 27(4) of Regulation 1/2003, summarising the case and

---

<sup>13</sup> See Commission Decision in case COMP/M.5181 *Delta Air Lines/Northwest Airlines*. As of February 2010, after the full integration of Northwest into Delta, the separate Northwest brand and flight numbers ceased to exist. < <http://news.delta.com/index.php?s=43&item=911>>.

<sup>14</sup> Annual report of Delta (form 10-K) available at: <http://d1lge852tjjqow.cloudfront.net/NYSE-DAL/ac53a69b-7dfb-4d38-aca7-a29c65ed68eb.pdf?noexit=true>.

<sup>15</sup> The current members are Aeroflot, Aerolineas Argentinas, Aeromexico, Air Europa, Air France, Alitalia, China Airlines, China Eastern, China Southern, Czech Airlines, Delta, Garuda Indonesia, Kenya Airways, KLM, Korean Air, Middle East Airlines, Saudia, Tarom, Vietnam Airlines and Xiamen Air.

<sup>16</sup> More about SkyTeam members and basic facts and figures available here: <https://www.skyteam.com/Global/Press/Facts%20and%20figures/2012%20Nov%20Xiamen/SkyTeam%20Fact%20Sheet%20%20July%202014.pdf>.

<sup>17</sup> The former Alitalia-Linee Aeree Italiane S.p.A. was a member of SkyTeam until 2010.

<sup>18</sup> OJ C 376, 23.10.2014, p. 12.

the Initial Commitments and inviting interested third parties to give their observations on the Initial Commitments within one month following publication.

- (16) On 8 December 2014, the Commission provided the Parties with non-confidential versions of the observations made by interested third parties on the Initial Commitments. On 4 May 2015, the Parties submitted a signed version of their **amended commitments** ("the Final Commitments").
- (17) On 28 April 2015, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 30 April 2015, the Hearing Officer issued his final report.

#### **4. PRELIMINARY ASSESSMENT**

##### **4.1. Relevant markets**

###### *4.1.1. Origin and destination (city pair) markets*

- (18) The Commission has traditionally defined the relevant market for scheduled passenger air transport services on the basis of the 'point of origin/point of destination' ('O&D') city pair approach.<sup>19</sup> Such a market definition corresponds to a demand-side perspective, whereby passengers consider all possible alternatives of travelling from a city of origin to a city of destination, while they do not generally consider one city pair to be substitutable for a different city pair.<sup>20</sup> Under this approach, every combination of a point of origin and a point of destination is considered to be a separate market.
- (19) The Parties did not contest the O&D market definition. However, they considered that it fails to fully capture the extent of competition that airlines experience from competing networks, notably from the presence of competition between the three major transatlantic alliances.<sup>21</sup>
- (20) With respect to corporate customers, the data gathered during the investigation shows that there is a group of corporate customers (for example large multinationals) who attach particular importance to the geographic coverage of airline networks when negotiating corporate contracts with airlines.<sup>22</sup> Nonetheless, as identified in the Commission's past practice, most of these corporate customers engage in route-

---

<sup>19</sup> See Case T-177/04 *easyJet v Commission*, ECLI:EU:T:2006:187, paragraph 56; and Case T-2/93 *Air France v Commission*, ECLI:EU:T:1994:55, paragraph 84. See also Case COMP/39596 – *British Airways/American Airlines/Iberia*, recitals 17 to 19; Case AT.39595 – *Continental/United/Lufthansa/Air Canada*, recitals 17 to 19; Case COMP/M.6663 *Ryanair/Aer Lingus III*, recitals 49 to 54; Case COMP/M.6447 – *IAG/bmi*, recitals 31 to 34; COMP/M.5830 – *Olympic/Aegean Airlines*, recitals 41 to 44; Case COMP/M.5889 – *United Air Lines/Continental Airlines*, recitals 9 to 12; Case COMP/M.5747 – *Iberia/British Airways*, recitals 9 and 10; Case COMP/M.5440 – *Lufthansa/Austrian Airlines*, recitals 11 to 14; Case COMP/M.5403 – *Lufthansa/bmi*, recitals 8 to 10; Case COMP/M.5181 – *Delta Air Lines/Northwest Airlines*, recitals 8 to 11; Case COMP/M.3280 – *Air France/KLM*, recitals 9 to 18; Case COMP/M.3770 – *Lufthansa/Swiss*, recitals 12 to 14.

<sup>20</sup> In accordance with the Commission notice on the definition of the relevant market, the consumer's viewpoint is the most important element to take into account in defining the product market. See OJ C372, 9.12.1997, p. 5.

<sup>21</sup> Parties' reply of 23 April 2012 to the Commission's request for information of 16 March 2012.

<sup>22</sup> Questionnaire to corporate customers (Q.3.1)



specific negotiations for discounts, since the needs of corporate customers' employees still revolve around transport from one point to another.<sup>23</sup>

- (21) On the basis of the data gathered during its market investigation, the Commission considers that in the present case, O&D city pairs remain the appropriate approach to market definition, including for corporate customers. So-called 'network effects'<sup>24</sup> are taken into account in the assessment of the impact of the TAJV Agreement on competition on each individual O&D, in particular when considering the barriers to entry arising from such networks.

#### 4.1.2. *Premium and non-premium passengers*

- (22) In line with its previous decisions,<sup>25</sup> the Commission has distinguished between two main categories of passengers on long-haul flights: 'premium' passengers and 'non-premium' passengers. In order to better reflect the various comfort and service levels offered on long-haul flights and single out passengers willing to pay a higher price for tickets in high-end comfort class, the Commission took the preliminary view that it was appropriate to distinguish between premium and non-premium passengers. Premium passengers tend to travel for business purposes, require significant flexibility, higher service quality, and tend to pay higher prices for this flexibility and level of comfort. Non-premium passengers travel predominantly for leisure purposes or to visit friends and relatives, do not require flexibility and are therefore usually not willing to pay higher prices in exchange for flexibility and higher service quality.
- (23) The Parties and a big majority of corporate customers and travel agents agree that a distinction between two categories of passengers can be made, based on the travel needs and preferences of each group.<sup>26</sup> The Commission's passenger survey in the present case indicated that first class and business class passengers share common travel preferences, which differ from those of passengers travelling in restricted economy class.<sup>27</sup> Thus, the Commission's survey concluded that first and business classes form part of a premium market, while restricted economy class passengers form part of a non-premium market.
- (24) Overall, on the basis of the data gathered during the market investigation, the Commission considers that the distinction between premium and non-premium markets remains relevant in the present case. For the purposes of this Decision, the Commission has carried out its competitive assessment and calculated market shares based on the widest possible premium market, which includes services in all cabin and fare classes except restricted economy class (for example, in first, business and flexible economy). For the non-premium market in the present case, the Commission has taken into account bookings in the restricted economy class only.

---

<sup>23</sup> Questionnaire to corporate customers (Q.3.3.2). Case AT.39595 – Continental/United/Lufthansa/Air Canada, recital 18; Case COMP/39596 – British Airways/American Airlines/Iberia recitals 18 and 19; Case COMP/M.5889 – United Air Lines/Continental Airlines recital 11; Case COMP/M.5181 – Delta Air Lines/Northwest Airlines recital 10.

<sup>24</sup> See, for example, Case COMP/M.3280 – Air France/KLM, recital 16.

<sup>25</sup> Case COMP/39596 – British Airways/American Airlines/Iberia, recitals 20 to 22; Case COMP/39595 – Continental/United/Lufthansa/Air Canada recitals 20 to 22; Case COMP/M.5889 – United Air Lines/Continental Airlines recitals 15 to 18.

<sup>26</sup> Parties' response of 23 April 2012 to Commission's request for information of 16 March 2012. Questionnaire to corporate customers (Q.1.2) and travel agents (Q.1.3).

<sup>27</sup> The survey covered passengers on non-stop flights departing from Rome FCO, Amsterdam Schiphol, Paris CDG and Paris ORY airports with New York JFK and Newark Liberty International Airports ('Newark Liberty') as their destination.

#### 4.1.3. *Non-stop and one-stop flights*

- (25) The Commission considers that the degree to which one-stop flights constrain non-stop flights should be considered on a route-by-route basis.<sup>28</sup> In previous cases, the Commission has accepted that, although one-stop flights are generally less attractive than non-stop flights, because of the extended travel time and inconvenience associated with the stop-over, these drawbacks may be mitigated by countervailing elements such as price.<sup>29</sup> Thus, in some previous cases the Commission has included certain long-haul one-stop flights in the same relevant market as non-stop flights.<sup>30</sup>
- (26) The Parties consider that one-stop services exercise a strong competitive constraint on non-stop services for all types of passengers and that they therefore form part of the same market. According to the Parties, they match their competitors' price changes for both one-stop and non-stop services on the non-stop routes investigated by the Commission in the present case.<sup>31</sup>
- (27) As regards corporate customers, approximately one third (37%) of respondents replied that they consider one-stop flights to be substitutable to non-stop flights, although the attractiveness of one-stop flights decreases as their additional travelling time increases compared to the corresponding non-stop flights. As regards travel agents, 21 % of respondents for premium passengers and 75 % of respondents for non-premium passengers agreed that non-stop and one-stop services are substitutable.<sup>32</sup> Competitors generally stated that one-stop services exert some competitive pressure on non-stop services on long-haul routes.<sup>33</sup> The passenger survey<sup>34</sup> suggested that one-stop flights could be considered to be in the same relevant market as non-stop flights for both premium and non-premium passengers<sup>35</sup>.
- (28) The Commission took the preliminary view that it was not necessary to conclude whether one-stop flights were in the same market as non-stop flights, as the competitive assessment would not materially differ if the market encompassed both non-stop and one-stop flights.<sup>36</sup> The Commission's assessment of the anti-

---

<sup>28</sup> See for example COMP/39596 - *British Airways/American Airlines/Iberia*, recital 25; and Case AT.39595 - *Continental/United/Lufthansa/Air Canada* recital 26; Case COMP/M.3280 - *Air France/KLM*, recital 21; Case COMP/M.5889 - *United Air Lines/Continental Airlines* recital 25.

<sup>29</sup> Case COMP/M.2041 - *United/US Airways*, recital 15; Case COMP/M.5181 - *Delta Air Lines/Northwest Airlines*, recitals 16 to 18; Case COMP/M.5889 - *United Air Lines/Continental Airlines*, recitals 19 to 25.

<sup>30</sup> See, for example, Case COMP/39596 - *British Airways/American Airlines/Iberia*, recitals 23 to 25; Case AT.39595 - *Continental/United/Lufthansa/Air Canada*, recital 26. Case COMP/M.2041 - *United Airlines/US Airways*, recitals 13 to 19; Case COMP/M.3280 - *Air France/KLM*, recitals 20 to 23; Case COMP/M.3770 - *Lufthansa/Swiss*, recitals 16 to 17; Case COMP/JV.19 - *KLM/Alitalia*, recital 22; Case COMP/M.2672 - *SAS/Spanair*, recitals 12 to 20; Case COMP/M.5889 - *United Air Lines/Continental Airlines*, recitals 19 to 25.

<sup>31</sup> Parties' response of 23 April 2012 to Commission's request for information of 16 March 2012.

<sup>32</sup> Questionnaire to corporate customers (Q1.3 and Q2.3) and travel agents (Q1.4).

<sup>33</sup> Questionnaire to competitors (Q1.3).

<sup>34</sup> See footnote 27.

<sup>35</sup> For all routes, the proportion of non-premium passengers who would potentially switch to one-stop flights is higher than the corresponding proportion of premium passengers. In the case of Rome-New York, only a small proportion of premium passengers would potentially switch to one-stop flights. The survey also showed that connecting flights with a two or three hour stop-over seem to be considered as an alternative to a non-stop flight, whereas stop-overs of four hours and more are not.

<sup>36</sup> In line with Case COMP/39596 - *British Airways/American Airlines/Iberia*, recital 24 and Case AT.39595 - *Continental/United/Lufthansa/Air Canada*, recital 26. For the purpose of calculating the Parties' market shares, the Commission used Marketing Information Data Tapes (MIDT) data that include bookings on one-stop flights.

competitive effects on the Routes of Concern included an evaluation of the constraint that one-stop services would exercise on the Parties' non-stop services (in addition to the constraint from competitors' non-stop services) in the premium and non-premium markets respectively. The extent to which one-stop flights exercise a competition constraint on the non-stop flights on the Routes of Concern has therefore been examined on a route-by-route basis.

#### 4.1.4. Airport substitution

- (29) The Commission assessed airport substitutability both in terms of demand-side substitutability and supply-side substitutability, which are the key considerations in determining the relevant market.<sup>37</sup> In the present case, decisive airport substitution issues arose in relation to airports serving the Paris and New York areas.

##### 4.1.4.1. New York airports

- (30) As regards New York, the Parties argued that Newark Liberty International Airport ('Newark Liberty') and John F. Kennedy International Airport ('New York JFK') are substitutable, on the basis that (a) both airports are served by major international airlines flying non-stop to European cities; (b) the two airports have significantly overlapping catchment areas, and (c) the Commission, the U.S. Department of Transport ('the DOT') and the U.S. Department of Justice have consistently held that these two New York airports are substitutable.<sup>38</sup>
- (31) In its investigation, the Commission found no serious indication that there were separate markets for transatlantic services to Newark Liberty and New York JFK<sup>39</sup> for either premium or non-premium passengers. In general, corporate customers and travel agents who responded to the Commission's requests for information agreed on the substitutability of Newark Liberty and New York JFK.<sup>40</sup>
- (32) In conclusion, the Commission considers that, for the purposes of this Decision, the airports of Newark Liberty and New York JFK should be considered as substitutable. This is consistent with past cases, where the Commission found both airports to be substitutable for transatlantic services.<sup>41</sup>

##### 4.1.4.2. Paris airports

- (33) Concerning Paris, the Parties considered that Paris-Charles de Gaulle airport ("Paris CDG") and Paris-Orly airport ("Paris ORY") are substitutable from a demand-side and supply-side perspective, for several reasons: (a) both airports are located in the same catchment area, (b) the two airports have comparable access facilities and (c)

---

<sup>37</sup> See, for example, Case T-177/04 *easyJet v Commission*, ECLI:EU:T:2006:187, recitals 99 to 102; Case COMP/39596 - *British Airways/American Airlines/Iberia* recitals 26 to 30; Case AT.39595 - *Continental/United/Lufthansa/Air Canada* recitals 27 to 30; Case COMP/M.5335 - *Lufthansa/SN Airholding*, recitals 51 to 104; Case COMP/M.4439 - *Ryanair/Aer Lingus*, recitals 69 to 287; Case COMP/M.3280 - *Air France/KLM*, recitals 24 to 34.

<sup>38</sup> Parties' response of 23 April 2012 to Commission's request for information of 16 March 2012.

<sup>39</sup> LaGuardia is the third New York airport. It serves Europe only indirectly (for example LaGuardia-Boston-Paris). Since one-stop services from LaGuardia are insignificant in the present case, this airport has been excluded from the Commission's assessment and only New York JFK and Newark Liberty were considered to be relevant for the analysis.

<sup>40</sup> Questionnaire to corporate customers (Q5.2) and travel agents (Q5.2).

<sup>41</sup> Case COMP/39596 - *British Airways/American Airlines/Iberia* recital 30; Case AT.39595 - *Continental/United/Lufthansa/Air Canada* recital 30; Case COMP/M.3280 - *Air France/KLM* recital 34.

there are no specific constraints on operating out of either of these airports, since many airlines operate at both airports.<sup>42</sup>

- (34) The majority of travel agents and corporate customers who replied to the Commission's market investigation questionnaire considered Paris CDG and Paris ORY airports to be substitutable for transatlantic flights and equally convenient for business trips.<sup>43</sup>
- (35) Consequently, the Commission took the view, for the purposes of this Decision, that the airports of Paris CDG and Paris ORY should be considered as substitutable. This is consistent with past cases, where the Commission found both airports to be substitutable for transatlantic services.<sup>44</sup>

## **4.2. Competitive assessment**

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

#### **Introduction**

- (36) While the TAJV Agreement creates a contractual joint venture, the joint venture does not conduct its business autonomously and at arm's length from its parent undertakings. On the contrary, it is directly managed by the parent undertakings and it uses their assets as well as their marketing channels. Therefore, since the TAJV does not qualify as a 'full-function' joint venture<sup>45</sup>, the TAJV Agreement is subject to Article 101 of the Treaty, rather than the Merger Regulation.
- (37) The TAJV Agreement is the latest in a series of long-standing bilateral and multilateral transatlantic cooperation agreements between Delta (and earlier Northwest Airlines) on the US side, and Air France, KLM and Alitalia (and its predecessors) on the European side of the Atlantic. The Parties implemented the TAJV Agreement in June 2009.
- (38) The TAJV Agreement covers scheduled services for passengers and combined passenger/cargo flights, therefore excluding cargo-only flights. The core geography covered by the TAJV Agreement is Europe to/from North America (namely U.S.A., Canada and Mexico). The Parties operate a profit/loss sharing joint venture on the Transatlantic Routes and their behind/beyond routes. Pursuant to the TAJV Agreement, the Parties fully coordinate their activities on capacity, schedule, pricing and revenue management on the Transatlantic Routes. The Parties agree that the guiding principle on sales is that each Party will implement sales and distribution programs and policies without preference for its own operated flights on the Transatlantic Routes, which is defined as metal neutrality.

#### **Restriction of competition by object**

- (39) The TAJV Agreement provides for extensive cooperation between the Parties in relation to all key parameters of airline competition, including price, capacity, scheduling and quality of service. In particular, it creates a metal-neutral profit/loss-sharing cooperation which includes: joint setting of capacity and schedules, frequency and aircraft type used; fully coordinated pricing at all levels; centralised

---

<sup>42</sup> Parties' response of 23 April 2012 to Commission's request for information of 16 March 2012.

<sup>43</sup> Questionnaire to corporate customers (Q5.1) and travel agents (Q5.1).

<sup>44</sup> Commission Decision in case M.3280 Air France/KLM (recitals 29-30) found that CDG airport and, ORY airport are substitutable from the demand side for point-to-point traffic.

<sup>45</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C95, 16.4.2008, paragraphs 91 to 109.

and coordinated revenue management functions; harmonised marketing and sales activities in all segments; full coordination of the Parties' combined passenger/cargo activities; and further cooperation in the fields of frequent flyer programmes, operating policies, IT systems, product planning and joint purchases.

- (40) Given that the TAJV Agreement eliminates competition between the Parties on these key parameters, the Commission took the preliminary view that it is by its very nature harmful to the proper functioning of normal competition, and therefore has the object of restricting competition. In particular, the TAJV Agreement incentivises each Party to focus on the common interest of all the Parties, at the expense of its individual incentives on the market. The concept of metal neutrality conflicts with the concept inherent in the Treaty provisions relating to competition, as the Parties substitute cooperation for competition between them.<sup>46</sup>
- (41) Therefore, the Commission considered in its Preliminary Assessment that the TAJV Agreement, which applies to a large number of transatlantic routes, constitutes a restriction of competition by object within the scope of Article 101(1) of the Treaty.
- (42) A restriction of competition by object alone is sufficient for an agreement to be caught by the prohibition of Article 101(1) of the Treaty.<sup>47</sup> Among the routes covered by the TAJV Agreement, the Commission concentrated on those routes where there was a high probability that the conditions of Article 101(3) of the Treaty would not be met.<sup>48</sup> The Commission raised preliminary competition concerns as regards the Paris-New York route for premium passengers, and the Amsterdam-New York and Rome-New York routes for premium and non-premium passengers, where no efficiency arguments were submitted.

#### Restriction of competition by effect

- (43) The Commission also examined whether the TAJV Agreement had the actual or potential effect of appreciably restricting competition on the Paris-New York route for premium passengers and the Amsterdam-New York and Rome-New York routes for both premium and non-premium passengers. As part of this assessment, the Commission first examined whether the Parties were actual or potential competitors in the relevant markets. Secondly, the Commission identified the likely anti-competitive effects, based in particular on the key market characteristics. Finally, it considered whether competitors of the Parties would be likely to counter the likely anti-competitive effects of the Parties' cooperation in the TAJV, by expanding their services.

#### 4.2.2. Route-by-route analysis

##### 4.2.2.1. Paris-New York (premium passengers)

##### Factual overview

---

<sup>46</sup> See Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd.*, ECLI:EU:C:2008:643, paragraph 34.

<sup>47</sup> See, inter alia, Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission*, ECLI:EU:C:1966:41, Case C-219/95 *P Ferriere Nord v Commission*, ECLI:EU:C:1997:375, paragraphs 12 to 14), Case T-62/98 *Volkswagen v Commission*, ECLI:EU:T:2000:180, paragraph 178, case C-32/11 *Allianz Hungária*, ECLI:EU:C:2013:160, paragraph 34 and case C-226/11 *Expedia*, ECLI:EU:C:2012:795, paragraph 35.

<sup>48</sup> For the avoidance of doubt, the present Decision, adopted on the basis of Article 9 of Regulation 1/2003, does not imply that the conditions of Article 101(3) TFEU would be met as regards other Transatlantic Routes.

- (44) Approximately [700 000-800 000] O&D passengers travelled on the Paris-New York route in 2013. The Commission only raised preliminary concerns in relation to the premium market on this route, which covers about [100 000-120 000] O&D passengers annually (15 % of the total market size), of whom only 6 % travel one-stop. Paris-New York is the second largest transatlantic route after London-New York. O&D passengers represent around 52 % of the total flow on this route.<sup>49</sup>
- (45) Air France operates a hub at Paris CDG for long-haul services. It is also the largest operator at Paris ORY. Delta has a hub at New York JFK. Besides Delta, both the oneworld Transatlantic Joint Business ("oneworld TJB")<sup>50</sup>, notably American Airlines at New York JFK, and Star Alliance A++ transatlantic joint venture ("Star Alliance A++")<sup>51</sup>, notably United Airlines, Inc at Newark Liberty ("United"), operate hub airports at the New York end of the route.
- (46) Air France and Delta operate seven daily frequencies on most weekdays on the Paris-New York route (Air France five frequencies and Delta two daily frequencies<sup>52</sup>), evenly spread throughout the day. They jointly offer the highest number of frequencies. Except for one Delta flight between Paris CDG and Newark Liberty, all the Parties' flights operate from Paris CDG to New York JFK. The largest competitor on the route is oneworld alliance partners with five daily frequencies (OpenSkies with almost three daily frequencies in the summer 2013 season (19 weekly frequencies) and approximately two daily frequencies in the winter 2013 season, while American Airlines consistently operated two daily frequencies). OpenSkies flies from Paris ORY approximately twice daily to Newark Liberty, and on average once daily to New York JFK, while American Airlines flies from Paris CDG to its hub at New York JFK. United flew twice daily between Paris CDG and Newark Liberty in the summer 2013 season and slightly reduced its weekly frequency in the winter 2013 season (11 weekly flights on average). During the summer season, XL Airways operates 2-6 frequencies a week, exclusively for non-premium passengers (with the exception of April 2013, first month of the summer season, when there were no flights). Lastly, in July 2014, La Compagnie began operating five weekly frequencies between Paris CDG and Newark Liberty.<sup>53</sup>
- (47) Air India only operated the route in the 2012 summer season and for a brief period between 2003 and 2008. As a result of the TAJV Agreement, the number of non-stop competitors on the Paris-New York route for premium passengers decreased from four (Air France, Delta, American Airlines/OpenSkies, United) to three (Air France/Delta, American Airlines/OpenSkies, United).

#### Competitive conditions in the absence of the TAJV Agreement

- (48) The Commission came to the preliminary conclusion that in the absence of the TAJV Agreement, Air France and Delta would each be operating non-stop flights on the

---

<sup>49</sup> "Total flow" means the total number of passengers carried on non-stop flights on the route. Some of these passengers also take connecting flights at either or both ends of the route.

<sup>50</sup> Oneworld Transatlantic Joint Business is a transatlantic alliance between British Airways Plc., American Airlines Inc. and Iberia Líneas Aéreas de España S.A.

<sup>51</sup> Star Alliance A++ refers to a transatlantic joint venture concluded between the following members of the Star Alliance: Air Canada, United Airlines, Inc., Deutsche Lufthansa AG and Continental Airlines Inc.

<sup>52</sup> Delta had a lower weekly frequency in the winter 2013/2014 season, namely five weekly flights instead of seven weekly flights.

<sup>53</sup> Given that La Compagnie has only recently entered the route, its market shares and frequencies are not taken into account for the purposes of this Decision.

Paris-New York route independently and would therefore be actual non-stop competitors. In 2009, when the TAJV was implemented, Delta was not operating on the route and it re-entered only in 2011. However, Delta did operate on the route continuously between 1992 and 2008, with a year-round daily service<sup>54</sup>. The Parties acknowledged that in the absence of the TAJV Agreement, Delta would operate one or two non-stop daily frequencies on the Paris-New York route.<sup>55</sup> Furthermore, the Commission came to the preliminary conclusion that, as Paris-New York is the second largest of all transatlantic routes, airlines with a hub at either end of the route are likely to have access to enough connecting traffic to operate at least one non-stop daily frequency.

#### Loss of competition between the Parties and market-specific assessment

- (49) In the Preliminary Assessment, the Commission took the view that, prior to their cooperation in the TAJV, Air France and Delta each had to consider the other's reaction when taking their individual decisions on pricing, capacity and service levels. By cooperating on these parameters, these Parties no longer face competition from each other.
- (50) In the Paris-New York premium market, in 2013, the Parties held a combined market share of [65-75] %. Air France had a market share of [50-60]% and Delta [10-20]%.<sup>56</sup> American Airlines and its oneworld partner OpenSkies had a combined 19 % market share, while United and other Star Alliance A++ airlines held 11 %. The Commission has previously stated that high market shares are one of the factors relevant for the assessment of horizontal cooperation agreements.<sup>57</sup>
- (51) The Commission also examined the closeness of competition between the various competitors' services and found evidence to suggest that Delta is a closer competitor to Air France on the Paris-New York route for premium passengers than are the rival airlines (for example American Airlines; OpenSkies; United). Both corporate customers and travel agents named Air France and Delta most often as the 'best choice' airlines on this route. These findings were confirmed by the Commission's passenger survey<sup>58</sup>, which showed that, among premium passengers who had travelled between Paris and New York on a non-stop flight in the preceding twelve months, 52 % of respondents stated that they had travelled with one of the Parties (Air France or Delta).
- (52) After analysing the key characteristics of the market, the Commission concluded in its Preliminary Assessment that the TAJV Agreement constituted a restriction by object and was likely to have anti-competitive effects for premium passengers on the

---

<sup>54</sup> Therefore, Delta operated on this route before the first cooperation agreement between Air France and Delta in 1997.

<sup>55</sup> Parties' submission on Paris-New York of 24 May 2013.

<sup>56</sup> The Commission's assessed the TAJV Agreement by reference to a situation of complete absence of any cooperation and not just the incremental effect of the TAJV Agreement relative to the previous levels of cooperation between certain Parties. This implied that the Commission should examine the market circumstances for the period before any cooperation started. However, in view of the difficulties of reproducing market circumstances after such a long period of time (Air France and Delta started their initial cooperation in 1997), the Commission used more recent data. For the purposes of this Decision, when calculating the market shares of the Parties, the Commission used 2013 Marketing Information Data Tapes ('MIDT') data.

<sup>57</sup> Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (OJ C 11/1, 14.1.2011) ("the Horizontal Cooperation Guidelines"), paragraph 34.

<sup>58</sup> See footnote 27.

Paris-New York route. The combined market share of the Parties is very large; the Parties' cooperation in the TAJV eliminates competition on all key parameters and Air France and Delta are closer competitors with respect to each other than with respect to other competitors. In view of these market characteristics, these effects are likely to be appreciable.

Will competitors counter the likely anti-competitive effects?

- (53) Finally, the Commission assessed whether competitors of the Parties would be able to counter the likely anti-competitive effects on the Paris-New York premium market. It considered barriers to entry and the ability of competitors to replace the loss of competition between Air France and Delta by expanding their services.
- (54) The Commission considers that its investigation showed that the Paris-New York route is a hub-to-hub route with significant barriers to entry and expansion, in particular airport congestion and hub advantages for the Parties at both ends of the route.
- (55) On the basis of its investigation the Commission found that both Paris CDG and Paris ORY are 'slot-coordinated' airports<sup>59</sup>. Furthermore, both airports are capacity constrained, in particular during the morning and evening peak times.<sup>60</sup> As regards Paris CDG, it may be difficult for an airline to open new transatlantic routes arriving and departing from Paris CDG during the morning peak and at certain times of the afternoon and evening.<sup>61</sup> In the case of Paris ORY, the quota limitation has been reached and new operations can start only if and when quota is made available, for example due to the loss of historic rights to quota, slot returns, or airline insolvencies.<sup>62</sup> However, with the exception of a few weeks a year, all slot requests had been able to be accommodated within a +/- 60 minute time window.<sup>63</sup> As regards terminal capacity, currently and for the next three to five years, there is no identified terminal constraint at Paris CDG or Paris ORY.
- (56) Despite the slot shortages at both airports, OpenSkies successfully expanded its services on the route by adding a third daily frequency in March 2013.<sup>64</sup> Finally, La Compagnie, a new business-class-only airline, started operating flights five times per week between New York Newark airport and Paris CDG in July 2014.<sup>65</sup>

---

<sup>59</sup> This means that the demand for slots at these airports is such that the allocation of slots must be 'coordinated' by an airport slot coordinator in order to be fair and efficient.

<sup>60</sup> At Paris CDG, there is a limitation on runway capacity (maximum number of arrivals and departures within a given period) and a night quota restriction (between 00:30 and 05:29 for arrivals, and between 00:00 and 04:59 for departures). See the 6 November 2003 order of the French Minister of Transport. At Paris ORY, the runway capacity limits are reached in the morning during the long-range flights arrival period and also in the evening. There is also a night curfew between 23:30 and 06:00. See COHOR's response of 8 November 2013 to Commission's request for information of 21 October 2013.

<sup>61</sup> Aéroports de Paris' response of 17 April 2012 to Commission's request for information of 23 March 2012.

<sup>62</sup> COHOR's response of 4 April 2012 to Commission's request for information of 23 March 2012 and of 8 November 2013 to Commission's request for information of 21 October 2013.

<sup>63</sup> COHOR's response of 4 April 2012 to Commission's request for information of 23 March 2012 and of 8 November 2013 to Commission's request for information of 21 October 2013.

<sup>64</sup> OpenSkies stated that the slot required at Paris ORY for the new service was obtained through the general slot allocation process. OpenSkies' response of 30 July 2013 to Commission's request for information of 5 July 2013.

<sup>65</sup> Press article in Forbes from 17 June 2014: <http://www.forbes.com/sites/grantmartin/2014/06/17/french-company-la-compagnie-launches-all-business-class-service-from-new-york-city-to-paris/> and Le Figaro



- (57) As regards the New York airports (New York JFK and Newark Liberty), the Commission, further to its investigation, found that both airports are capacity constrained and that it is particularly difficult to obtain suitable peak time slots for transatlantic services. To address 'persistent congestion' issues, the U.S. Federal Aviation Administration ('FAA') issued orders in 2008 limiting scheduled operations at New York JFK and Newark Liberty.<sup>66</sup> However, the current numbers of hourly movements already exceed the limits fixed.
- (58) The Commission also found that, compared to competitors or potential new entrants, the Parties have a unique ability to reshuffle their slots to provide optimal timings for their Paris-New York flights, as they have a much larger slot portfolio at Paris CDG and Paris ORY than any other airline.<sup>67</sup> In the 2013 summer season, SkyTeam alliance partners held approximately [55-65]% of the slots at Paris CDG and [35-45]% at Paris ORY ([50-60]% and [35-45]% for the Parties at the two airports respectively).<sup>68</sup> At the New York airports, the competitors have a larger combined presence than the Parties.<sup>69</sup> Thus, entry and expansion at U.S. airports would not be as difficult for these competitors on the Paris-New York route as for other competitors or potential new entrants.
- (59) The Commission also provisionally concluded that the Parties' advantage from operating hub airports at both ends of the Paris-New York route acts as a substantial barrier to entry and expansion for any new entrant or smaller competitor wishing to expand premium passenger operations on the route. A hub operator is able to reap benefits from (a) economies of scale, as it is able to spread its fixed costs at that airport over a large number of routes; (b) better brand recognition and more efficient marketing and advertising expenditure; (c) attractiveness of its frequent flyer programme among the local population; (d) feed traffic from its network flowing through the airport in question, and (e) a better ability to attract corporate customers. Several Commission decisions have recognised that this hub advantage constitutes a barrier to entry.<sup>70</sup> As stated in recital (45), the Parties benefit from these advantages at the airports of Paris (Air France) and to some extent at New York JFK (Delta).
- (60) The hub advantage of the Parties ensures benefits in particular with regard to feed traffic flowing from their large networks through the hubs in question. However,

---

from 18 June 2014; <http://www.lefigaro.fr/voyages/2014/06/18/30003-20140618ARTFIG00007-paris-new-york-la-compagnie-prend-son-envol.php>.

<sup>66</sup> See the Order Limiting Operations at Newark Liberty International Airport (73 FR 29550, May 21, 2008) (several consecutive hours in the afternoon and evening are oversubscribed as demand is around "the upper 80s" or "the mid-90s" in terms of movements per hour, while actual capacity was average 83 movements). The situation was even worse at New York JFK. See Order Limiting Scheduled Operations at John F. Kennedy International Airport (73 FR 3510, Jan. 18, 2008): "For example, from February 2007 through July 2007, JFK's average actual airport capacity was 81 operations per hour. The scheduled demand during the busiest hour, 4:00 p.m., was over 110 arrivals and departures during summer 2007. Adjacent hours had fewer scheduled flights, with total operations numbering from the mid-80s to mid-90s, but they were still above the average hourly runway capacity."

<sup>67</sup> This conclusion is not altered by the fact that, in March 2013, the competitor OpenSkies was able to expand its services on the route by obtaining slots at Paris ORY through the general slot allocation process or that, in July 2014, La Compagnie started operating flights on the route.

<sup>68</sup> COHOR's response of 6 November 2013 to Commission's request for information of 21 October 2013.

<sup>69</sup> In the summer 2013 season, Delta operated a hub at New York JFK with approximately [30-40]% of slots at the airport, making it the largest operator at the airport, however close to the slots share of jetBlue (approximately 33.1 %). American Airlines (oneworld TJB) also operated a hub at New York JFK (slots share approximately 18 %), while United (Star Alliance A++) accounts for over 80.4% of slots at Newark Liberty.

<sup>70</sup> See for example Case COMP/M.5335 *Lufthansa/Brussels Airlines*, recital 160.

connecting traffic may not always be available to non-hub airlines. Given that the European alliance partners of the Parties' competitors do not have hubs at Paris airports, these competitors have very limited access to traffic at these airports and mainly rely on their own limited self-feed at their U.S. hubs (New York).

- (61) As regards frequency on the Paris-New York route, the Commission observed that in the 2013 summer season, the total number of frequencies operated by the Parties' competitors (almost 8 daily frequencies at the peak in August) was slightly higher than that operated by the Parties (7 daily frequencies). The oneworld TJB operated 5 daily frequencies, Star Alliance A++ operated 2 daily frequencies and XL Airways operated 3-5 weekly frequencies (less than one daily).
- (62) However, despite their number of frequencies, some of the Parties' competitors operate with smaller aircraft than the Parties. The use of less competitive narrow-body aircraft by these competitors limits their possibility to operate profitable services. Thus the scale of the competitors' operations is unlikely to counter the likely anti-competitive effects of the TAJV Agreement.
- (63) As regards one-stop services, the Commission considered that they provide a limited competitive constraint on the Paris-New York route. While one-stop capacity is easier to ramp up than non-stop capacity, it is unlikely that one-stop competitors will expand their Paris-New York capacity in response to the TAJV Agreement – and find passengers – to such an extent that they will counter the likely anti-competitive effects of the TAJV, in particular in light of the many existing non-stop frequencies on the route. Finally, in the Paris-New York premium market, only 6 % of passengers travel on one-stop services, given that New York is on the U.S. East coast, so one-stop services via U.S. hubs would require backtracking<sup>71</sup>.
- (64) As regards potential non-stop entrants, it is not very likely that any major European or U.S. airline would enter the Paris-New York route, since all three revenue-sharing alliances<sup>72</sup> already operate non-stop services on the route. Furthermore, fifth-freedom carriers,<sup>73</sup> such as Air India, would not be covered by the EU-U.S. Open Skies Agreement, and, as such, would be subject to the regulatory restrictions embodied in the existing bilateral air service agreements.<sup>74</sup>

#### Conclusion on Article 101(1) of the Treaty

- (65) The Commission took the preliminary view that the TAJV Agreement has an anti-competitive object and in any event has the effect of appreciably restricting competition in the Paris-New York premium market. In particular, the Commission considered that the competition that would have existed between Air France and Delta has been eliminated and is unlikely to be replaced by competition from third-party airlines, because the latter face substantial barriers to entry and expansion. This preliminary conclusion is, for reasons explained in recitals (53) to (64), not altered by

---

<sup>71</sup> For example, passengers departing from New York would first be required to fly westbound to reach the connecting hub on the U.S side, before flying eastbound to cross the Atlantic Ocean.

<sup>72</sup> Oneworld TJB, Star Alliance A++ and SkyTeam TAJV.

<sup>73</sup> The fifth freedom is 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.

<sup>74</sup> For example, the France-India Air Service Agreement of 1947 contains restrictions on fifth freedom traffic rights, both in terms of the destinations that Air India can serve beyond Paris, the frequency entitlement and the type of aircraft to be used.

evidence of a degree of residual competition from American Airlines, OpenSkies, United, the recent entry of La Compagnie, nor by one-stop competitors.

#### 4.2.2.2. Amsterdam-New York (premium and non-premium passengers)

##### Factual overview

- (66) Approximately [200 000-300 000] O&D passengers travelled on the Amsterdam-New York route in 2013. The proportion of premium passengers was 15%, of whom 12 % travel one-stop. The share of total passengers flying one-stop was 16%. O&D passengers represented around 37 % of the total flow.
- (67) KLM operates its hub at Amsterdam, while Delta has a hub at New York JFK. As regards competitors, both the oneworld TJB (American Airlines at New York JFK) and Star Alliance A++ (United at Newark Liberty) operate hub airports at the New York end of the route.
- (68) The route is served by three non-stop airlines: Delta, KLM and United. In the winter 2013 season, KLM and Delta together operated 26 weekly frequencies (14 KLM and 12 Delta), whereas United operated 7 weekly frequencies. In summer 2013, the Parties operated 31 weekly frequencies on average (14 KLM and 17 Delta on average), against 7 weekly frequencies for United. KLM operates to New York JFK airport; United flies from its hub at Newark Liberty and Delta serves both of these New York airports.

##### Competitive conditions in the absence of the TAJV Agreement

- (69) The Commission came to the preliminary conclusion that in the absence of the TAJV Agreement, KLM and Delta would each be operating non-stop services on the Amsterdam-New York route independently, as they did before the implementation of the TAJV Agreement. They would therefore be actual non-stop competitors.
- (70) The Parties argued in the course of the procedure that the Commission had already exhausted its jurisdiction to examine competition between the Parties on the Amsterdam-New York route in its 2004 *Air France/KLM* merger decision<sup>75</sup>. Therefore, in their opinion, there is no basis for intervention under Article 101 of the Treaty. The Parties claimed that the counterfactual should be that KLM and Delta are not competitors on the Amsterdam-New York route. Furthermore, the Parties argued that since, under the 2004 *Air France/KLM* merger decision, one daily slot has to be made available to competitors at Amsterdam Schiphol airport, any possible competition concern on the route has been addressed.
- (71) The Commission considered that it is not precluded from examining this route under Article 101 of the Treaty. A merger decision grants clearance only to the concentration between the merging parties, in this case Air France and KLM, and not to any cooperation with third parties. Accordingly, any remedy can only be imposed on the merging parties and not on any third party. While the merger relationship cannot be re-evaluated, the TAJV Agreement was not part of the object of the authorisation granted in the 2004 merger decision and therefore, even if the TAJV Agreement was considered during the merger proceedings, it remains subject to antitrust rules. In addition, since the *Air France/KLM* merger decision in 2004, market conditions have changed and the Parties have entered into a new, more integrated joint venture in relation to transatlantic routes. Furthermore, the slots made available at Amsterdam Schiphol pursuant to the *Air France/KLM* merger decision

---

<sup>75</sup>

have not been taken up, and that decision did not make slots available at New York airports.

- (72) Therefore, the Commission concluded on a preliminary basis that the counterfactual to the TAJV Agreement is that KLM and Delta would be operating competing non-stop services on the Amsterdam-New York route.

Loss of competition between the Parties and market-specific assessment

- (73) In the Preliminary Assessment, the Commission took the view that, prior to their cooperation in the TAJV, KLM and Delta each had to consider the other's reaction when taking their individual decisions on pricing, capacity and service levels. By cooperating on these parameters, these two airlines no longer face competition from each other.
- (74) In 2013, in the premium market on the Amsterdam-New York route, the combined market share of KLM and Delta was [65-75]% (including 2 % attributable to one-stop services). Individually, KLM held a market share of [40-50]% and Delta [20-30]%.<sup>76</sup> In comparison, Star Alliance A++ and oneworld TJB members accounted for 20 % and 5 % respectively of the total premium market.
- (75) In the Amsterdam-New York non-premium market, the Parties' combined market share was [55-65]% (including 2 % attributable to one-stop services). Individually, KLM held a market share of [30-40]% and Delta [20-30]%. Star Alliance A++ members' market share was 29 % and the oneworld TJB's 5 % (derived from one-stop flights).
- (76) The Commission also examined the closeness of competition between the various competitors' services and found evidence suggesting that Delta is a closer competitor to KLM on the Amsterdam-New York route for premium and non-premium passengers than is the rival airline (namely United). A majority of both corporate customers and travel agents named KLM and Delta as the 'best choice' airlines on this route. These findings were further confirmed by the Commission's passenger survey, which showed that among premium passengers who had travelled between Amsterdam and New York on a non-stop flight in the preceding twelve months 60 % of respondents stated that they had travelled with one of the Parties (KLM or Delta), while in the Amsterdam-New York non-premium market, 58 % of respondents had travelled with one of the Parties (KLM or Delta).
- (77) After analysing key market characteristics, the Commission concluded in its Preliminary Assessment that the TAJV Agreement constituted a restriction by object and was likely to have anti-competitive effects, for premium and non-premium passengers, on the Amsterdam-New York route. The combined market share of the Parties is very large; the Parties' cooperation in the TAJV eliminates competition on all key parameters, and KLM and Delta are closer competitors with respect to each other than with respect to other competitors. In view of these market characteristics, these effects are likely to be appreciable.

Will competitors counter the likely anti-competitive effects?

---

<sup>76</sup> The Commission assessed the TAJV Agreement by reference to a situation of complete absence of cooperation. This implied that the Commission should examine the market circumstances for the period before any cooperation existed between the Parties. However, in view of the availability of data, the Commission used 2013 MIDT data to assess the Parties' position.

- (78) Finally, the Commission assessed whether competitors of the Parties would be able to counter the likely anti-competitive effects on the Amsterdam-New York route for premium and non-premium passengers. It considered barriers to entry and the ability of competitors to replace the loss of competition between KLM and Delta by expanding their services.
- (79) On the basis of its investigation the Commission found that Amsterdam-New York is a hub-to-hub route for the Parties, with significant barriers to entry and expansion, in particular airport congestion, as well as hub and frequency advantages for the Parties, at both Amsterdam Schiphol and New York JFK airports.
- (80) Amsterdam Schiphol is a 'slot-coordinated' airport and is currently capacity constrained.<sup>77</sup> The current limitations vary according to the arrival and departure peaks. In recent years, as a result of the economic downturn, the slots requested and the corresponding aircraft movements did not reach the airport's capacity limits and additional slots were available even at peak times.<sup>78</sup> As shown in recital (57) of this Decision, both New York airports (namely JFK and Newark Liberty) are capacity constrained and it is particularly difficult to obtain suitable peak time slots for transatlantic services.
- (81) Furthermore, the Parties and their alliance partners have a much larger slot portfolio at Amsterdam Schiphol than any other airline. This large portfolio gives the Parties a unique ability to reshuffle their slots, to provide optimal timings for their Amsterdam-New York flights, compared to competitors or new entrants. In the 2013 summer season, SkyTeam alliance members held approximately [55-65]% of the slots ([50-60]% for the Parties).<sup>79</sup>
- (82) Furthermore, the Parties enjoy significant benefits from their established hub presence at both ends of the Amsterdam-New York route, and in particular at the European end, which acts as a substantial barrier to entry and expansion by competitors<sup>80</sup>. The hub advantage provides the Parties with a significant strength in the O&D market in terms of brand recognition, frequent flyer programme attractiveness and access to connecting traffic, which cannot be reproduced by competitors. The need for access to connecting traffic at the European end of the route presents a significant barrier to entry and expansion and restricts the number of non-stop competitors and new entrants.
- (83) As to the frequency gap between the Parties' and their competitors' services post-cooperation, the Commission provisionally considered it to be a significant advantage that the Parties' existing or potential competitors would be unable to bridge.<sup>81</sup> As a result of the TAJV Agreement, the number of daily frequencies offered by KLM and Delta doubled from two to four flights per day in the summer season. The only competing service is provided by United, with its single daily flight. The frequency share of the Parties is four times that of the only competitor. Therefore, United's daily service – even if competitively priced – is unlikely to draw

---

<sup>77</sup> There is a capacity limit on the total number of aircraft movements, due to environmental issues (Stichting Airport Coordination Netherlands ('SACN') response of 16 April 2012 to Commission's request for information of 23 March 2012).

<sup>78</sup> According to the Dutch slot coordinator, in the last four IATA seasons, as a result of the economic downturn, all slot requests were able to be accommodated within a +/- 60 minute time window. Moreover, slot trading, rentals and swaps are permitted at Amsterdam Schiphol.

<sup>79</sup> SACN's response of 8 November 2013 to Commission's request for information of 21 October 2013.

<sup>80</sup> More information on the benefits of the hub presence can be found in recital (59) of this Decision.

<sup>81</sup> More information on the importance of frequency can be found in recital (60) of this Decision.

significant numbers of passengers away from the Parties' four-times-daily service. The quality gap is such that premium passengers are likely to prefer to pay higher prices for the higher-frequency service. Moreover, due to the above-mentioned hub advantage of the Parties at Amsterdam Schiphol, United is unlikely to be able to replicate the Parties' four-times-daily service, as there would not be enough additional demand. Furthermore, since the Parties enjoy a significant advantage and United is unable to bridge the frequency gap, United is likely to suffer a permanent disadvantage in its ability to attract sufficient passengers to fill potential additional aircraft. This disadvantage constitutes a significant barrier to entry and expansion for United and any potential new entrant on the Amsterdam-New York route.

- (84) The Commission also looked at the existing one-stop services on the Amsterdam-New York route and provisionally concluded that the competitive constraints provided by these services are limited. While one-stop capacity is easier to ramp up than non-stop capacity, it is unlikely that one-stop competitors would expand their Amsterdam-New York capacity – and find passengers – to such an extent that they could counter the likely anti-competitive effects of the TAJV Agreement, in particular in the light of the many existing non-stop frequencies on the route. On the Amsterdam-New York route, 16 % of total passengers travel on one-stop services (12 % of premium passengers and 17 % of non-premium passengers). Furthermore, the relative popularity of one-stop services on the route also benefits the Parties, which offer attractive one-stop options.
- (85) As regards further potential entrants, fifth-freedom carriers would not be covered by the EU-U.S. Open Skies Agreement, and, as such, would be subject to the regulatory restrictions embodied in the bilateral air service agreements of other countries. The most recent example of fifth-freedom operations on the Amsterdam-New York route was Singapore Airlines in 2003. In any event, there is no clear indication that potential entrants are planning any likely, timely and sufficient entry.<sup>82</sup>

#### Conclusion on Article 101(1) of the Treaty

- (86) The Commission took the preliminary view that the TAJV Agreement has an anti-competitive object and in any event has the effect of appreciably restricting competition in the Amsterdam-New York premium and non-premium markets. In particular, the Commission considered that the competition which would have existed between KLM and Delta has been eliminated and is unlikely to be replaced by competition from third parties, for the reasons explained in recitals (78) to (85), because the latter face substantial barriers to entry and expansion. This preliminary conclusion is not altered by evidence of residual competition from United and one-stop competitors.

#### 4.2.2.3. Rome-New York (premium and non-premium passengers)

##### Factual overview

- (87) Approximately [250 000-350 000] O&D passengers travelled on the Rome-New York route in 2013. The proportion of premium passengers on this route is 9 % (approximately [20 000-30 000] passengers), of whom only 17 % travel one-stop. The proportion of total O&D passengers flying one-stop is relatively high: 33 %. O&D passengers represent around 42 % of the total flow on this route. The route is highly seasonal: around three quarters of annual passengers travel during the summer season.

<sup>82</sup>

Horizontal Cooperation Guidelines, paragraph 47.

- (88) Alitalia operates a hub at Rome FCO, while Delta has a hub at New York JFK. Besides the Parties, both oneworld TJB (American Airlines at New York JFK) and Star Alliance A++ (United at Newark Liberty) operate hub airports at the New York end of the route.
- (89) In the 2013 summer season, Alitalia and Delta operated an average of four daily flights on Rome-New York (Alitalia on average almost three (average weekly frequency of 18 flights) and Delta one daily flight). The non-stop competitors American Airlines and United offered one daily frequency each. The seasonality of the route, combined with Italy's recent economic difficulties has resulted in a decrease in winter capacity. In the 2013/2014 winter season, the only airline operating a non-stop service on the route was Alitalia, which reduced its services to only two daily flights. American Airlines has not operated services in the winter season since 2010, while United stopped its four times weekly service in winter 2013, though it re-introduced the service at the end of the winter season (April 2014). Alitalia, Delta and American Airlines operate between Rome FCO and New York JFK, while United flies from Rome FCO to its Newark Liberty hub.

Competitive conditions in the absence of the TAJV Agreement

- (90) The Commission came to the preliminary conclusion that in the absence of the TAJV Agreement, Alitalia and Delta would each be operating non-stop flights independently on the Rome-New York route, as they did before the implementation of the TAJV Agreement. They would therefore be actual non-stop competitors. Although Delta is not currently operating the route on a year-round basis,<sup>83</sup> it did operate a daily service on the route from 1992 until 2012.

Loss of competition between the Parties and market-specific assessment

- (91) In its Preliminary Assessment, the Commission took the view that, prior to their cooperation in the TAJV, Alitalia and Delta each had to consider the other's reaction when taking their individual decisions on pricing, capacity and service levels. By cooperating on these parameters, these airlines no longer face competition from each other.
- (92) In the Rome-New York premium market, in 2013, the combined market share of the Parties was [60-70]% (including 3 % attributable to one-stop services). Individually, Alitalia held a market share of [40-50]% and Delta [15-25]%.<sup>84</sup> American Airlines and its oneworld TJB partners held a 15 % market share, while United and other Star Alliance A++ airlines held a 19 % share.
- (93) In the Rome-New York non-premium market, the combined market share of the Parties was [50-60]% (including 6 % attributable to one-stop services). Individually, Alitalia held a market share of [30-40]% and Delta [15-25]%, based on 2013 data. American Airlines and its oneworld TJB partners held a combined market share of 20 %, while United and other Star Alliance A++ airlines held a 23 % market share.
- (94) The Commission also examined the closeness of competition between the various competitors' services and found evidence suggesting that Delta is a closer competitor to Alitalia for premium and non-premium passengers on Rome-New York than are

---

<sup>83</sup> Delta operates in the summer season on this route.

<sup>84</sup> The Commission's assessed the TAJV Agreement by reference to a situation of complete absence of any cooperation. This implied that the Commission should examine the market circumstances for the period before any cooperation between the Parties. However, in view of the availability of data, the Commission used 2013 MIDT data to assess the Parties' position.

the rival airlines (namely American Airlines and United). Both corporate customers and travel agents named Alitalia and Delta most often as the 'best choice' airlines on this route. These findings were confirmed by the Commission's passenger survey, which showed that among premium passengers who had travelled between Rome and New York on a non-stop flight in the preceding twelve months 89 % of respondents stated that they had travelled with one of the Parties (Alitalia or Delta), while in the Rome-New York non-premium market 75 % of respondents had travelled with one of the Parties (Alitalia or Delta).

- (95) After analysing key market characteristics, the Commission concluded in its Preliminary Assessment that the TAJV Agreement constitutes a restriction of competition by object and is likely to have anti-competitive effects for premium and non-premium passengers on the Rome-New York route. The combined market share of the Parties is very large; the Parties' cooperation in the TAJV eliminates competition on all key parameters, and Alitalia and Delta are closer competitors with respect to each other than with respect to other competitors. In view of these market characteristics, these effects are likely to be appreciable.

Will competitors counter the likely anti-competitive effects?

- (96) Finally, the Commission assessed whether competitors of the Parties would be able to counter the likely anti-competitive effects on the Rome-New York route for premium and non-premium passengers. It considered barriers to entry and the ability of competitors to replace the loss of competition between Alitalia and Delta by expanding their services.
- (97) On the basis of its investigation the Commission found that Rome-New York is a hub-to-hub route, with significant barriers to entry and expansion, in particular airport congestion, as well as hub and frequency advantages for the Parties at both Rome FCO and New York JFK airports.
- (98) Rome FCO airport is 'slot-coordinated' and is currently capacity constrained.<sup>85</sup> Capacity limits are reached especially in the morning peak hours of the summer season and sometimes during the evening peak. Furthermore, the Italian slot coordinator indicated that there are also terminal and stand capacity constraints at Rome FCO airport.<sup>86</sup> Nevertheless, according to the Italian slot coordinator, in the last four IATA seasons, all slot requests were able to be accommodated within a +/- 60 minute time window.
- (99) As shown in recital (57) of this Decision, both New York airports (namely JFK and Newark) are capacity constrained and it is particularly difficult to obtain suitable peak time slots for transatlantic services.
- (100) The Parties have the largest slot portfolio at Rome FCO. In the 2013 summer season, SkyTeam alliance members held approximately [45-55]% of the slots ([45-55]% for the Parties).<sup>87</sup> This large portfolio gives the Parties a unique ability to reshuffle their slots, to provide optimal timings for their Rome FCO-New York flights. A new entrant or competitor wishing to expand does not have such flexibility.

---

<sup>85</sup> There is a capacity limit of 90 aircraft movements per hour. Assoclearance's response of April 2012 to Commission's request for information of 23 March 2012.

<sup>86</sup> Assoclearance's responses of April 2012 to Commission's request for information of 23 March 2012 and of 8 November 2013 to Commission's request for information of 5 July 2013.

<sup>87</sup> Assoclearance's response of 8 November 2013 to Commission's request for information of 5 July 2013.



- (101) Furthermore, the Parties enjoy significant benefits from their hubs at both ends of the Rome-New York route, and in particular at the European end, which acts as a barrier to entry and expansion to competitors on this route.<sup>88</sup> This provides a significant strength in the O&D market in terms of brand recognition, frequent flyer programme attractiveness and access to connecting traffic, which cannot be reproduced by competitors. Finally, the fact that Alitalia is the only airline operating a year-round service on the route distinguishes it from other competitors as being the obvious choice for corporate customers and frequent flyers.
- (102) The need for access to connecting traffic at the European end of the route also presents a significant barrier to entry and expansion and restricts the number of non-stop competitors and new entrants. Connecting passengers represent 58 % of the total flow on the Rome-New York route, the large majority of them connecting at least at the European end. As regards connecting traffic, the majority of the Parties' competitors' (namely American Airlines and United) connecting passengers on the route are provided by their U.S. networks.<sup>89</sup> In the case of United, it has historically operated the New York (Newark Liberty)-Rome (FCO) route on an annual basis until 2012, when it suspended its winter service as a result of market conditions on the route. It has not reintroduced the winter service since then.
- (103) As to the frequency gap between the Parties' and their competitors' services post-cooperation, in the 2013 summer season, the Parties operated twice as many flights as their competitors combined and four times as many frequencies as each of the two competitors individually. As of the 2012/2013 winter season, partly due to low demand, no competitor operated a non-stop service on the route during the winter season. Both American Airlines' and United's once daily services are inherently less competitive than the Parties' average of four daily services, which provide greater flexibility and lower schedule delay. In the absence of a year-round daily flight and given the significant difference in summer frequencies, the Parties have a frequency advantage which constitutes a significant barrier to entry and expansion for United, American Airlines and any potential new entrant on the Rome-New York route.
- (104) The Commission also looked at the existing one-stop services on the Rome-New York route and came to the preliminary view that the competitive constraints provided by one-stop services are also limited on this route. While one-stop capacity is easier to ramp up than non-stop capacity, it is unlikely that one-stop competitors would expand their Rome-New York capacity in response to the TAJV Agreement – and attract passengers – to such an extent that they could counter the likely anti-competitive effects of the TAJV Agreement, in particular in the light of the many existing non-stop frequencies on the route. On Rome-New York, 33 % of O&D passengers travel one-stop, which can be explained by Rome's geographic position (one-stop flights via other European hubs do not usually require backtracking). In addition, the Parties' one-stop services on the Rome-New York route are among the best, based on total travel time.<sup>90</sup>

---

<sup>88</sup> More information on the benefits of the hub presence can be found in recital (59) of this Decision.

<sup>89</sup> American Airlines has had a special prorate agreement with Alitalia since 2010, which was recently renewed. Nevertheless, the traffic feed from Alitalia flights to American Airlines' transatlantic services is limited; the overwhelming majority of American Airlines' connecting passengers are provided by its own U.S. network (American Airlines' response of 27 April 2012 to Commission's request for information of 16 March 2012).

<sup>90</sup> According to the Parties' response of 20 April 2012 to Commission's request for information of 16 March 2012.

- (105) As regards further potential entrants, fifth-freedom carriers would not be covered by the EU-U.S. Open Skies Agreement, as already concluded in recital (64) of this Decision, and, as such, they would be subject to the regulatory restrictions embodied in the bilateral air service agreements of other countries. The most recent example of fifth-freedom operations on the Rome-New York route was Ethiopian Airlines, which stopped operating the route in 2005. In any event, the Commission did not find indications that potential entrants are planning any "likely, timely and sufficient" entry.<sup>91</sup>

#### Conclusion on Article 101(1) of the Treaty

- (106) The Commission took the preliminary view that the TAJV Agreement has an anti-competitive object and in any event has the effect of appreciably restricting competition in the Rome-New York premium and non-premium markets. In particular, the Commission considers that the competition that would have existed between Alitalia and Delta has been eliminated and is unlikely to be replaced by competition from third parties, for the reasons explained in recitals (96) to (105), because the latter face substantial barriers to entry and expansion. This preliminary conclusion is not altered by evidence of residual competition from American Airlines and United and from one-stop competitors.

#### 4.2.2.4. Effect on trade between Member States

- (107) The Courts of the European Union have consistently held that, in order to find that an agreement or a practice may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.<sup>92</sup> The effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. Moreover, the Courts of the Union have consistently held that the effect on trade should be appreciable, although they have specified that a potential effect suffices.<sup>93</sup>
- (108) In the present case, the Parties have significant operations and sales across Europe. The TAJV Agreement covers all the passenger services of the Parties on the transatlantic routes, as well as intra-EU services connecting to the Transatlantic Routes. The TAJV Agreement alters the manner in which the Parties would provide such transatlantic and intra-EU services absent that Agreement.
- (109) In the light of the above factors, the Commission provisionally concluded that the TAJV Agreement may appreciably affect trade between Member States within the meaning of Article 101(1) of the Treaty.

#### 4.2.3. *Article 101(3) of the Treaty*

- (110) In order to benefit from the exception provided by Article 101(3) of the Treaty, as explained in the Commission's guidelines on the application of Article 101(3) ("the Article 101(3) Guidelines")<sup>94</sup> (1) an agreement must create efficiencies, (2) the restrictions imposed by the agreement must be indispensable to the creation of those efficiencies, (3) consumers must receive a fair share of such efficiencies, and (4) the

---

<sup>91</sup> Horizontal Cooperation Guidelines, paragraph 47.

<sup>92</sup> Case 42/84 *Remia BV and others v Commission*, ECLI:EU:C:1985:327, paragraph 22.

<sup>93</sup> Case C-219/95 *Ferriere Nord SpA v Commission*, ECLI:EU:C:1997:375, paragraph 19.

<sup>94</sup> Guidelines on the application of Article 81(3) of the EC Treaty (now Article 101(3) of the Treaty on the Functioning of the European Union), OJ C 101/97, paragraphs 38 to 116.

agreement must not create the possibility to eliminate competition in respect of a substantial part of the market.

- (111) The Parties have not provided any arguments concerning the creation of efficiencies in relation to the Paris-New York, Amsterdam-New York or Rome-New York routes. Therefore, the Commission provisionally concluded in its Preliminary Assessment that there are no efficiencies that would offset the appreciable restriction of competition by object and by effect resulting from the TAJV Agreement on the Routes of Concern.

## **5. INITIAL COMMITMENTS OFFERED BY THE PARTIES**

- (112) In order to address the competition concerns set out in the Commission's Preliminary Assessment, the Parties proposed the Initial Commitments, the key elements of which are described in recitals (113) to (132). The Parties have emphasised that this should not be interpreted as an acknowledgement that they have infringed the EU competition rules or that the TAJV Agreement is incompatible with Article 101 of the Treaty.

### **5.1. Slot release commitments**

- (113) The slot commitments involve the release of landing and take-off slots by the Parties to interested competitors which are ready to operate new non-stop services or increase the frequency of their existing services on the Amsterdam-New York and Rome-New York routes respectively. The slot commitments are aimed at addressing the lack of suitable slots for competitive services on these two routes.
- (114) The Parties proposed to make slots available at Amsterdam airport and, if applicable, at the choice of a competitor at either New York JFK or Newark Liberty airports, as well as at Rome airport and, if applicable, at the choice of a competitor at either New York JFK or Newark Liberty airports, in order to allow up to seven new or additional frequencies weekly on each of the Amsterdam-New York and Rome New-York routes.
- (115) The number of slots to be released by the Parties may be decreased according to the total number of competitive frequencies operated by the Parties' competitors. As regards Amsterdam-New York, if the Parties' competitors increase the total number of frequencies they operate on the route above one daily (seven weekly) frequencies, without availing themselves of the slots offered under the Initial Commitments, the number of such additional frequencies shall be deducted from the number of slots which the Parties must make available on the Amsterdam-New York route. Similarly, as regards Rome-New York, if the Parties' competitors increase the total number of frequencies they operate on the route above two daily (fourteen weekly) frequencies for a particular IATA summer season and above zero for a particular IATA winter season, without availing themselves of the slots offered under the Initial Commitments, the number of such additional frequencies shall be deducted from the number of slots which the Parties must make available on the Rome-New York route for the relevant IATA season.
- (116) The slot release commitments are subject to a number of conditions, including that a competitor must first exhaust all reasonable efforts to obtain slots through the general slot allocation process. In addition, to prevent possible abuse, the Initial Commitments specify that, to be eligible to receive slots from the Parties, a competitor must have exhausted its own slot portfolio at the airport.
- (117) Finally, the Initial Commitments set out detailed rules for the selection of eligible slot applicants. For these purposes, members of SkyTeam can apply for slots,

provided that they do not belong to the same holding company as one of the Parties and do not cooperate with the Parties on the route in question in the provision of passenger air transport services. The Initial Commitments also contain rules to ensure that any slots awarded are not misused by competitors.

## **5.2. Fare combinability commitment**

- (118) Fare combinability agreements enable eligible competitors (or travel agents) to offer a return trip to passengers covered by the fare combinability agreement, namely a non-stop service provided one way by one of the Parties, and the other way by the competitor. Fare combinability agreements are intended to reduce the Parties' frequency advantage against such competitors on the Routes of Concern for those passengers covered by the fare combinability agreement.
- (119) The Parties offered to enter into fare combinability agreements with competitors which begin operating new non-stop services or increase the frequency of their existing non-stop services on any of the Routes of Concern. Only airlines which do not, either alone or through their alliance partners, operate a hub (including a focus city) at both ends of the route would be eligible. In the case of Paris-New York, fare combinability agreements would also be available to competitors which already operate non-stop services on this route.
- (120) The Initial Commitments provide for the Parties to offer fare combinability agreements irrespective of whether a new service on the Amsterdam-New York or Rome-New York routes is operated using slots released under the Initial Commitments. Furthermore, fare combinability agreements will be subject to the approval of the Commission, which will assess, in particular, whether the terms of such agreements are reasonable.
- (121) The key features of the fare combinability commitment are as follows:
  - (a) Fare combinability agreements apply to premium and non-premium passengers, except in case of Paris-New York, where they apply only to the premium passengers.
  - (b) For competitors which are members of a transatlantic joint venture also benefiting from antitrust immunity granted by the DOT, fare combinability is to be on the basis of published one-way fares. For all other eligible competitors, the fare combinability agreement will also provide access to the Parties' other published fares.
  - (c) The combinability of fares is limited to O&D traffic.
  - (d) The fare combinability agreement is to be subject to standard industry rules.
  - (e) The terms of the fare combinability agreements cannot be less favourable than those in any fare combinability agreement existing between the relevant Party and the requesting competitor as at 26 September 2014.

## **5.3. Special prorate agreement commitments**

- (122) A special prorate agreement ('SPA') is intended to provide competitors with access to the Parties' connecting traffic on the Routes of Concern.
- (123) The Parties offered to conclude SPAs with competitors which begin operating new non-stop services or increase the frequency of their existing services on any of the Routes of Concern, irrespective of whether such services use slots obtained under the Initial Commitments. In addition, for Paris-New York, existing competitors which already operate non-stop services on the route would also qualify for SPAs.

- (124) Such SPAs would be available for all classes of passengers, except on Paris-New York, where only premium passengers would be covered. Only airlines which do not, alone or through their alliance partners, operate hubs (or focus cities) at both ends of the particular Route of Concern would be eligible for SPAs.
- (125) Subject to the specific provisions of the Initial Commitments, the terms of SPAs must be at least as favourable as the terms contained in any SPA between the relevant Party and a third party airline. Finally, any SPA concluded under the Initial Commitments must be approved by the Commission, which will assess, in particular, whether the terms of such agreements are reasonable.
- (126) The key features of the SPA commitments are as follows:
- (a) The SPA covers traffic with an origin or destination in geographical Europe on the one hand, and an origin or destination in North America (Canada, United States of America and Mexico), the Caribbean and Central America on the other hand, provided that part of the itinerary involves one of the Routes of Concern.
  - (b) The SPA covers net fares and published fares, at the request of the interested airlines. If it includes straight rate proration, it would apply only to published fares.
  - (c) The SPA covers up to twenty feeder routes on which the Parties' connecting traffic can be transferred onto the competitor's transatlantic services (fifteen feeder routes if the competitor has a hub at one end of the relevant Route of Concern).
  - (d) The terms of the SPA cannot be any less favourable than those in any SPA existing between the relevant Party and the requesting competitor as at 26 September 2014.

#### **5.4. Frequent Flyer Programme commitment**

- (127) The purpose of the frequent flyer programme ('FFP') commitment is to give competitors access to the FFP of the Parties, where such FFP constitutes a barrier to entry and expansion.
- (128) Under the FFP commitment, the Parties proposed to give access to competitors, upon their request, to the Parties' FFP on the Routes of Concern.
- (129) The Parties proposed to open their FFP on the Routes of Concern to any competitor which begins operating new services or increases the frequency of its existing services on any of the Routes of Concern, provided that such competitor does not have a comparable programme and does not already participate in the Parties' programme. The Initial Commitments provide that the terms of such FFP agreements should ensure the same treatment for competitors as for the members of the SkyTeam alliance other than the Parties.

#### **5.5. Reporting obligation**

- (130) The Parties proposed to permit the US DOT to provide the Commission with data concerning the Parties' cooperation in the TAJV Agreement from the date of the DOT's final order granting antitrust immunity to the Parties' cooperation.<sup>95</sup>

---

<sup>95</sup>

The TAJV Agreement superseded the separate joint venture agreements between Air France and Delta (2007), between KLM and Northwest (1997), and the 2007 Air France/Delta/KLM/Northwest joint

## **5.6. Duration of agreements concluded under the Initial Commitments and review clause**

- (131) The Parties proposed that any slot release agreements, fare combinability agreements and SPAs concluded pursuant to the Initial Commitments should last for up to ten years, at the choice of the requesting competitor.
- (132) In the Initial Commitments, the Parties proposed a review clause. Pursuant to this clause, without prejudice to Article 9(2) of Regulation 1/2003, the Parties accepted the Commission's right to review the commitments five years after the date of adoption of this Decision.

## **6. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4)**

### **6.1. Introduction**

- (133) On 23 October 2014, the Commission published a notice pursuant to Article 27(4) of Regulation 1/2003, inviting third parties to comment on the Initial Commitments ('the Market Test Notice'). The Commission received five responses from interested third parties.
- (134) Overall, the responses did not identify new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the Preliminary Assessment. The respondents did not question the general aim of the Initial Commitments, namely to lower the barriers to entry and expansion on the Routes of Concern, by making slots available<sup>96</sup> and enabling eligible competitors to conclude fare combinability, FFP agreements and SPAs with the Parties. The respondents did however make comments on the scope and the conditions of certain of the Initial Commitments. These were intended to ensure that the Initial Commitments would be effective in achieving their aim. One respondent, namely United, stated that the Initial Commitments were likely to exert an effective competitive constraint, because they would make competitive entry attractive, particularly if the TAJV sought to raise fares on the Routes of Concern.

### **6.2. Slot release commitments**

- (135) In their comments in response to the Market Test Notice, British Airways Plc., American Airlines, Inc. and Iberia S.A., all being parties to the oneworld TJB, stated that the Parties should provide a slot release commitment on the Paris-New York route, in particular at Paris ORY airport. Furthermore, oneworld TJB argued that clause 1.2.2(c)(iv) of the Initial Commitments, which conditions the eligibility of slot applicants on the size of their aggregate holding of slots at New York airports, should

---

venture agreement. The US Department of Transportation (DOT) completed its review of this latter 2007 joint venture agreement in May 2008 (see Docket OST-2007-28644, DOT final order of 22 May 2008). This 2008 DOT order granting antitrust immunity also covers the 2009 TAJV Agreement, as this is a combination of the previously immunised bilateral Air France/Delta and KLM/Northwest agreements and the 2007 joint venture agreement between the same parties. The DOT approved the addition of Alitalia to the immunised TAJV Agreement with its final order of 26 June 2009 (order 2009-6-26).

<sup>96</sup> As explained in section 0, the slot release commitments apply only to the Amsterdam-New York and Rome-New York routes.

use the same wording as the Commission's previous commitment decisions relating to airline transatlantic joint ventures.<sup>97</sup>

- (136) The European Travel Agents' and Tour Operators' Associations ('ECTAA') noted that the terms of the slot commitments do not ensure that slots will be allocated on a non-discriminatory basis. Specifically, ECTAA referred to the lack of clarity concerning the notion of "all reasonable efforts" that have to be undertaken by the slot applicant under clause 1.2.1 of the Initial Commitments, in order to obtain the necessary slot through the general slot allocation procedure. Finally, ECTAA pointed out that the Initial Commitments do not include a slot release commitment for the Paris-New York route.

### **6.3. Fare combinability commitment**

- (137) In its comments following the Market Test Notice, ECTAA pointed out that given the strong position of the Parties on the Routes of Concern, any fare combinability agreements may be concluded under disproportionate conditions, as the Parties would be able to impose less attractive modalities for such contracts.

### **6.4. Special prorated agreement commitments**

- (138) ECTAA made the same comment regarding disproportionate conditions and less attractive contractual modalities in respect of the SPA commitments as it made in respect of the fare combinability commitments.
- (139) Oneworld TJB argued that the SPA commitments do not provide sufficient access to the Parties' feed traffic on the Paris-New York route. Oneworld TJB submitted that, given that the behind/beyond traffic at Paris is dispersed, the scope of the SPA commitments should be broadened, both in terms of number and geographical coverage of the available behind/beyond destinations. According to oneworld TJB, the SPA commitments should be expanded to cover at least thirty behind/beyond destinations at the request of a competitor, and to include behind/beyond destinations in Africa, India and the Middle East.
- (140) Oneworld TJB also submitted that in order to generate the feed traffic necessary to ensure the viability of competitors' services, the SPA commitments for Paris-New York should cover not only premium passengers, but also non-premium passengers. According to oneworld TJB, premium passengers on transatlantic routes increasingly require the option to travel in non-premium fare classes both on their transatlantic flight and on short-haul segments which form part of their itinerary. In this regard, Oneworld TJB also claimed that the Parties did not operate premium services on any domestic flights concerning behind/beyond destinations to or from Paris ORY and/or CDG.
- (141) Finally, oneworld TJB argued that for the SPA remedy to be effective it should allow competitors to have access to the same feed opportunities as the Parties, and in particular to those provided by Air France's subsidiaries, such as HOP! and Transavia, for feed traffic behind/beyond Paris. Oneworld TJB considered that this was necessary in view of recent announcements concerning the restructuring of the Air-France KLM group and in particular Air France's intention to transfer most of its short-haul point-to-point and feed network to its subsidiary HOP!. Furthermore, oneworld TJB stated that the SPA commitments should not only give access to

---

<sup>97</sup>

Case COMP/39596 - *British Airways/American Airlines/Iberia*; Case COMP/39595 - *Continental/United/Lufthansa/Air Canada*.

inventory on these subsidiary-operated flights, but should also ensure that any subsidiary providing feed traffic would be able to settle and process SPA agreements with third parties pursuant to industry standards<sup>98</sup>, in order to ensure that third parties do not face a greater settlement burden.

#### **6.5. Comments in relation to travel agents**

- (142) ECTAA and a travel agent argued that the Commission should also have examined the vertical effects of the Parties' cooperation in the TAJV Agreement on the distribution of airline tickets, both offline and online.
- (143) ECTAA argued that the Initial Commitments did not contain a commitment which would restrict the ability of the Parties to collectively negotiate incentive agreements with travel agents, nor did they contain a commitment ensuring that the Parties do not apply unfair or discriminatory practices or restrict the access of travel agents to their fares. The respondent travel agent further argued that the Initial Commitments did not address concerns relating to joint contracting by the Parties for the provision of marketing and booking services.

### **7. SUBMISSION OF FINAL COMMITMENTS BY THE PARTIES**

- (144) In response to the comments received from third parties pursuant to the Market Test Notice, the Parties offered the Final Commitments. The Final Commitments differ from the Initial Commitments only as regards the scope of the SPA commitments. The amendments extend the geographical scope of the SPA commitment to traffic with a true origin/destination in Lebanon and Israel. Furthermore, they clarify that the SPA commitments include behind/beyond routes that are operated by Air France's subsidiary HOP! wet-leased<sup>99</sup> by Air France, as well as those operated by KLM's subsidiary KLM Cityhopper, Alitalia's subsidiary CityLiner and flights marketed under the Delta Connection brand.

### **8. ASSESSMENT OF THE FINAL COMMITMENTS IN THE LIGHT OF THE COMMENTS RECEIVED IN RESPONSE TO THE MARKET TEST NOTICE**

#### **8.1. Slot release commitments**

- (145) The Parties propose to make slots available at Amsterdam airport and Rome airport and, if applicable, at the choice of a competitor at either New York JFK or Newark Liberty airport, to allow up to seven new or additional frequencies weekly on each of the Amsterdam-New York and Rome New-York routes. The slot release commitments enable a potential competitor to enter the route or existing competitors to expand their services with additional competitively timed frequencies.
- (146) Following the comments from third parties in response to the Market Test Notice, the Parties did not propose any change concerning the slot release commitments offered in the Initial Commitments, notably as regards the third party comment set out in recital (135) of this Decision.

---

<sup>98</sup> These include IATA Clearing House ('ICH') and Simplified Interline Settlement ('SIS').

<sup>99</sup> A wet lease or ACMI (namely Aircraft, Crew, Maintenance and Insurance) is a leasing arrangement whereby one airline or aircraft operator (*the lessor*) provides an aircraft, complete crew/only cockpit crew, maintenance, and insurance (hull and third party liability) to another airline or aircraft operator (*the lessee*), which pays by hours operated.



- (147) As has been recognised by the courts of the Union and the Commission, the lack of slots at congested airports constitutes the main barrier to entry in the air transport industry.<sup>100</sup> The Commission found that its investigation in this case confirmed that the lack of slots is one of the main barriers to entry on the Amsterdam-New York and Rome-New York routes, in particular at the two New York airports (New York JFK and Newark Liberty). The Commission also provisionally established that new entrants or competitors which might wish to expand their services with additional frequencies may encounter difficulties in obtaining slots and access to the necessary infrastructure at peak times at both Amsterdam and Rome airports. The Final Commitments address this barrier by making slots available to competitors on the Amsterdam-New York and Rome-New York routes. The flexibility offered to new entrants with regard to the choice of New York airports makes the slot commitments more attractive and available to airlines with different business strategies and airport preferences.
- (148) The procedure for selecting slot applicants under the Final Commitments builds on the experience gained by the Commission in previous commitments cases in the aviation sector. Furthermore, the Final Commitments provide that the slots to be released must be within a narrow window of +/- 60 minutes of the time requested by the slot applicant. The Final Commitments also make clear that the definition of a slot includes both access to runway capacity for take-off and landing and to the full range of airport infrastructure (for example check-in desks, luggage belts) necessary for the provision of an air service on the route in question (namely Amsterdam-New York or Rome-New York). Furthermore, the Final Commitments contain procedural safeguards to prevent misuse by either the Parties or prospective entrants.
- (149) The number of slots to be released by the Parties may be decreased depending on the number of competitive frequencies operated by the Parties' competitors from time to time. This provision ensures the proportionality of the slot commitments in view of the concerns identified by the Preliminary Assessment.
- (150) As regards the absence of a slot release commitment for the Paris-New York route, the Commission preliminarily found that this route is demonstrably more competitive than any other route where slot commitments have previously been offered to the Commission, in particular in relation to concerns limited to premium passengers.<sup>101</sup> Competitors operate more frequencies per day than the Parties<sup>102</sup> and some competitors have recently been able to add frequencies on the route<sup>103</sup>. The Parties therefore considered that there is no justification for a slot commitment on this route, in view of the other commitments they have given, notably SPA and fare combinability commitments for both existing and new competitors.
- (151) On that basis, the Commission considers that the slot release commitments offered under the Final Commitments remedy the competition concerns identified in the Preliminary Assessment. In addition, the attractiveness of the slot commitments offered on the Amsterdam-New York and Rome-New York routes is further increased by the fare combinability, SPA and FFP commitments, which should

---

<sup>100</sup> For example, in Case T-177/04 *easyJet v Commission*, ECLI:EU:T:2006:187, 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'.

<sup>101</sup> Case COMP/39596 - *British Airways/American Airlines/Iberia*; Case AT.39595 - *Continental/United/Lufthansa/Air Canada*.

<sup>102</sup> See notably recital (61) of this Decision.

<sup>103</sup> See notably recital (56) of this Decision.

enable competitors to increase the sustainability of their new services through access to the Parties' connecting traffic, schedules, frequencies and FFP. Therefore, the Commission considers that the number of slots to be released, in combination with the fare combinability, SPA and FFP commitments, are adequate to meet the competition concerns identified.

- (152) Overall, the Commission considers that the scope of the Final Commitments as regards slots is sufficient and adequate to make the Final Commitments effective and attractive enough to encourage competitors to actually take them up.

## **8.2. Fare combinability commitment**

- (153) Under the Final Commitments, the Parties offer to conclude fare combinability agreements with competitors which begin operating a new non-stop service on the Routes of Concern or which increase the frequency of their existing services. For the Paris-New York route, the Parties also offer to conclude fare combinability agreements with competitors which already operate a non-stop service on the route. The ability for competitors to offer the combined frequencies and schedules of the Parties in one direction and their own frequencies and schedules in the other direction should mitigate the frequency disadvantage of these competitors relative to the Parties. Through the fare combinability commitments, such competitors would be able to offer a higher frequency service with better schedules, which should make the competing services more attractive for premium passengers on all the Routes of Concern and also for non-premium passengers on the Amsterdam-New York and Rome-New York routes. The improved ability to attract premium and non-premium<sup>104</sup> passengers should, in turn, improve the overall long-term sustainability of competitors' services on the Routes of Concern and enable competitors to provide a long-lasting competitive discipline on the Parties' services in relation to premium and non-premium<sup>105</sup> passengers.

- (154) On that basis, the Commission considers that the fare combinability commitment, as proposed in the Final Commitments, is adequate and sufficient. The Commission considers that the conditions of the commitment are attractive enough to encourage competitors to actually take it up. The Commission therefore concludes that the fare combinability commitment lowers the barriers to entry on the Paris-New York route for premium passengers and on the Amsterdam-New York and Rome-New York routes for premium and non-premium passengers and addresses the Commission's concerns in this regard. The Commission also concludes that the fare combinability commitment in respect of existing competitor services on the Paris-New York route should assist the competitors concerned to sustain their services for premium passengers, thereby addressing the Commission's concerns on this route.

## **8.3. Special prorate agreement commitments**

- (155) Under the Final Commitments, the Parties offer to conclude SPAs with competitors on up to twenty feeder routes operated by the relevant Party, including routes operated by Air France's subsidiary HOP! wet-leased by Air France, routes operated by KLM's subsidiary KLM Cityhopper, routes operated by Alitalia's subsidiary CityLiner and routes marketed under the Delta Connection brand. These feeder routes must have a point of origin or destination in geographical Europe, Lebanon or

---

<sup>104</sup> In the case of the Paris-New York route, the fare combinability commitment applies only to premium passengers.

<sup>105</sup> Idem.

Israel on the one hand, and an origin or destination in North America (Canada, United States of America and Mexico), the Caribbean or Central America on the other hand. Such SPAs would be available for all classes of passengers, except on Paris-New York, where only premium passengers would be covered.

- (156) The ability to attract feed traffic is particularly important for sustainable operations on a long-haul route. The SPA commitments are therefore intended to give competitors access to sufficient connecting traffic provided by the Parties on advantageous terms at both ends of the Routes of Concern, where the lack of such access constitutes a barrier to entry or expansion. The SPA commitments would also reduce the hub advantage of the Parties against new entrants and would therefore incentivise entry by competitors with no presence or no alliance partners at Paris, Amsterdam, Rome and/or New York airports. Furthermore, the availability of SPAs for existing competitor services on Paris-New York for premium passengers is intended to address the Commission's concerns in relation to the access of existing competitors to the Parties' connecting traffic on this route and to assist these competitors in sustaining their premium passenger services on the route.
- (157) In response to the comments received from oneworld TJB pursuant to the Market Test Notice, the Parties agreed to extend the geographical scope of the SPA commitments to cover two more behind/beyond destinations (namely Lebanon and Israel). These destinations are very important feeder routes, notably for the Paris-New York and Rome-New York routes. The Commission considers that this geographical extension of the SPAs is sufficient to address the arguments raised by oneworld TJB. As regards the comment of oneworld TJB in relation to a further extension of the geographical scope of the SPA commitments, notably to cover long-haul feeder routes (for example Mumbai and New Delhi), the Commission considers that such an extension would not be justified, given that the current SPA commitments, now extended to cover Lebanon and Israel, already cover the most important feeder routes at Paris, Amsterdam and Rome. Furthermore, in the Commission's view, the level of feed traffic made available by the Parties under the existing geographical scope is already sufficient to ensure sustainable operations on the Routes of Concern. Therefore, the inclusion of other regions, such as India, would not be justified in this case.
- (158) As mentioned in recital (155) of this Decision, in response to the comments received from oneworld TJB pursuant to the Market Test Notice, the Parties agreed to clarify that the SPA commitments will also cover behind/beyond routes which are operated by certain subsidiaries of the Parties, namely routes operated by HOP! wet-leased by Air France, routes operated by KLM's subsidiary KLM Cityhopper, routes operated by Alitalia's subsidiary CityLiner and routes marketed under the Delta Connection brand.
- (159) As to oneworld TJB's comments in response to the Market Test Notice regarding the extension of the SPA commitments to non-premium passengers on the Paris-New York route, the Commission considers that the commitments that the Parties have offered address the concerns raised in the Preliminary Assessment on the route in a proportionate manner, as the Commission's concerns are limited to premium passengers.
- (160) As regards oneworld TJB's comment that the Parties do not operate premium services on any domestic flights connecting to the Paris airports, the Parties clarified to the Commission that they do offer tickets sold in premium classes.
- (161) Therefore the Commission considers that the SPA commitments contained in the Final Commitments are adequate and sufficient. In particular, the Commission

concludes that the availability of SPAs on favourable terms and with wider geographical coverage (namely including Lebanon and Israel) and a large number of feeder routes, should, in conjunction with the other commitments, where applicable, further reduce barriers to entry and expansion on the Routes of Concern. The amendments should also encourage timely and likely entry and expansion on the Routes of Concern. The Commission also concludes that the availability of SPAs for premium passengers for existing competitors on the Paris-New York route should assist such competitors to sustain their services on this route and should address the Commission's concerns on the route.

#### **8.4. Frequent flyer programme commitment**

- (162) Under the Final Commitments, the Parties offered to allow competitors which begin operating new non-stop services on any of the Routes of Concern or which increase the frequency of their existing services to be hosted in the Parties' FFP. The FFP commitment only applies to those competitors that do not have a comparable programme and do not already participate in the Parties' programmes.
- (163) In its Preliminary Assessment, the Commission provisionally found that the Parties' FFP constituted an advantage at both ends of the Routes of Concern. The FFP commitment proposed by the Parties removes or reduces this advantage. 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 premium and non-premium<sup>106</sup> passengers on the Routes of Concern and therefore enhances the likelihood of entry and expansion.

#### **8.5. Reporting obligation**

- (164) As noted in recital (130) of this Decision, the Parties undertake to provide the Commission with data which relate to the Parties' operations from the date of the DOT's final order granting antitrust immunity to the Parties' cooperation in the TAJV Agreement.
- (165) The Commission takes the view that this reporting obligation is appropriate and necessary, since it provides the Commission with access to detailed data, allowing it to monitor the Parties' cooperation in the TAJV Agreement and assess its impact in the future.

#### **8.6. Review clause**

- (166) The Commission takes the view that the review clause, as proposed by the Parties, is appropriate and necessary. It provides an additional safeguard, enabling the Commission to assess how the market has evolved in light of the Final Commitments after five years from the date of adoption of this Decision. In order not to disincentivise entry during the first five years, the Final Commitments make clear that any such review will not affect any agreement that may have been concluded in the meantime on the basis of the Final Commitments.

#### **8.7. Comments in relation to travel agents**

- (167) The Commission considers that the Final Commitments are designed to ensure a sufficient level of competition between airlines on the Routes of Concern. By addressing this horizontal concern the Commission considers that vertical issues

---

<sup>106</sup> Except in the case of Paris-New York route, where the frequent flyer programme commitment applies only to premium passengers.

related to passenger sales and marketing of airline tickets by the Parties should also be addressed. The Final Commitments are therefore suitable to address the competitive concerns identified by the Commission, without the need for specific provisions on passenger sales and marketing of airline tickets by the Parties. Finally, in the present Decision the Commission assesses the TAJV Agreement under Article 101 of the Treaty. Therefore comments from travel agents in response to the Market Test Notice that go beyond the TAJV Agreement itself are not covered in this Decision.

## **9. PROPORTIONALITY OF THE COMMITMENTS**

### **9.1. Principles**

- (168) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.<sup>107</sup>
- (169) In the context of Article 9 of Regulation 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.<sup>108</sup> When carrying out that assessment, the Commission must take into consideration the interests of third parties.<sup>109</sup>

### **9.2. Application in the present case**

- (170) The Final Commitments are sufficient to address the concerns identified by the Commission in its Preliminary Assessment. In this respect, the Commission considers that it must evaluate the whole package of the Final Commitments and not only their individual elements.
- (171) The Commission has already examined the appropriateness and necessity of the Final Commitments in section 8 above. Therefore, recitals (172) to (173) below set out only the Commission's main points in this regard.
- (172) The slot commitment offered by the Parties remedies the loss of competition between the Parties on the Amsterdam-New York (namely between KLM and Delta) and Rome-New York (namely between Alitalia and Delta) routes. With the released slots at Amsterdam and Rome respectively, and if applicable at New York, new entrants or existing competitors can operate or add up to one daily new or additional frequency (seven weekly frequencies) on each of the Amsterdam-New York and Rome New-York routes. As regards the Paris-New York route, the Commission considers that the SPA commitment as proposed by the Parties (namely applicable both to competitors which begin to operate a new or increased non-stop services and to competitors which already operate non-stop services on the route) provides an appropriate remedy in view of the concerns identified on the Paris-New York route. Thus, the Commission considers that the number of slots proposed to be released by the Parties is appropriate to address the concerns identified in the Preliminary Assessment, given the characteristics and competitive situation on each of the Routes of Concern.

---

<sup>107</sup> See for instance, Case T-260/94 *Air Inter v. Commission*, ECLI:EU:T:1997:89, paragraph 144 and Case T-65/98 *Van den Bergh Foods v. Commission*, ECLI:EU:T:2003:281, paragraph 201.

<sup>108</sup> Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

<sup>109</sup> Case C-441/07 P *Commission v Alrosa*, ECLI:EU:C:2010:377, paragraph 41.

- (173) The provisions of the Final Commitments concerning fare combinability, SPA and FFP commitments ensure the proportionality of the Final Commitments. Following the comments made by third parties in response to the Market Test Notice, the Parties agreed to extend the geographical scope of the SPA commitment in order to cover two further significant behind/beyond destinations (namely Lebanon and Israel). The Commission considers that this geographical extension of the SPA commitments in the Final Commitments is sufficient to address the arguments raised by third parties.
- (174) The Parties have not offered less onerous commitments in response to the Preliminary Assessment that would address the Commission's concerns adequately.
- (175) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Market Test Notice.
- (176) This Decision accordingly complies with the principle of proportionality.

## **10. CONCLUSION**

- (177) By adopting a decision pursuant to Article 9(1) of Regulation 1/2003, the Commission makes the commitments offered by the undertakings concerned binding upon them. Recital 13 of the Preamble to Regulation 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its Preliminary Assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a Market Test Notice.
- (178) In the light of the Final Commitments offered by the Parties, the Commission considers that there are no longer grounds for action on its part and the proceedings in this case should therefore be brought to an end. The Commission notes that, in the case of any material change in the factual situation on which this Decision is based, the Commission may reopen the proceedings upon request or on its own initiative, pursuant to Article 9(2) of Regulation 1/2003.

HAS ADOPTED THIS DECISION:

*Article 1*

The Final Commitments as listed in the Annex shall be binding on Société Air France, Alitalia Società Aerea Italiana S.p.A., Delta Air Lines Inc. and Koninklijke Luchtvaart Maatschappij N.V. for a period of ten (10) years from the date of adoption of this Decision.

*Article 2*

There are no longer grounds for action by the Commission and the proceedings in this case should therefore be brought to an end.

*Article 3*

This Decision is addressed to:

Société Air France  
45 rue de Paris  
95747 Roissy CDG cedex  
France

Alitalia Società Aerea Italiana S.p.A.  
Via A. Nasseti,  
Pal. Alfa  
00054 Fiumicino (RM)  
Italy

Delta Air Lines, Inc.  
Department 981  
1030 Delta Boulevard  
Atlanta, Georgia 30354-1989  
United States of America

Koninklijke Luchtvaart Maatschappij NV  
Amsterdamseweg 55  
1182 GP Amstelveen  
The Netherlands

Done at Brussels, 12.5.2015

*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*



## ANNEX

### THE COMMITMENTS