EUROPEAN COMMISSION
Competition DG

CASE COMP/AT.39595 - Continental/United/Lufthansa/Air Canada

(Only the English text is authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 9 Regulation (EC) 1/2003

Date: 23/05/2013

EUROPEAN COMMISSION

Brussels, 23.5.2013
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PUBLIC VERSION

COMMISSION DECISION

of 23.5.2013

addressed to:
- Air Canada
- United Airlines, Inc.
- Deutsche Lufthansa AG
relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union

in Case AT.39595

(Only the English text is authentic)

TABLE OF CONTENTS

1. Subject matter 5

2. Parties 5

3. Procedural steps under Regulation (EC) No 1/2003 6

4. Preliminary assessment 7

4.1. Treatment of alliance partners 7

4.2. Relevant markets 7

4.2.1. Origin and destination (city pair) markets 7

4.2.2. Premium and non-premium passengers 8

4.2.3. Non-stop and one-stop flights 9

4.2.4. Airport substitution 10

4.3. Competitive assessment 10

4.3.1. Application of Article 101(1) of the Treaty 11

4.3.1.1. Introduction 11

4.3.1.2. Restriction of competition by object 11

4.3.1.3. Restriction of competition by effect 12

4.3.1.4. Effect on trade between Member States 15

4.3.1.5. Conclusion on Article 101(1) of the Treaty 16

4.3.2. Article 101(3) of the Treaty 16

4.3.2.1. Analytical framework 16

4.3.2.2. Four conditions of Article 101(3) of the Treaty 18

4.3.2.3. Conclusion on Article 101(3) of the Treaty 21

4.3.3. Conclusion on Article 101 of the Treaty 21

5. Initial commitments offered by the parties 22

5.1. Slot commitment 22

5.2. Fare combinability commitment 23

5.3. Special prorate agreement commitment 23

5.4. FFP commitment 25

5.5. Reporting obligation 25

5.6. Duration of the slot release agreement, fare combinability agreement and SPA concluded under the initial commitments and review clause 25

6. Comments received in response to Commission communication pursuant to Article 27(4) of Regulation (EC) No 1/2003 25
6.1. Introduction 25
6.2. Slot commitment 26
6.3. Fare combinability commitment 26
6.4. SPA commitment 26
6.5. Commitments in relation to travel agents 27
7. Submission of the final commitments by the parties 27
8. Assessment of the final commitments in light of the comments received in response to Commission communication pursuant to Article 27(4) of Regulation (EC) No 1/2003 27
8.1. Slot commitment 27
8.2. Fare combinability commitment 30
8.3. SPA commitment 31
8.4. FFP commitment 32
8.5. Reporting obligation 32
8.6. Review clause 33
8.7. Commitments in relation to travel agents 33
9. Proportionality of the commitments 33
9.1. Principles 33
9.2. Application in this case 34
10. Conclusion 34

ANNEX 36

COMMISSION DECISION

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- United Airlines, Inc.
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relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union

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(Only the English text is authentic)

THE EUROPEAN COMMISSION,

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

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 Treaty,[1] and in particular Article 9(1) thereof,

Having regard to the Commission decision of 8 April 2009 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 10 October 2012,

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

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

Having regard to the final report of the Hearing Officer,

Whereas:

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[1] OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty on the Functioning of the European Union should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty on the Functioning of the European Union also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the Treaty on the Functioning of the European Union is used throughout this Decision.

[2] OJ C 396, 21.12.2012, p. 21.

1. SUBJECT MATTER

(1) This Decision is addressed to Air Canada ('AC'), United Airlines, Inc. ('UA'), and Deutsche Lufthansa AG ('LH').

(2) This Decision concerns the agreement ('A++ agreement') concluded between AC, UA, Continental Airlines Inc. ('CO')[3] and LH (together 'the parties') in relation to the establishment of a revenue-sharing joint venture ('A++ joint venture'),[4] which covers among others all passenger air transport services of the parties on routes between Europe and North America ('transatlantic routes').[5] The A++ agreement provides for extensive cooperation between the parties, which includes pricing, capacity and scheduling coordination, as well as the sharing of revenues.

(3) The A++ agreement applies to hundreds of transatlantic routes. Among those routes, 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 10 October 2012, the Commission came to the provisional conclusion that the parties' cooperation in the A++ joint venture raised concerns as to its compatibility with Article 101 of the Treaty, and raised preliminary concerns in relation to the Frankfurt-New York route for premium passengers.

2. PARTIES

(5) AC, registered in Canada, is a subsidiary of ACE Aviation Holdings Inc. and is Canada's largest full-service network airline. AC operates a global network with hubs in Toronto, Montreal and Vancouver in Canada. In 2011, the airline achieved a total worldwide turnover of CAD 11 612 million (approximately EUR 8 438 million).[6]

(6) UA is the company created following the merger between United Air Lines Inc. and CO, two U.S. airlines. Although that merger took place in 2010, the integration of those two companies was only completed on 31 March 2013. In this Decision, references to CO should therefore be understood as a reference to UA where appropriate. UA is a publicly-held U.S. corporation with its headquarters in Chicago in the United States of America. It is a fully owned subsidiary of United Continental Holdings, Inc. The total worldwide turnover of United Continental Holdings. Inc.

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3 In 2010, Continental Airlines and United Air Lines merged (Case COMP/M.5889 - United Air Lines/Continental Airlines). On 31 March 2013, the merger between those two carriers was completed. Continental Airlines was a party to the antitrust investigation in this case until the date of the merger's completion.

4 Since July 2011, the cooperation in the A++ joint venture extends to the fully-owned Lufthansa subsidiaries Austrian Airlines AG and Swiss International Air Lines Ltd., and since March 2012 to Brussels Airlines S.A./N.V..

5 To the West, the geographical scope of the A++ joint venture extends from [...]. To the East, it extends to [...].

6 AC 2011 Annual Report.

was USD 37 110 million (approximately EUR 26 659.5 million) in 2011.[7] The merged entity operates hubs at Chicago, Cleveland, Denver, Houston, Los Angeles, Newark, San Francisco and Washington in the United States of America.

(7) LH is the holding company of Lufthansa Group with its headquarters in Cologne, Germany. Its passenger air transport business includes in particular Lufthansa Passenger Airlines, Swiss International Air Lines Ltd., Brussels Airlines S.A./N.V., Austrian Airlines AG, Air Dolomiti S.p.A., Eurowings GmbH, and low-cost airline Germanwings GmbH. LH operates hubs in Frankfurt, Munich, Brussels, Zürich and Vienna. Its 2011 total worldwide turnover was EUR 28 734 million.[8]

(8) AC, LH and UA are founding members of the Star Alliance, established in 1997, which is the world's largest airline alliance by the number of member airlines and carried passengers. As of April 2013, the Star Alliance had over 25 members.[9] In 2011, the Star Alliance carried over 650 million passengers and member airlines had a total revenue of USD 167 180 million.

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

(9) On 8 April 2009, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 in relation to the A++ agreement establishing the A++ joint venture, which covers among others all passenger air transport services of the parties on transatlantic routes. On 10 October 2012, a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 was adopted, which set out the Commission's preliminary competition concerns. That preliminary assessment was notified to the parties by letter of 10 October 2012.

(10) During the investigatory phase, the Commission sent several requests for information to the parties, as well as to the parties' top 20 corporate customers and travel agents, to the main competitors of the parties on the relevant routes and to the German slot coordinator. The Commission also held multiple meetings with the parties and considered the parties' numerous submissions on Article 101(1) and Article 101(3) of the Treaty.

(11) On 11 December 2012, in response to the preliminary assessment, the parties submitted commitments ('the initial commitments') to the Commission.

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7 'United Continental Holdings, Inc. Announces Full-Year and Fourth-Quarter 2011 Profit', press release of United Continental Holdings, Inc. of 26 January 2012.

8 LH's 2011 Annual Report.

9 The current members are Adria Airways d.d., Aegean Airlines S.A., AC, Air China Ltd., Air New Zealand Ltd., ANA Holdings Inc., Asiana Airlines Inc., Austrian Airlines AG, AviancaTaca Holding S.A., Brussels Airlines S.A./N.V., Copa Holdings, S.A., Croatia Airlines Ltd., Egyptair Holding, Ethiopian Airlines Enterprise, LOT Polish Airlines S.A., LH, SAS AB, Shenzen Airlines Co., Ltd., Singapore Airlines Limited ('Singapore Airlines'), South African Airways Ltd., Swiss International Air Lines Ltd., TAM S.A., TAP SGPS, S.A., THAI Airways International Public Company Limited, Turkish Airlines, Inc., UA and US Airways Group, Inc. EVA Airways Corp. is a future member of the Star Alliance. TAM S.A. will leave Star Alliance during the second quarter of 2014 and join oneworld, a competing global airline alliance.

(12) On 21 December 2012, a communication was published in the *Official Journal of the European Union*[10] pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the initial commitments, and inviting interested third parties to give their observations on the initial commitments within one month following publication.

(13) On 4 February 2013, the Commission provided the parties with non-confidential versions of the observations made by interested third parties on the initial commitments.

(14) On 7 May 2013, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 8 May 2013 the Hearing Officer issued his final report.

(15) Following the comments received from third parties, on 15 May 2013, the parties submitted a signed version of their amended commitments ('the final commitments').

4. PRELIMINARY ASSESSMENT

4.1. Treatment of alliance partners

(16) When calculating market shares, the Commission aggregated the shares of parties[11] and those of other airlines with which they currently enjoy U.S. antitrust immunity[12] (namely SAS AB, LOT Polish Airlines S.A. and TAP SGPS, S.A.).[13] By contrast, members of the Star Alliance that are not covered by U.S. antitrust immunity with the parties were treated as competitors of the parties. This includes, in particular, Singapore Airlines.[14]

4.2. Relevant markets

4.2.1. Origin and destination (city pair) markets

(17) In the past, the Commission defined the relevant market for scheduled passenger air transport services on the basis of the 'point of origin/point of destination' ('O&D')

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10 OJ C 396, 21.12.2012, p. 21.

11 Since Swiss International Air Lines Ltd., Brussels Airlines S.A./N.V. and Austrian Airlines AG are now also members of the A++ joint venture, their shares are included in the calculation of the parties' market shares.

12 Under U.S. law, the U.S. Department of Transportation may grant immunity from the application of U.S. antitrust laws to airlines concluding cooperation agreements on international routes, subject to conditions if necessary. In this case for example, Final Order 2009-7-10 (Docket DOT-OST-2008-0234).

13 The parties themselves concede that the Star airlines benefitting from antitrust immunity in the United States of America. should not be treated as competitors of the parties for the purposes of this case (White Paper on the proposed A++ joint venture of 31 October 2008, p. 7).

14 This is in line with (i) the parties' position that the airlines not benefitting from antitrust immunity should be treated as 'full competitors, which fully reflects legal and commercial realities'; and (ii) the statement from Singapore Airlines that it 'considers itself a competitor to the Parties on […] Frankfurt-New York' (Singapore Airlines' response of 15 January 2009 to the request for information of 27 November 2008, question 3, p. 7).

city pair approach, with each route being considered a separate market.[15] This market definition corresponds to the demand-side perspective whereby customers consider possible alternatives of travelling from a city of origin to a city of destination, which they generally do not consider substitutable to a different city pair.[16]

(18) With respect to corporate customers, the investigation in this case showed that there is a group of corporate customers (for example, large multinationals) who attach particular importance to the geographical coverage of airline networks. However, the needs of corporate customers' employees still revolve around transport from one point to another. Therefore, the Commission took the preliminary view that O&D city pairs remained the relevant market definition for corporate customers.[17]

(19) The Commission's investigation in this case confirmed that the O&D city pair approach remains the appropriate market definition. The so-called 'network effects'[18] were taken into account in the assessment of the competitive impact of the parties' cooperation in the A++ joint venture on each individual O&D, as well as, to the extent appropriate, in the assessment of the efficiencies presented by the parties.

4.2.2. Premium and non-premium passengers

(20) In line with its accepted practice, the Commission distinguished between two main categories of customers.[19] 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 (i) 'premium' customers who 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; and (ii) 'non-premium' customers who travel predominantly for leisure purposes, do not require flexibility, and are therefore usually not willing to pay higher prices in exchange for flexibility and higher service quality.

(21) When referring to premium passengers, the Commission took into account bookings in all classes except restricted economy (for example, in first, business and flexible economy). In the case of non-premium passengers, the Commission took into account bookings in the restricted economy class only.

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15 See Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1913, paragraph 56; and Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 84. See also Case COMP/39596 – British Airways/American Airlines/Iberia, recitals 17 to 19; Case COMP/M.3280 - Air France/KLM, recitals 9 to 18; Case COMP/M.3770 - Lufthansa/Swiss, recitals 12 to 14; Case COMP/M.5181 - Delta Air Lines/Northwest Airlines, recitals 8 to 11; Case COMP/M.5747 - British Airways/Iberia, recitals 9 and 10; Case COMP/M.5889 - United Air Lines/Continental Airlines, recitals 9 to 12.

16 In accordance with the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5.), the consumer's viewpoint is the most important element to take into account in defining the product market.

17 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.

18 See, for example, Case COMP/M.3280 - Air France/KLM, recital 16.

19 Case COMP/39596 - British Airways/American Airlines/Iberia, recitals 20 to 22.

(22) Overall, the Commission's investigation confirmed that premium and non-premium passengers belonged to different markets.

4.2.3. Non-stop and one-stop flights

(23) In previous cases, the Commission accepted that although one-stop flights were generally less attractive than non-stop flights because of the travel time extension and inconvenience associated with the stop-over, these drawbacks might be mitigated by countervailing elements such as price.[20] Thus, in some cases, the Commission included certain long-haul one-stop flights in the same relevant market as non-stop flights.[21] However, the degree to which one-stop flights constrain non-stop flights should be considered on a route-by-route basis.[22]

(24) The parties argued that '[e]ven where indirect services operated by SkyTeam and oneworld airlines currently attract only a limited number of transfer passengers on the O&D pair in question, they could easily increase their share of O&D traffic if the A++ airlines attempted to offer less competitive conditions or unilaterally raise fares' because of the ease of expanding the one-stop capacity.[23]

(25) As regards corporate customers, the choice between non-stop and one-stop flights seemed to depend to a certain extent on whether a one-stop flight was offered by a contracted/preferred airline. Competitors of the parties also claimed that in general one-stop services exerted some degree of competitive pressure on non-stop services.[24]

(26) 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.[25] The Commission's assessment of the anticompetitive effects on the Frankfurt-New York route for premium passengers (see Section 4.3.1.3) included an evaluation of the constraint that one-stop services would exercise on LH's and CO's combined non-stop services (in addition to the constraint from competitors' non-stop services) in the premium market.

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20 Case COMP/M.2041- United Air Lines/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.

21 See, for example, Case COMP/M.2041 - United Airlines/US Airways; Case COMP/M.3280 - Air France/KLM; Case COMP/M.3770 - Lufthansa/Swiss; Case COMP/JV.19 - KLM/Alitalia; Case COMP/M.2672 - SAS/Spanair; Case COMP/M.5889 - United Air Lines/Continental Airlines.

22 See for example, Case COMP/M.3280 - Air France/KLM, recital 21; Case COMP/M.5889 - United Air Lines/Continental Airlines recital 25; and case COMP/39596 – British Airways/American Airlines/Iberia, recital 25.

23 White Paper on the proposed A++ joint venture of 31 October 2008, p. 6 and 7.

24 See, for example, Delta's response of 13 December 2008 to the request for information of 27 November 2008, questions 17 and 19.

25 In line with Case COMP/39596 - British Airways/American Airlines/Iberia. For the purpose of calculating market shares of the parties, the Commission uses Marketing Information Data Tapes (MIDT) data that include bookings on one-stop flights.

4.2.4. Airport substitution

(27) The Commission assessed airport substitution both in terms of demand-side substitution and supply-side substitution, which are the key considerations in determining the extent of the relevant market.[26] Decisive airport substitution issues only arose in relation to airports serving the New York area in this case.

(28) In that respect, the parties argued that Newark Liberty International Airport ('Newark Liberty') and John F. Kennedy International Airport at New York ('New York JFK') were substitutable on the basis that (a) airlines charged similar prices for flights to the same destinations out of Newark Liberty and New York JFK; (b) Newark Liberty and New York JFK had significantly overlapping catchment areas; and (c) the Commission, the U.S. Department of Transportation ('DOT') and the U.S. Department of Justice have consistently held the view that the two New York airports were substitutable.

(29) In its investigation, the Commission found no serious indication that there were separate markets for transatlantic services to Newark Liberty and New York JFK for both premium and non-premium passengers. In general, corporate customers, travel agents, the parties and all the parties' competitors that responded to the Commission's requests for information agreed on the substitutability of Newark Liberty and New York JFK. That is consistent with past cases, where the Commission found both airports to be substitutable for transatlantic services.[27]

(30) In conclusion, the Commission took the preliminary view that, for the purpose of this case, transatlantic services to Newark Liberty and New York JFK airports should be considered as forming part of the same relevant market.

4.3. Competitive assessment

(31) Based on 2011 figures, approximately 328 000 O&D passengers travel annually on the Frankfurt-New York route. The Commission only raised preliminary concerns on the premium market on this route, which covers about 63 000 O&D passengers annually.

(32) LH operates a hub at Frankfurt, while CO operates a hub at Newark Liberty. Before the parties' cooperation in the A++ joint venture, LH flew to both New York JFK (twice daily) and Newark Liberty (once daily), while CO flew once a day to Newark Liberty. In June 2008, CO announced its intention to join the Star Alliance and the A++ joint venture. Actual cooperation on this route started in the Winter 2009/2010 season. Since the cooperation started, the parties added a fifth Frankfurt-New York frequency (to Newark Liberty) using a CO aircraft. In total, LH and CO now fly five

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[26] See, for example, Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1931, paragraphs 99 to 102; 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; Case COMP/39596 - British Airways/American Airlines/Iberia, recitals 26 to 30.

[27] Case COMP/M.3280 - Air France/KLM, recital 34; Case COMP/M.3770 - Lufthansa/Swiss (implicitly).

times a day, well spread out, to both New York airports.[28] They offer unparalleled choice in terms of frequencies and schedules at New York airports.

(33) Air India operated the Frankfurt-New York route for a brief period between 2009 and 2010. Today, the main competitors on this route are Singapore Airlines and Delta Air Lines Inc. ('Delta'), who each offer one daily non-stop flight. Delta flies from New York JFK. Singapore Airlines flies with a plane that originates in Singapore and stops for two hours in Frankfurt to drop off and take on board passengers. However, in contrast to several LH/CO services, Singapore Airlines' eastbound timing does not allow for early-morning meetings in Frankfurt. The suboptimal timing results from the fact that Singapore Airlines must take account of the timing of the Frankfurt-Singapore leg of the service. Due to the parties' cooperation in the A++ joint venture, the number of non-stop competitors on the Frankfurt-New York route decreased from four (LH, CO, Singapore Airlines, Delta) to three (LH/CO, Singapore Airlines, Delta).

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

4.3.1.1. Introduction

(34) While the A++ agreement creates a contractual joint venture, that joint venture does not conduct its business autonomously and at arm's length from its parents. On the contrary, it is directly managed by the parents and it uses the parents' assets as well as their marketing channels.[29] Since the A++ joint venture does not qualify as 'full-function', the A++ agreement is subject to Article 101 of the Treaty rather than Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EU Merger Regulation').[30]

(35) The A++ agreement is the latest element of the long-standing cooperation between AC, LH and UA on transatlantic routes. LH and UA and separately LH and AC had been operating joint ventures on transatlantic routes for more than a decade. The aim of the A++ agreement is full metal neutrality. The parties' definition of metal neutrality in the A++ agreement is 'a state of events in which each Party will be incentivised to treat all flying, regardless of airline, within the scope of the provisions of the A++ agreement as flying on its own network and in which customers will also become neutral to the choice among the parties as airlines and among itineraries on any given route'.[31]

4.3.1.2. Restriction of competition by object

(36) The parties cooperate extensively in relation to key parameters of airline competition. In particular, they develop strategic network plans including capacity requirements, potential schedule patterns, new projects and production shares; pursue joint revenue management activities; combine their pricing functions and align their

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28 With some limited exceptions in the 'deep' winter season, when they revert to four frequencies.

29 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1.), paragraphs 91 to 109.

30 OJ L 24, 29.01.2004, p. 1.

31 Parties' Joint Response of 14 October 2008 to the request for information of 31 July 2008, Appendix A-Definitions, p. 50.

pricing policy; coordinate on inventory management on transatlantic markets while maintaining separate inventory management systems; coordinate their marketing activities; and align their frequent flyer programmes ('FFP'). Moreover, the A++ agreement has provisions on the parties' cooperation in relation to airport operations, quality management, IT and monitoring with the members of the A++ joint venture and other non-member airlines.

(37) Based on the above, in its preliminary assessment, the Commission took the preliminary view that the A++ agreement by its very nature aimed at, and had the potential of, restricting competition. This is because the parties' cooperation in the joint venture completely eliminated competition between the parties on key parameters of competition, such as price and capacity. Within the metal-neutral revenue-sharing joint venture the parties undertook all possible means to eliminate their own incentives on the market and focused on the common interest and benefit of the joint venture. The whole concept of metal-neutrality conflicts patently with the concept inherent in the Treaty provisions relating to competition, since the parties substituted competition with full cooperation for the risk of competition that would occur due to individual airlines' different incentives.[32]

(38) Therefore, the Commission provisionally considered in the preliminary assessment that the A++ agreement that applies to a large number of transatlantic routes, was restrictive of competition by object under Article 101(1) of the Treaty. Due to this qualification of the parties' cooperation in the A++ joint venture, the restriction was also considered appreciable.[33]

(39) Among the routes concerned by the A++ 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, and the preliminary assessment raised preliminary concerns on the Frankfurt-New York route for premium passengers.

4.3.1.3. Restriction of competition by effect

(40) The Commission also examined whether the A++ agreement had the actual or potential effect of appreciably restricting competition on the Frankfurt-New York route for premium passengers. As part of this assessment, the Commission, first, examined whether the parties were actual or potential competitors in the relevant market. Secondly, the Commission identified the likely anti-competitive effects based in particular on the key market characteristics, namely market shares, closeness of competition, demand price elasticity, and buyer power.[34] Finally, it considered whether competitors of the parties would be likely to counter the likely

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32 See Case C-209/07 *Competition Authority* v *Beef Industry Development Society Ltd.* [2008] ECR I-8637, paragraph 34.

33 This is in line with the reasoning in the judgment of the Court of Justice of 13 December 2012 in Case C-226/11 *Expedia Inc.* v *Autorité de la concurrence and Others*, not yet published, paragraph 37.

34 In line with the relevant factors listed in paragraphs 34 and 45 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ('Horizontal Cooperation Guidelines') (OJ C 11, 14.1.2011, p. 1.) and paragraph 27 of the Guidelines on the application of Article 81(3) of the Treaty ('Article 101(3) Guidelines') (OJ C 101, 27.4.2004, p. 97.).

anti-competitive effects of the parties' cooperation in the A++ joint venture by expanding their services.

Competitive conditions in the absence of the cooperation

(41) The Commission came to the preliminary conclusion that LH and CO would be actual competitors in the absence of their cooperation in the A++ joint venture, operating independently their own non-stop flights as they did before the implementation of the A++ agreement. Moreover, the parties have not made the argument that in the absence of their cooperation in the A++ joint venture, LH or CO would exit the market.

Loss of competition between the parties and market specific assessment

(42) In the preliminary assessment, the Commission's preliminary view was that prior to their cooperation in the A++ joint venture, LH and CO had to consider each other's reaction to their own decisions on pricing, capacity or service levels. By joining forces, LH and CO no longer face competition from each other. Due to that reduced degree of competition in the market and the stronger combined market position that the parties gained as a result of their cooperation in the A++ joint venture, the Commission's preliminary conclusion was that this cooperation is likely to be restrictive of competition by effect on the Frankfurt-New York route for premium passengers.

(43) Prior to the parties' cooperation in the A++ joint venture, in 2009, LH held a market share of 64 % and CO held a market share of 9 % in the market for premium passengers on the Frankfurt-New York route. That is a combined market share of 73 %. In 2011, that combined market share was slightly down at 71 %. In 2011, Singapore Airlines had a 16 % market share, Delta had 5 %, and one-stop services accounted for 8 %.[35] The Commission has previously stated that high market shares are relevant to the competitive assessment.[36] Specifically, when two parties eliminate competition on key parameters, such as price and capacity, between each other and hold a very large combined market share of 71 %, it may at least be concluded that their cooperation is likely to produce 'appreciable' effects.

(44) The Commission also examined the closeness of competition between the various competitors' services and found evidence suggesting that CO is a closer competitor to LH on the Frankfurt-New York route for premium passengers than the rival airlines (namely, Delta and Singapore Airlines). Corporate customers most often named LH and CO as the two 'best choice' airlines on the route.

(45) The Commission also provisionally considered that premium passengers were relatively price inelastic. This circumstance was conducive to creating the likely anti-

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35 According to the Article 101(3) Guidelines, paragraph 26, '[t]he degree of market power normally required for the finding of an infringement under Article [101](1) in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article [102]'. See also paragraph 42 of the Horizontal Cooperation Guidelines.

36 Horizontal Cooperation Guidelines, paragraph 34.

competitive effects, given the presence of other factors such as, for example, high market shares protected by high entry barriers. The vast majority of premium passengers were also found to lack sufficient buyer power in their dealings with CO and especially LH.

(46) By analysing key market characteristics, the Commission came to the provisional conclusion in its preliminary assessment that the situation in this case is leading to likely anti-competitive effects in the relevant market. The combined market share of the parties is very large, the parties' cooperation in the A++ joint venture eliminates competition on all key parameters, LH and CO are closer competitors with respect to each other than with respect to other competitors, and the customers are relatively price inelastic and largely deprived of significant buyer power.

Will competitors of the parties counter the likely anti-competitive effects?

(47) Finally, the Commission assessed whether competitors of the parties would be able to counter the likely anti-competitive effects on the Frankfurt-New York route for premium passengers. It considered barriers to entry and the parties' competitors' ability to replace the loss of competition between LH and CO through expanding their services.

(48) The preliminary assessment identified slot constraints on the Frankfurt-New York route, in particular at the two New York airports (namely, New York JFK and Newark Liberty). The Commission also provisionally established that while the fourth runway alleviated the slot constraints at Frankfurt at present, a new entrant might nevertheless encounter difficulties to obtain slots and infrastructure at peak times in the medium or long run. Moreover, the parties have much larger slot portfolios at Frankfurt and Newark Liberty airports than any other airline: in the summer 2012 season, the parties had approximately 67 % of Frankfurt slots and 78 % of Newark Liberty slots.[37] Such a large portfolio gives them a unique ability to reshuffle their slots in a way that gives them optimal timings for their Frankfurt-New York flights. A new entrant and smaller competitor of the parties trying to expand would not have that flexibility.

(49) The Commission provisionally concluded that the parties' hub advantage acts as a substantial barrier for any new entrant or smaller competitor of the parties wishing to expand operations on the Frankfurt-New York route for premium passengers. Thanks to the hub advantage, a large operator at a given airport 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 name recognition; (c) attractiveness of its FFP among the local population; (d) feed traffic from its large network flowing through the airport in question; and (e) a better ability to attract corporate customers. The parties hold these advantages at both ends of the Frankfurt-New York route for premium passengers. At Frankfurt, LH operates its hub, while Newark Liberty airport is the hub for CO.

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[37] Based on the number of flights, which according to the parties 'should correspond reasonably closely to slot holdings'. The parties' reply of 8 May 2012 to the request for information.

(50) As to the frequency gap between the parties' and their competitors' services post-cooperation, the Commission provisionally considered it as a significant advantage that the parties' competitors are unable to bridge. Post-cooperation, the parties added a Frankfurt-New York frequency, for a total of five daily frequencies compared to a single daily frequency for each of Singapore Airlines and Delta. Therefore, the frequency advantage was provisionally considered as a significant barrier to entry and expansion for competitors of the parties. The relative number of frequencies of airlines on a route affects the attractiveness of each of these airlines in the eyes of customers, and especially premium passengers. Therefore, adding frequencies results in a disproportionately larger amount of market share for the airline. This phenomenon is known as the 's-curve' effect.[38]

(51) The ability of existing competitors of the parties to replace the loss of competition between LH and CO was provisionally considered as very limited, since neither Singapore Airlines nor Delta was considered as an airline able to significantly expand operations to counter the likely anti-competitive effects of the parties' cooperation in the A++ joint venture. Singapore Airlines is subject to regulatory constraints deriving from the Air Service Agreement concluded between Germany and Singapore.[39] The Commission also provisionally considered that Delta does not appear to be willing and able to significantly expand operations.[40]

(52) Given, among others, the short duration of the Frankfurt-New York flight, a high number of available non-stop flights, a low market share of one-stop flights (8 %), one-stop services were provisionally not regarded as a competitive force that could counter the likely negative effects, just like the Commission did not identify any potential entrants that are planning likely, timely and sufficient entry on the Frankfurt-New York route for premium passengers.

4.3.1.4. Effect on trade between Member States

(53) In its preliminary assessment, the Commission provisionally concluded that the A++ agreement may appreciably affect trade between Member States within the meaning of Article 101(1) of the Treaty. The parties have significant operations and sales

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38 See W Wei and M Hansen, 'Impact of aircraft size and seat availability on airlines' demand and market share in duopoly markets' (2005) 41 Transportation Research Part E 315; M Tretheway and T Oum, *Airline Economics-Foundations for Strategy and Policy* (Centre for Transportation Studies, University of British Columbia 1992) (Tretheway and Oum) 27-28; U Binggeli and L Pompeo, 'Analyst viewpoint, does the S-curve still exist?' (2006) IATA Economics, available at: <www.iata.org/whatwedo/Documents/economics/McKinsey-Scurve.pdf> accessed 1 July 2012; WE Fruhan Jr, *The fight for competitive advantage: a study of the United States domestic trunk carriers* (Harvard Business School 1972); G Eads, 'Competition in the domestic trunk airline industry: too much or too little?' in A Phillips (ed), *Promoting competition in regulated markets* (The Brookings Institution 1975).

39 Agreement between the Federal Republic of Germany and the Republic of Singapore for air services between and beyond their respective territories, done at Singapore on 15 February 1969, as amended and supplemented by the Supplementary Memorandum of Understanding, signed in Bonn on 7 June 2000.

40 Delta has stated that 'it would be rare for DL to offer greater than a single flight per day on any transatlantic route that did not serve as a connecting gateway between hubs within its Transatlantic Joint Venture'. Delta's response of 7 February 2012 to the request for information of 24 January 2012, question 7, p. 3.

across the European Union. The A++ agreement covers all passenger services of the parties on transatlantic routes, namely those, among others, that link the European Union and North America and also services within the European Union connecting to or from transatlantic routes. The parties' cooperation in the A++ joint venture alters the manner in which their services on European Union-North American routes and intra-European Union routes that connect to these routes would be provided absent the A++ joint venture.

4.3.1.5. Conclusion on Article 101(1) of the Treaty

(54) The Commission took the preliminary view that the parties' cooperation in the A++ joint venture restricts competition in the premium market on the Frankfurt-New York route both by object and by effect. In particular, as regards the restriction of competition by effect, the Commission considered that the pre-cooperation competition that existed between LH and CO was eliminated and most likely could not be replaced by competition from the parties' competitors because they face substantial barriers to entry and expansion. This preliminary conclusion was not invalidated by evidence of some degree of residual competition from Singapore Airlines, Delta and one-stop competitors. The concern was that there was an appreciable reduction of competition and not that competition was being entirely eliminated.

4.3.2. Article 101(3) of the Treaty

4.3.2.1. Analytical framework

(55) During the proceedings, the Commission assessed the benefits claimed by the parties on the Frankfurt-New York route against the four cumulative conditions of Article 101(3) of the Treaty. According to those four conditions, and as explained in the Article 101(3) Guidelines,[41] (1) the agreement must create efficiencies, (2) the restrictions imposed by this agreement must be indispensable to the creation of these efficiencies, (3) consumers must receive a fair share of these efficiencies, and (4) the agreement must not create the possibility to eliminate competition in respect of a substantial part of the market.

(56) As a first step, the Commission provisionally assessed the in-market efficiencies claimed by the parties. According to the Article 101(3) Guidelines, the efficiencies assessment 'is in principle made within the confines of each relevant market to which the agreement relates'.[42]

(57) In relation to the out-of-market efficiencies, on the basis of the objective factual elements specific to this case, the Commission took the preliminary view that it was appropriate to extend the test under paragraph 43 of the Article 101(3) Guidelines.[43]

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41 Article 101(3) Guidelines, paragraphs 38 to 116.

42 Article 101(3) Guidelines, paragraph 43 ('paragraph 43').

43 The Article 101(3) Guidelines allow for the possibility that 'where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same' (out of market efficiencies).

This broadened test does not, however, replace the test under paragraph 43. It is used in the specific circumstances of this case, in addition to the test under paragraph 43.

(58) Those objective factual elements specific to this case include a certain discrepancy between market definition on the demand-side and supply-side, two-way flow of efficiencies and considerable commonality between passenger groups travelling on the route of concern and related behind and beyond routes.

(59) A discrepancy in market definition arose from the fact that passengers usually travel on a specific route (demand-side), while airlines consider the total network for commercial decisions on a specific route (supply-side). A two-way flow of efficiencies arose from a bi-directional flow of efficiencies on related behind and beyond routes, on the one hand, and the route of concern, on the other hand. For example, the preservation of efficiencies on the related behind and beyond routes also created additional efficiencies on the route of concern,[44] including for those consumers who did not belong to the common consumer group between the route of concern and related behind and beyond routes. Finally, there was a considerable commonality between the passengers travelling on the Frankfurt-New York route – the group that suffered from the likely competitive harm under Article 101(1) of the Treaty and enjoyed the in-market efficiencies – and the passengers who also flew on related behind and beyond routes and benefited, respectively, from efficiencies generated on those routes.

(60) Under the broadened test, the parties should first demonstrate that the route of concern (in this case, Frankfurt-New York) and the behind and beyond routes out of these cities are related. It is necessary to demonstrate a considerable commonality in the consumer groups that travel on the route of concern and related behind and beyond routes, and that there is a two-way flow of efficiencies across those routes.

(61) Secondly, the parties should quantify efficiencies on related behind and beyond routes that accrue to those consumers who also travel on the route of concern. Under this broadened test, the Commission credits the out-of-market efficiencies only to the extent that they accrue to the customer group in the relevant market at issue (in this case, only those efficiencies on behind and beyond routes that also accrue to the passengers on the Frankfurt-New York route). Given that the assessment takes into account only those out-of-market efficiencies that are enjoyed by the passengers who travel both on the Frankfurt-New York route of concern and related behind and beyond routes - while the out-of-market efficiencies enjoyed by the passengers on related behind and beyond routes, who do not travel on the route of concern, are disregarded - this assessment does not balance competitive harm to one customer group against benefits to another customer group.

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[44] For example, the elimination of the double marginalisation (see recital 64) would increase the number of passengers on the behind and beyond routes and, therefore, on the route of concern (in this case, Frankfurt-New York). This would allow the parties to add non-stop frequency (or increase the size of the aircraft) on the route of concern, which would result in higher time-savings and economies of density for the passengers on the Frankfurt-New York route.

4.3.2.2. Four conditions of Article 101(3) of the Treaty

(62) The parties submitted that the A++ agreement results in substantial efficiencies across the parties' joint network. The parties quantified efficiencies accruing to passengers travelling on the Frankfurt-New York route and on the routes connected to it either at Frankfurt or New York, or at both ends of the route ('behind and beyond routes'). The parties also argued and partially quantified efficiencies produced on other routes covered by the A++ agreement. In this respect, the parties claimed that all routes covered by the A++ agreement are related to the Frankfurt-New York route.

(63) The parties considered that they had met the conditions of Article 101(3) of the Treaty. The Commission made a preliminary assessment of the claimed efficiencies against the four conditions of Article 101(3) of the Treaty.

(a) Condition 1: efficiency gains

(64) The Commission conducted a detailed assessment of the types of efficiencies argued by the parties. Those efficiencies stem largely from time savings in schedule delay, economies of density, benefits from the reciprocal lounge access (in-market efficiencies) and benefits from a significant reduction in the double marginalisation (out-of-market efficiencies).

(a) Time savings arise due to two reasons. First, time savings arise because under the A++ agreement passengers on the Frankfurt-New York route are able to choose return flight bundles combining the schedules of the two airlines (namely, LH and CO). Secondly, due to a closer cooperation, the parties were able to introduce an additional daily non-stop flight on the Frankfurt-New York route which led to further time savings. Both of those factors contribute to reduced waiting time of the Frankfurt-New York passengers by on average bringing actual departure times closer to their preferred departure time.

(b) Economies of density result from the ability of the parties to increase the load factor, to use a more efficient configuration of aircraft (for example, CO upgauged from Boeing 767 to the larger Boeing 777) and to expand capacity (the parties added a new non-stop flight). This is likely to reduce average per-passenger costs and – provided this reduction is passed on to consumers – result in lower fares for the Frankfurt-New York passengers.

(c) Double marginalisation arises when both operators in a supply relationship mark up the prices they charge their respective partner above their respective marginal costs, which leads to deadweight loss. When the parties enter into a close cooperation, these mark-ups are substantially reduced, leading to lower prices for connecting passengers.

(65) The Commission preliminarily accepted those types of efficiencies,[45] and that there appeared to be a causal link between the A++ agreement and those efficiencies.

(b) Condition 2: indispensability of the restrictions

(66) The parties submitted that the A++ agreement is indispensable to generating efficiencies because, according to them, all realistic and less restrictive alternatives generate substantially less efficiencies. The parties considered alternatives that would be less restrictive than price-fixing, such as code-sharing and two-part tariffs, and alternatives that are less geographically extensive than the A++ agreement, such as carving out the Frankfurt-New York route from the parties' cooperation in the A++ joint venture. With such a carve out, the parties would cooperate only on behind and beyond routes (for example, Prague-Frankfurt-New York), but not on the hub-to-hub route of concern (Frankfurt-New York).

(67) The Commission made a detailed assessment of the claims made by the parties. Unlike the A++ agreement, less restrictive types of cooperation, such as traditional types of code-sharing and two-part tariff arrangements, do not substantially reduce the double marginalisation. Under code-sharing, a marketing airline sells the seats of an operating airline for a transfer price. This transfer price often includes a considerable mark-up over an operating party's marginal costs, while elimination of the double marginalisation requires the transfer price to be equal to marginal costs. The two-part tariff arrangement[46] can substantially reduce or even eliminate the double marginalisation in theory. In practice, it does not achieve it due to serious complications relating to uncertainty about future cost and demand, and asymmetric information between operating and marketing airlines.[47]

(68) In addition, the current geographical scope of the A++ agreement, in particular in relation to revenue sharing with price coordination on the hub-to-hub overlap Frankfurt-New York route ('trunk route'), is indispensable to achieving efficiencies both on the trunk route and related behind and beyond routes. In the absence of revenue sharing with price coordination on the trunk route, the problem of the double marginalisation would not be resolved. If the Frankfurt-New York route were carved out, the parties would have an incentive to steer traffic onto the carved-out route (namely, the route where they can retain the total revenue), thus prioritising O&D passengers over behind and beyond passengers. Although the parties would still be able to cooperate on behind and beyond routes, there would be no incentive to reduce

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45 In respect of the benefit from the reciprocal lounge access (for example, LH's passengers' ability to access for free CO's lounge at Newark Liberty, and, likewise, CO's passengers' ability to access for free LH's lounge at Frankfurt, while travelling on a Frankfurt-New York flight), while the Commission did not contest that this type of benefit may result from the A++ agreement, it preliminarily found that the parties overestimated its magnitude. Due to this finding, under the most conservative scenario, the Commission excluded this benefit from the total efficiencies.

46 A two-part tariff arrangement would be, for example, an arrangement where UA would, first, pay LH an upfront fixed fee for the authorisation to sell some seats on LH's flight Munich-Frankfurt, as part of the itinerary Munich-Frankfurt-New York, and, secondly, would pay a marginal cost for each of those seats actually sold.

47 The need to spread the risk between cooperating carriers faced with uncertainty on the level of future costs and demand acting under asymmetric information, requires adjustments to the two-part tariff arrangement. This adjustment often requires charging unit prices above the marginal costs. This defeats the purpose of the two-part arrangement to eliminate the double marginalisation.

the price on these routes due to the maintenance of the double marginalisation. On this basis carving out the route of concern could not be considered an alternative under the indispensability test.

(69) On the basis of those arguments, the Commission provisionally found that the A++ agreement at issue in this case passed the indispensability test.

(c) Condition 3: fair share to consumers

In-market efficiencies

(70) Benefits from time savings and reciprocal lounge access directly accrue to passengers on the Frankfurt-New York route.

(71) Conversely, benefits from economies of density accrue initially to the parties in the form of lower per-passenger costs. Reduction in the double marginalisation for connecting passengers leads to higher demand as a consequence of lower price on behind and beyond routes and consequently – to a higher number of passengers flown on the Frankfurt-New York route and hence – lower per-passenger costs.

(72) The parties argued that the level of the pass-on of variable cost savings, or the share of these efficiencies that consumers receive, depends among others on the elasticity of demand, elasticity of supply and the number of airlines operating on a route, that is to say, on the extent of residual competition. For example, the more elastic demand and the higher the extent of residual competition (namely, the higher the number of operating airlines), the more likely the parties are to pass on variable cost savings to consumers. The pass-on rate on the Frankfurt-New York route, computed on the basis of a theoretical model of competitive interaction and standard assumptions (based on academic studies and verified by the Commission), is 75 %, and therefore 75 % of the savings in variable costs on this route are likely to be passed on to passengers in the form of lower fares. In order to be conservative, the parties did not provide estimates of the pass-on of fixed-cost savings.

(73) Considering whether passengers would receive a fair share of efficiencies on the Frankfurt-New York route, in the preliminary assessment, the Commission concluded that these efficiencies are likely to be insufficient to compensate the premium passengers travelling on this route for the negative effects of the A++ agreement.

Out-of-market efficiencies

(74) For the purpose of the complementary test on out-of-market efficiencies,[48] the Commission preliminarily accepted that behind and beyond routes are related to the route of concern. Passengers travelling on the Frankfurt-New York route take the same flight as passengers travelling on behind and beyond routes, involving the Frankfurt-New York segment.

[48] See recitals (60) and (61) of this Decision.

(75) The Commission also preliminarily accepted that there is considerable commonality in the consumer groups that travel on the route of concern and related behind and beyond routes, and that there is a two-way flow of efficiencies across these routes.

(76) In this case, the parties were able to demonstrate considerable commonality between the Frankfurt-New York passengers – the group that suffers from the competitive harm under Article 101(1) of the Treaty and enjoys the in-market efficiencies – and the passengers who fly on related behind and beyond routes and, thus, benefit from the reduction of the double marginalisation on those trips. The Commission preliminarily accepted to credit the out-of-market efficiencies accruing to the passengers who travel both on the Frankfurt-New York route and related behind and beyond routes in its assessment under Article 101(3) of the Treaty. However, in the preliminary assessment, the Commission concluded that the total level of such out-of-market efficiencies and the in-market efficiencies is likely to be insufficient to compensate the premium passengers travelling on the Frankfurt-New York route for the negative effects of the A++ agreement.

(d) Condition 4: no possibility to eliminate competition

(77) Finally, the parties argued that their market position on the Frankfurt-New York route remains contestable by their competitors and that the A++ agreement does not result in the elimination of competition on that route. Given the fact that there are two remaining competitors of the parties on the Frankfurt-New York route, the Commission preliminarily found that the A++ agreement would not afford the parties the possibility to eliminate competition in respect of the premium market on that route.

4.3.2.3. Conclusion on Article 101(3) of the Treaty

(78) In its assessment under Article 101(3) of the Treaty, the Commission preliminarily accepted to credit the in-market efficiencies, to the extent they are passed on to consumers on the Frankfurt-New York route, and the out-of-market efficiencies on related behind and beyond routes accruing to the passengers who travel both on the Frankfurt-New York route and these behind and beyond routes.

(79) The Commission, however, preliminarily concluded that the level of demonstrated efficiencies (in-market and out-of-market) was insufficient to outweigh the likely significant negative effects resulting from the elimination of competition between LH and CO on the Frankfurt-New York premium market and from the inability of competitors of the parties to provide a competitive constraint due to substantial barriers to entry and expansion.[49]

4.3.3. Conclusion on Article 101 of the Treaty

(80) In the Commission's preliminary view, the cooperation between the parties under the A++ agreement infringed Article 101 of the Treaty in relation to the Frankfurt-New York route for premium passengers.

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[49] See recitals (40) to (52) of this Decision.

5. INITIAL COMMITMENTS OFFERED BY THE PARTIES

(81) In order to address the Commission's competition concerns as set out in the preliminary assessment, the parties offered the initial commitments on 11 December 2012. On 15 May 2013, in response to the comments received from third parties in response to the communication of the Commission published pursuant to Article 27(4) of Regulation (EC) No 1/2003, the parties submitted the signed final commitments pursuant to Article 9 of the same Regulation. The key elements of the initial commitments offered by the parties on 11 December 2012 are described in recitals (82) to (97) of this Decision.

5.1. Slot commitment

(82) The slot commitment involves the release of landing and take-off slots by the parties at Frankfurt and/or New York airports to interested competitors that are ready to operate new or increase existing frequencies on the Frankfurt-New York route. The slot commitment is aimed at addressing the lack of suitable slots for competitive services on the Frankfurt-New York route.

(83) The parties proposed to make slots available at Frankfurt and, if applicable, at the choice of a competitor at either New York JFK or Newark Liberty airports to allow up to one additional daily frequency (seven weekly frequencies) on the Frankfurt-New York route.

(84) In addition, the number of slots to be released by the parties may be increased or decreased according to the number of competitive frequencies operated by the parties' competitors. If the parties' competitors increase the number of their total frequencies on the Frankfurt-New York route above two daily (fourteen weekly) frequencies without availing themselves of the slots offered under the initial commitments, the parties would not be required to release any slots. However, if the number of the services by the parties' competitors on the Frankfurt-New York route decreases under two daily frequencies, the parties would have to increase the number of slots to be released accordingly.

(85) This slot commitment is subject to a number of conditions, including that a competitor would have to exhaust all reasonable efforts to obtain the necessary slots through the general slot allocation process.[50] In addition, to prevent possible abuse, the initial commitments specify that, to be eligible for receiving slots from the parties, a competitor must have exhausted its own slot portfolio at the airport.

(86) The initial commitments set out the detailed rules for the selection of eligible slot applicants. For the purposes of the slot commitment, members of Star Alliance can also be eligible applicants 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 Frankfurt-New York route in the provision of passenger air transport services. The

[50] Clause 1.2 of the initial commitments lists the circumstances in which the entrant would be deemed not to have exhausted all reasonable efforts. This would be the case in particular if slots were available at the airport through the general slot allocation process.

initial commitments also contain rules that should ensure that the awarded slots are not misused by competitors.

5.2. Fare combinability commitment

(87) The parties also offered to enter into fare combinability agreements for premium passengers with existing competitors and new entrants on the Frankfurt-New York route. Such fare combinability agreements provide for the possibility for a competitor (or travel agents) to offer a return trip to premium passengers, thus comprising a non-stop service provided one way by one of the parties, and the other way by that competitor. The possibility for existing competitors and new entrants to conclude a fare combinability agreement is intended to reduce the parties' frequency advantage against these competitors on the Frankfurt-New York route for premium passengers where the parties' frequency advantage constitutes a barrier to entry and expansion.

(88) Under the initial commitments, existing competitors and new entrants can request a fare combinability agreement in case they operate, have started to operate or increased their services on the Frankfurt-New York route. Airlines which do not operate a hub (including a focus city) at both ends of that route are eligible. The key features of the fare combinability commitment are as follows:

(a) Fare combinability agreements apply to premium passengers only.

(b) For eligible airlines, members of a transatlantic joint venture also benefiting from antitrust immunity granted by the DOT,[51] the agreement is to provide for fare combinability on the basis of published one-way fares. For all other eligible airlines, it also provides 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.[52]

(e) The fare combinability agreements cannot be concluded on terms which are less favourable than corresponding terms in any existing fare combinability agreement between the parties and an eligible airline as at 10 October 2012.

(f) The parties shall propose a fare combinability agreement within four weeks of the request by a competitor. At the request of a competitor, this fare combinability agreement may be applied provisionally without prejudice to further negotiations between the parties and that competitor.

5.3. Special prorate agreement commitment

(89) The parties also offered to conclude a special prorate agreement ('SPA') with competitors on the Frankfurt-New York route. These SPAs allow interested airlines to obtain favourable terms from the parties to carry connecting passengers on flights

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51 See footnote 12.

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

of the parties on short-haul routes in geographical Europe and Israel on the one hand, and North America (Canada, United States of America and Mexico), the Caribbean and Central America on the other hand, in order to 'feed' their own transatlantic services on the Frankfurt-New York route by transferring these passengers onto their own transatlantic flights.

(90) The initial commitments offer an SPA to competitors that increase their services on the Frankfurt-New York route, irrespective of whether they obtain slots from the parties. The initial commitments provide that airlines are eligible to request an SPA when they do not, alone or through their alliance partners, operate hubs (or focus cities) at both ends of the Frankfurt-New York route.

(91) The possibility to conclude an SPA is intended to facilitate access to sufficient connecting traffic of the parties on the Frankfurt-New York route to new entrants and competitors that increase their services, where the lack of such access constitutes a barrier to entry and expansion.

(92) The key features of the SPA commitment are as follows:

(a) The SPA covers traffic with an origin or destination in geographical Europe and Israel 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 the Frankfurt-New York route.

(b) The SPA covers net fares and published fares, at the request of the interested airlines. If it includes straight rate proration,[53] it would apply only to published fares.

(c) The SPA covers up to fifteen feeder routes on which the parties' connecting traffic can be transferred onto competitor's transatlantic services.

(d) Subject to the conditions referred to in points (a), (b) and (c) of this recital and with limited exceptions, the SPA is concluded on terms at least as favourable as terms agreed with any other airline.

(e) The SPA cannot be concluded on terms which are less favourable than corresponding terms in any existing SPA between the parties and an eligible airline as at 10 October 2012.

(f) The parties shall propose an SPA within four weeks of the request by competitors. At the request of a competitor, this SPA may be applied provisionally without prejudice to further negotiations between the parties and that competitor.

[53] Under straight rate proration, the fare is divided between the issuing airline and the parties in proportion to their shares of the total mileage of a journey, with adjustments to take account of differences in unit cost for short-haul flights and long-haul flights.

5.4. FFP commitment

(93) Under the FFP commitment the parties proposed to give access to competitors, upon their request, to the parties' FFPs on the Frankfurt-New York route. The purpose of this commitment is to allow competitors to benefit from the FFPs of the parties, where such FFPs constitute a barrier to entry and expansion.

(94) The parties proposed to open their FFPs on the Frankfurt-New York route to a competitor launching or expanding a service on the route, if such competitor does not have a comparable programme and does not participate in any of the parties' programmes. The terms of the FFP agreement under the initial commitments should ensure the same treatment for competitors as for the members of the Star Alliance other than the parties.

5.5. Reporting obligation

(95) The parties proposed to permit the DOT to provide to the Commission data concerning the parties' cooperation in the A++ joint venture as of the date of the DOT's final order granting antitrust immunity to the parties' cooperation.[54]

5.6. Duration of the slot release agreement, fare combinability agreement and SPA concluded under the initial commitments, and review clause

(96) The parties proposed a period of up to 10 years for the duration of the agreements concluded under the initial commitments.

(97) In the initial commitments, the parties proposed a review clause. Pursuant to that review clause, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the parties accepted the Commission's right to review those commitments five years after the date of adoption of this Decision.

6. COMMENTS RECEIVED IN RESPONSE TO COMMISSION COMMUNICATION PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

6.1. Introduction

(98) In response to the publication on 21 December 2012 of a communication pursuant to Article 27(4) of Regulation (EC) No 1/2003, the Commission received comments from four interested third parties.

(99) Overall, those comments 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 to lower the barriers to entry and expansion on the Frankfurt-New York route for premium passengers by making slots available and providing the possibility to conclude fare combinability, FFP agreements and SPAs with the parties on this route. The respondents, however, made several comments on the exact scope

[54] See footnote 12.

and the way the initial commitments could operate in an efficient manner to achieve the general aim.

6.2. Slot commitment

(100) In their comments on the communication pursuant to Article 27(4), British Airways Plc., American Airlines, Inc. and Iberia S.A., all the parties to the oneworld transatlantic joint business ('oneworld TJB') proposed to extend, at the request of the applicant, the non-disclosure obligation under clause 1.3.5 of the initial commitments, established for the Monitoring Trustee, also to airport operators and slot coordinators when terminal and infrastructure availability is checked during the slot application process.

(101) The oneworld TJB objected to the fact that the definition of Prospective Entrant[55] did not exclude those Star Alliance member airlines that are not party to the A++ agreement.

(102) Emirates claimed that the number of slots that the parties proposed to make available under the initial commitments was insufficient to ensure an effective competitive constraint on the parties for premium passengers on the Frankfurt-New York route.

(103) Emirates also argued that it was unlikely that the new entrants would be guaranteed the necessary commercially suitably timed slots to cater for premium passengers, given the limited runway capacity at Frankfurt, New York JFK and Newark Liberty airports.

(104) Finally, Air France-KLM S.A. argued that with respect to the clause 1.3.12 of the initial commitments, which was intended to give equivalent preference to applicant(s) disregarding the country in which it is licensed, preference should have been given to airline(s) licensed either in the territory of the European Union or in the United States of America or any other country having concluded a comprehensive bilateral air service agreement with the European Union.

6.3. Fare combinability commitment

(105) In its comments on the communication pursuant to Article 27(4), Emirates accepted that the fare combinability commitment might enable potential new entrants to offer improved schedules. Emirates, however, argued that the fare combinability commitment lacked a deadline for the conclusion of a fare combinability agreement which would ensure full cooperation of the parties in case a new entrant requests this commitment on the Frankfurt-New York route.

6.4. SPA commitment

(106) The oneworld TJB argued that the SPA commitment does not provide sufficient access to feeder traffic of the parties to ensure the long-term competitiveness of the parties' competitors on long-haul routes operated out of Frankfurt. The oneworld TJB submitted that given that the behind/beyond traffic in particular at Frankfurt comes

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[55] Page 4 of the final commitments.

from many small destinations and is, therefore, dispersed, the scope of the SPA commitment should be broadened both in terms of the number and geographical coverage of the available behind/beyond destinations. According to the oneworld TJB, incremental passengers from additional points covered by the SPA commitment can make a difference in attracting adequate flow traffic. On that basis, the oneworld TJB requested that the SPA commitment be expanded to cover at least thirty behind/beyond destinations at the request of a competitor, and to include behind/beyond destinations in Africa, Asia and the Middle East, and in particular in Russia, India and Turkey.

(107) In its comments on the communication pursuant to Article 27(4), Emirates accepted that SPAs might enable new entrants to offer behind and beyond destinations, provided that these SPAs are offered on competitive terms. Emirates, however, commented that the parties' presence at both Frankfurt and New York airports and beyond would force new entrants to conclude agreements ultimately benefiting the parties.

6.5. Commitments in relation to travel agents

(108) The European Travel Agents' and Tour Operators' Association and the Guild of European Business Travel Agents argued that the Commission should also have examined the vertical effects of the parties' cooperation in the A++ joint venture affecting the distribution of airline tickets. They argued that the initial commitments (1) neither contained a commitment which would restrict the ability of the parties to collectively negotiate incentive agreements with travel agents, (2) nor a commitment ensuring that the parties did not apply unfair or discriminatory practices or restrict the access of travel agents to their fares, (3) nor a commitment to limit the exchange of data on travel agents' sales and corporate customer's purchases.

7. SUBMISSION OF THE FINAL COMMITMENTS BY THE PARTIES

(109) In response to the comments received on the communication pursuant to Article 27(4), the parties submitted the signed final commitments on 15 May 2013. Except for a few technical adjustments and clarifications, these final commitments differ from the initial commitments only in relation to the scope of the SPA commitment. The scope of the SPA commitment has been extended from 15 to 20 feeder routes, subject to the caveat that a competitor with a hub at any end of the Frankfurt-New York route would be eligible only for 15 feeder routes at that end of the route. This competitor would, however, be eligible for 20 feeder routes at the other end of the route where it does not have a hub.

8. ASSESSMENT OF THE FINAL COMMITMENTS IN LIGHT OF THE COMMENTS RECEIVED IN RESPONSE TO COMMISSION COMMUNICATION PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) NO 1/2003

8.1. Slot commitment

(110) The parties offered to make slots available at Frankfurt and, if applicable at the choice of a competitor at either New York JFK or Newark Liberty airports to allow up to one daily slot pair (seven weekly frequencies) on the Frankfurt-New York

route. The slot commitment enables a potential competitor to enter the route or existing competitors to expand their services with additional competitively timed services.

(111) As has been recognised by the European Union judicature and the Commission, the lack of slots at congested airports constitutes the main barrier to entry in the air transport industry.[56] The Commission's investigation in this case has confirmed that the lack of slots is one of the main barriers to entry in this case on the Frankfurt-New York route, in particular at the two New York airports (New York JFK and Newark Liberty). The Commission also provisionally established that new entrants may encounter difficulties to obtain slots and access to the necessary infrastructure at peak times in the medium or long run at Frankfurt airport. Hence, airlines are restricted in their ability to launch new or expand existing services due to the difficulty or inability to obtain slots suitable for competitive services. The final commitments offered by the parties address this barrier by making slots available to competitors on the Frankfurt-New York route thereby enabling competitors to launch new or expand existing services.

(112) The flexibility offered to new entrants with regard to the choice of New York airports makes the slot commitment more attractive and available to airlines with different business strategies and airport preferences.

(113) The slots offered as part of the slot release procedure should be within a narrow time window of +/- 60 minutes of the original request submitted by the slot applicant. This increases the attractiveness of the slot commitment and mitigates Emirates' concern explained in recital (103) of this Decision. The final commitments also make it clear that the definition of a slot includes both the access to take-off and landing runway capacity and to corresponding terminal capacity (for example, gates, check-in desks, luggage belts).

(114) The Frankfurt-New York route is among the larger transatlantic routes in terms of passenger numbers and it has a significant proportion of high-yield business passengers. This further increases the attractiveness of this route and, thus, the likelihood of competitors picking up the slot commitment.

(115) In addition, the number of slots to be released by the parties may be increased or decreased according to the number of competitive frequencies operated by the parties' competitors Delta and Singapore Airlines. If these competitors increase the number of their frequencies above two daily (fourteen weekly) frequencies without availing themselves of the slots offered under the final commitments, the parties would not be required to release any slots. However, if the total number of the services of the parties' competitors decreases under two daily frequencies, the parties would have to increase the number of slots to be released correspondingly. These measures ensure the proportionality of the slot commitment but at the same time enable competitors of the parties to maintain at all times at least three daily

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[56] For example, in Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1913, 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'.

frequencies - that is the number of daily frequencies of LH's competitors that were available before the implementation of the A++ agreement.

(116) The selection procedure to be applied under the final commitments builds on the experience of previous cases where the Commission made binding commitments in the aviation sector. It contains procedural safeguards that prevent the misuse by both the parties and the prospective entrants.

(117) During the Commission's investigation, the Commission received confidential indications of entry on the Frankfurt-New York route. The attractiveness of entry and expansion is further increased by the fare combinability, SPA and FFP commitments which would enable competitors to increase the sustainability of their new services through access to the parties' connecting traffic, schedules, frequencies and FFPs.

(118) The Commission considers, on the basis of the available information, that the level of interest shown by competitors in entering the Frankfurt-New York route, taking into account slots which the final commitments make available, is credible.[57]

(119) Following the comments by third parties on the communication pursuant to Article 27(4), the parties proposed a few technical adjustments and clarifications to the initial commitments and extended the number of feeder routes in the SPA commitment. The parties accepted the comment described in recital (100) of this Decision and extended the non-disclosure obligation of clause 1.3.5 to slot coordinators and airport operators.

(120) The fact that in its preliminary assessment the Commission found Singapore Airlines to be a competitor of the parties, demonstrates that, under certain circumstances, the Star Alliance members can be competitors of the parties and thus represent appropriate candidates for receiving slots. However, the Commission remains free to take into account the alliance membership when assessing the extent of the competitive constraint that an applicant would provide on the route of concern. In principle, a Prospective Entrant that is a member of the Star Alliance would provide a weaker competitive constraint than an airline with no affiliation to the Star Alliance. On that basis, the Commission does not find it reasonable to exclude at the outset the Star Alliance members from the definition of a Prospective Entrant.

(121) As to the number of slots offered under the final commitments, the Commission considers that the slot commitment offered by the parties remedy the overlap - that is the loss of one daily competitive frequency operated by CO pre-cooperation. In addition, competitors would also have the possibility of availing themselves of the fare combinability commitment in order to mitigate their relative frequency disadvantage compared to the parties. The fare combinability commitment would be available to the existing competitors of the parties (Delta and Singapore Airlines) and to any new non-stop entrant, whether or not any such airline acquires slots from the parties. Therefore, the Commission considers the number of slots to be released, in combination with the commitment on the fare combinability agreement, adequate to meet the competition concerns on the Frankfurt-New York route.

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[57] See Case T-177/04 *easyJet* v *Commission* [2006] ECR II-1913, paragraphs 197, 198 and 199.

(122) No preference should be given to slot applicants on the basis of the country where their operating license was granted. The objective of the final commitments is to ensure a sufficient number of competitive frequencies on the Frankfurt-New York route. To that end, the decisive factor is the viability of the new competitive service.

(123) 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

(124) Under the final commitments, the parties offered to conclude a fare combinability agreement with both existing and potential competitors, at the request of these competitors. The ability for the existing competitors to offer the combined frequencies and schedules of the parties in one direction by combining it with their own frequencies and schedules in the other direction would mitigate the frequency disadvantage of these competitors against the parties. Through the fare combinability commitment, these competitors would be able to offer a higher frequency service with better schedules, which would make it more attractive for premium passengers. The improved ability to attract premium passengers would, in turn, improve the overall long-term sustainability of competitors' services on the Frankfurt-New York route and would enable competitors to provide a long-lasting competitive discipline on the services of the parties in relation to premium passengers. Given that the parties now jointly operate five frequencies, the fare combinability commitment would also reduce the entry barrier of a likely frequency disadvantage of potential competitors against the parties.

(125) The final commitments allow for a fare combinability agreement to be concluded irrespective of whether a new service on the Frankfurt-New York route would be operated using slots released under the final commitments. Furthermore, the Commission shall approve each fare combinability agreement concluded under the final commitments, and in particular assess whether the terms of such an agreement are reasonable. Therefore, the Commission ensures that competitors benefit from fare combinability agreements on reasonable terms.

(126) In addition, the final commitments contain deadlines for negotiations of a fare combinability agreement. Namely, the parties shall propose a fare combinability agreement within four weeks of a competitor's request. This fare combinability agreement may, at a competitor's request, be applied provisionally without prejudice to further negotiations between the parties and that competitor. Furthermore, any subsequent clarification and additional evidence requested by the Monitoring Trustee shall be submitted within two weeks of the request. The parties shall propose a new fare combinability agreement within two weeks of the confirmation of the Monitoring Trustee that the provided clarification and evidence are sufficient.

(127) On that basis, the Commission considers that the fare combinability commitment, as amended by the parties in the final commitment, is adequate and sufficient. The Commission considers the terms and conditions of the fare combinability

commitment attractive enough to encourage competitors to actually take up the fare combinability commitment. The Commission therefore concludes that the fare combinability commitment lowers the barriers to entry[58] on the Frankfurt-New York route for premium passengers and addresses its concerns in this regard. The Commission also concludes that the availability of the fare combinability commitment in relation to existing competitor services should assist the competitors concerned to sustain their services on the Frankfurt-New York route for premium passengers and should address its concerns on this route.

8.3. SPA commitment

(128) Under the final commitments the parties offered to conclude an SPA with competitors on up to 20 feeder routes operated by the relevant party. These feeder routes should have a point of origin or destination in geographical Europe and Israel 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.

(129) The ability to attract feed traffic is particularly important for sustainable operations on a long-haul route. It is more risky and therefore less likely for airlines, with no presence and thus no access to feed traffic at Frankfurt and/or New York airports, to enter the Frankfurt-New York route. The SPA commitment would enable a new entrant to have the necessary access to feed traffic of the parties on advantageous terms at both ends of the route. The SPA commitment would 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 Frankfurt and/or New York airports.

(130) An SPA would be concluded irrespectively of whether a new service on the Frankfurt-New York route is operated using slots released under the final commitments. Subject to the specific provisions in the final commitments, an SPA would be concluded on terms at least as favourable as the terms agreed with any other airline, including the terms in the current SPA of the parties. Finally, the Commission shall approve an SPA concluded under the final commitments, and in this context in particular will assess whether the terms of such an agreement are reasonable.

(131) Pursuant to the comments received from the oneworld TJB in response to the communication pursuant to Article 27(4), the parties agreed to extend the scope of the SPA commitment from 15 to 20 feeder routes, subject to the caveat that a competitor with a hub at any end of the Frankfurt-New York route would be eligible only for 15 feeder routes at that end of the route. This competitor would, however, be eligible for 20 feeder routes at the other end of the route where it does not have a hub. The Commission considers that this extension of the number of feeder routes in the final commitments is sufficient to address the arguments raised by the oneworld TJB in their comments on the communication pursuant to Article 27(4). As regards the comment of the oneworld TJB in relation to the extension of the geographical

[58] See recital (50) of this Decision.

scope of the SPA commitment, the Commission is of the view that no such extension would be justified, given that the current SPA commitment already covers several important destinations in Russia and Turkey. Furthermore, in the Commission's view, the level of feed traffic made available by the parties on 20 feeder routes under the existing geographical scope is already sufficient to ensure sustainable operations on the Frankfurt-New York route. Therefore, the inclusion of other regions, such as India, would not be justified in this case.

(132) In addition, the final commitments contain deadlines for negotiations of an SPA. Namely, the parties shall propose an SPA within four weeks of the request by a competitor, which, at the request of that competitor, may be applied provisionally without prejudice to further negotiations between the parties and that competitor. Furthermore, any subsequent clarification and additional evidence requested by the Monitoring Trustee shall be submitted within two weeks of the request. The parties shall propose a new SPA within two weeks of the confirmation of the Monitoring Trustee that the provided clarification and evidence are sufficient.

(133) On that basis, the Commission considers that the final SPA commitment, as amended by the parties, is adequate and sufficient. The Commission concludes that the possibility to conclude an SPA on favourable terms on a larger number of feeder routes should, in conjunction with the slot commitment and other commitments, further reduce barriers to entry and expansion on the Frankfurt-New York route.[59] The amendments should also encourage timely and likely entry and expansion on this route.

8.4. FFP commitment

(134) The parties offered to allow competitors that had commenced or increased services on the Frankfurt-New York route under the final commitments to be hosted in the parties' FFPs. The FFP commitment only applies to competitors that do not have a comparable programme and do not participate in the parties' programmes.

(135) In its preliminary assessment, the Commission provisionally found that the parties' FFP constituted an advantage at both ends of the Frankfurt-New York route.[60] 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 passengers on this route and therefore enhances the likelihood of entry and expansion under the final commitments.

8.5. Reporting obligation

(136) As noted in recital (95) of this Decision, the parties undertake to provide the Commission with data which relate to the parties' operations as of the date of the DOT's final order granting antitrust immunity to the parties' cooperation in the A++ joint venture. This reporting obligation addresses Emirates' general concerns about

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[59] See recital (49) of this Decision.

[60] See recital (49) of this Decision.

the Commission's ability to monitor the effects of new entry and competition on the Frankfurt-New York route.

(137) The Commission takes the view that such a 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 A++ joint venture and assess its impact in the future.

8.6. Review clause

(138) 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 such a review does not affect any of the agreements that may have been concluded in the meantime on the basis of the final commitments.

8.7. Commitments in relation to travel agents

(139) The Commission considers that the final commitments are designed to ensure a sufficient level of competition between airlines on the Frankfurt-New York route. Addressing this horizontal concern should also, in principle, mitigate vertical issues related to distribution of airline tickets. The final commitments are therefore suitable to address the competitive concerns identified by the Commission, without the need for specific provisions on airline ticket distribution.

9. PROPORTIONALITY OF THE COMMITMENTS

9.1. Principles

(140) The principle of proportionality requires that the measures adopted by the Institutions of the European Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.[61]

(141) In the context of Article 9 of Regulation (EC) No 1/2003, the 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.[62] When carrying out that assessment, the Commission must take into consideration the interests of third parties.[63] Finally, it must be ensured that the commitments offered and made binding do not manifestly go beyond what was necessary to address the concerns identified by the Commission in its preliminary assessment.

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

62 Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5949, paragraph 41.

63 Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5949, paragraph 41.

9.2. Application in this case

(142) The final commitments are sufficient to address the concerns identified by the Commission in its preliminary assessments. The slot commitment offered by the parties remedy the loss of one daily competitive frequency operated by CO pre-cooperation. With the released slots at Frankfurt, and if applicable at New York, new entrants or existing competitors can operate or increase up to one daily new or additional frequencies (seven weekly frequencies) on the Frankfurt-New York route.

(143) The 'counting against mechanism' of the slot commitment, described in recital (115) of this Decision, ensures the proportionality of the slot commitment but at the same time always enables the parties' competitors to maintain at least three daily competing frequencies - the number of daily frequencies by LH's competitors that were available before the implementation of the A++ agreement. The number of slots to be released by the parties may be increased or decreased according to the number of frequencies operated by the parties' competitors.

(144) The provisions of the final commitments concerning fare combinability, FFP agreements and SPA ensure the proportionality of the final commitments.

(145) The parties have not offered less onerous commitments that would adequately address the Commission's concerns expressed in the preliminary assessment.

(146) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the communication pursuant to Article 27(4).

(147) This Decision accordingly complies with the principle of proportionality.

10. CONCLUSION

(148) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes the commitments proposed by the undertakings concerned binding upon them. Recital 13 of the Preamble to Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is based on its preliminary assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a communication pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(149) In light of the final commitments offered by the parties, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

(150) The Commission retains full discretion to investigate and to open proceedings under Article 101 of the Treaty and as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The commitments as listed in the Annex shall be binding on Air Canada, United Airlines, Inc. and Deutsche Lufthansa AG for a period of ten years from the date of adoption of this Decision.

Article 2

It is hereby concluded that 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:

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Germany

Done at Brussels, 23.5.2013

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

THE COMMITMENTS