

CASE COMP/A.38.477/D2 (British Airways / SN Brussels Airlines)

On 10 March 2003, the Commission decided not to raise serious doubts against the alliance between British Airways and SN Brussels Airlines. As a consequence, these agreements are automatically exempted for six years. A summary of the Commission's assessment of the alliance is set out below.¹

1. PROCEDURE

1. By letter of 25 July 2002, British Airways (BA) and SN Brussels Airlines (SN) notified to the Commission a number of co-operation agreements and applied for negative clearance under Article 3(2) of Regulation 3975/87 or exemption under Article 5 of the same Regulation.
2. On 10 December 2002, under Article 5 of Council Regulation No 3975/87², the Commission published a Notice in the Official Journal summarising the main elements of the agreements. Under Article 5 of the Regulation, interested parties had four weeks to comment on the alliance. According to Article 5 (3) of the Regulation, if the Commission does not raise serious doubts within 90 days of the date of the publication of the Notice, the alliance is deemed exempted from the prohibition under Article 81 (1) for a maximum of six years. Two comments have been received.

2. THE PARTIES

3. BA is a public limited company registered under the laws of England and Wales. Its principal activities are the operation of international and domestic scheduled and charter air services for the carriage of passengers and cargo. BA also provides ancillary services to the air transport business, such as ground handling services and aircraft maintenance and engineering. The world-wide turnover of BA in the year ending 31st March was £ 8, 340 million. BA is part of the Oneworld alliance.³
4. SN is a société anonyme/naamloze vennootschap incorporated under the laws of Belgium. SN is a former subsidiary of Sabena (known as DAT) which performed flights on Sabena's behalf. Following Sabena's demise in November 2001 and with

¹ This assessment is based on the information made available to the Commission in the course of its investigation and does not reflect subsequent market changes.

² OJ L 374, 31.12.1987, p.1

³ The bilateral co-operation between BA and SN might also lead to SN becoming a member of Oneworld, although this is not yet on the agenda. Oneworld is a rather "loose" alliance, which mainly provides for co-ordination of FFPs, access to airline lounges, easiest connections and baggage handling. The impact of BA being a member of Oneworld is not assessed in the present document but this is without prejudice to any possible investigation that could be opened by the Commission with regard to the Oneworld alliance.

the backing of a new majority shareholder, SN Airholding, SN was re-launched under the “SN Brussels Airlines” brand name on 15 February, as a small full-service carrier offering flights within Europe and onto Africa from its Brussels base. SN currently operates a fleet of Avro and BAe 146 regional jets on point-to-point routes on 36 European destinations and serves an additional 12 African destinations on the basis of a wet lease agreement.

5. The parties explain that SN is different from Sabena in size and in scale. Its new mission statement provides that SN will focus on point to point passengers mainly on European destinations from and to Brussels. SN’s capacity, in terms of available seat kilometres is about 28% that of Sabena. The turnover of SN (Delta Air Transport) in the year ending 31st December 2001 was €181 309 000.

3. THE NOTIFIED AGREEMENTS

6. Generally, the parties intend to co-operate on all routes across their respective networks in terms of pricing, scheduling and capacity. They consider that this co-operation is particularly important on London-Brussels, through which SN passengers will access the BA network from London. The same goes for regional routes between the UK and Brussels, which will give UK passengers access to SN’s African destinations.
7. The alliance is governed by the following agreements.
 - The **Alliance Agreement**. It operates as an “umbrella agreement” for general co-operation between the parties. It specifically provides for (i) code sharing in accordance with the Code Share and Revenue Apportionment Agreements and (ii) access to business lounges and frequent flyer programmes (FFPs) in accordance with the Frequent Flyer Programme Agreements to be negotiated between the parties. The parties will co-operate on all routes across their respective networks in terms of pricing, scheduling and capacity.
 - The **Code Share Agreement**. It allows each party to place its flight designator code on certain flights operated by the other party.

The parties are already codesharing on London-Brussels and Birmingham-Brussels. They have started codesharing on Bristol-Brussels, Southampton-Brussels and Newcastle-Brussels on 5th February 2003. A date has not yet been agreed for when they will start codesharing on Manchester-Brussels, but the parties hope to start codesharing at the beginning of the summer 2003 season.

On the behind and beyond routes, there are provisions in the Alliance Agreement for the parties to extend their co-operation to other routes on their respective networks. The parties are currently evaluating the feasibility of codesharing on SN’s African routes.

- The **Revenue Apportionment Agreement**. It provides the parties with a mechanism to pay each other for carrying each other’s passengers on code shared flights. It may in the future be extended to other routes on which the parties carry each other’s passengers, but at the moment, these are covered by an interline agreement between the parties under standard IATA terms.

- The parties are also in the process of negotiating a **Frequent Flyer Programme Agreement**, which will govern reciprocal access to the parties' FFPs and will introduce arrangements that provide eligible passengers of one of the parties with access to the lounges of the other.
- Initially, the parties had also notified a **Slot Exchange Agreement**, governing the exchange of a number of slot pairs between them at London Heathrow. This agreement has thereafter been formally withdrawn from the notification. In the present case, the Commission only analysed the possible concerns raised by the alliance under competition rules, without prejudice to any assessment that could be made of the slot exchange agreement under the slot regulation.

4. THE RELEVANT MARKETS

4.1. Market definition in air transport

8. To establish the relevant market in air transport cases, the Commission has developed the so-called "point of origin/point of destination" (O&D) pair approach. According to this approach, every combination of a point of origin and a point of destination should be considered to be a separate market from the customer's viewpoint. To establish whether there is competition on an O&D market, the Commission looks at the different transport possibilities in that market, that is, not only at the direct flights between the two airports concerned, but also, to the extent that they are substitutable to these direct flights, at other alternatives. These alternatives may be direct flights between the airports whose respective catchment areas significantly overlap with the catchment areas of the airports concerned at each end, indirect flights between the airports concerned, or other means of transport such as road, train or sea.
9. Whether one of those alternatives is substitutable to the direct route depends on a multiplicity of factors, such as the travel time, frequency and the price of the different alternatives.
10. The Commission further distinguishes between "time-sensitive" and "non time-sensitive" customers.⁴ For the first group, time is of the essence, either as regards the need to ensure a minimum travel time or the need to travel at a precise time of the day and not at any other given moment, or both. Also, certain time-sensitive passengers may need to book a flight at short notice or require flexibility (the possibility to miss one flight and book onto the next). Time-sensitive passengers are willing to pay a premium to have their requirements satisfied. On the contrary, for non-time sensitive passengers, savings on the price of the trip have priority over time constraints and flexibility.
11. The distinction between business and leisure travellers does not necessarily coincide with the difference between time-sensitive and non time-sensitive passengers. For example, leisure travellers going to their destination for a week-end or city trip will

⁴ See for example paragraph 30 of the Commission's Decision of 18 July 2001 in the *SAS/Maersk Air* case (OJ L265 of 5.10.2001, p.15).

prefer not to spend a substantial part of their leisure time travelling in more time-consuming means of transport. It can nevertheless be used as a proxy.

4.2. The relevant markets as regards the transport of passengers and the parties' position on the markets

12. The parties' co-operation as regards the transport of passengers extends to three different types of routes:
 - the non-stop overlap routes (i.e. the routes on which both parties operate a direct service at present), all of which are routes that link Brussels and the UK;
 - the one-stop overlap routes, where one company operates a direct service and the other an indirect one;
 - the non-overlap routes, where only one of the parties operates air services but where the other might be a potential entrant.
13. The parties have provided market information for all non-stop overlap routes and all UK-Brussels routes. For the other routes, they have provided data when (i) the parties have together a share of O&D passengers at least 40%, (ii) the smaller carrier has a share of at least 2% of the O&D traffic and (iii) the total number of O&D passengers flown over one year is 30,000 or more.

4.2.1. The non-stop overlap routes

14. There are three point to point routes between Brussels and the UK on which BA and SN both provide a non-stop service, i.e. Brussels-London, Brussels-Manchester and Brussels-Birmingham.⁵
15. The tables below only concern direct passengers as the number of passengers flying indirect on these three routes is minimal.⁶

⁵ For non-stop overlap routes, the parties have used the **CAA & IPS** (International Passenger Survey) data, which examine the journey purpose of passengers and their origin and destination. The split between business and leisure traffic is generated on this basis, which means that passengers who do not travel in business class are counted as business traffic if the purpose of their journey is business. The reasons for using this source is that, unlike MIDT data, it enables comparisons to be made with Eurostar, provides data on the no frills carriers and includes direct sales by the airlines.

⁶ [less than 5%] on Brussels-London, [less than 5%] on Brussels-Manchester and [less than 5%] on Brussels-Birmingham.

London-Brussels

Market information

Table 1

Period: winter 00– summer 01 (w00-s01)	Total O&D Direct pax ⁷	Business O&D Direct pax	MS total		MS business
London-Brussels	less than 2,500,000	less than 1,500,000	BA	[5-15%]	[10-20%]
			Sabena/TV ⁸	[15-25%]	[30-40%]
			Eurostar	[55-65%]	[30-40%]
			Bmi	[5-15%]	[10-20%]

- **BA** operates 7 frequencies a day on Brussels-LHR on weekdays (reduced service at weekends). It intends to add one frequency for summer 2003 as a result of the alliance (i.e. to accommodate an increasing number of connecting passengers originating in Brussels). It also intends to use larger aircraft. BA also operates 2 daily services on Brussels-LGW on weekdays (one on Sundays).
- **SN/Virgin Express (TV)**: originally, SN was codesharing with Virgin Express on 9 daily frequencies (SN operated seven of these and Virgin the remaining two). The codeshare terminated in October 2002 and Virgin Express ceased operation as from 27 October.
- **SN/VLM**: In March 2002, SN and VLM started codesharing on the Brussels-London-City route, which was operated by VLM (5 daily frequencies on weekdays and 2 on Sundays). These arrangements will terminate as from 30 March 2003, as VLM has concluded a code-share agreement with Virgin express.
- **VLM/Virgin Express⁹**: on 31 January 2003, the two airlines reached a codeshare agreement on the Brussels-London City route, which is to enter into force on 30 March 2003.
- **Eurostar**: Eurostar operates 8 daily frequencies. The parties argue that over the last few years, Eurostar has been increasing its share of point-to-point leisure and business traffic to the detriment of airlines.
- **bmi**: as of May 2001, bmi codeshares on this route with Lufthansa (and, to a lesser extent with Air New Zealand). It operates 7 daily frequencies (reduced service at weekends) from LHR.
- **No frills carriers**: Ryanair entered the route (London Stansted-Charleroi Brussels) South in April 2001. In summer 2001, Ryanair accounted for [between 15 and

⁷ By comparison, the number of connecting passengers is [less than 650,000).

⁸ TV is the designator code for Virgin Express

⁹ “Virgin Express en VLM Airlines bundelen krachten op route Brussel-Londen” (tijd.be, 31/01/03)

25%] of all point to point airline passengers between London and Brussels¹⁰ and this with 18 weekly frequencies. It now operates 28 weekly frequencies. The parties consider that other no frills such as Easyjet/Go and Buzz are potential entrants on this route.

Airport substitutability

16. Five airports, i.e. Heathrow (LHR), Gatwick (LGW), Stansted, Luton and London City serve London. The parties consider that they are substitutable. The degree of substitutability between the London airports highly depends on the passenger's final destination in London and is not a straightforward issue.¹¹ For the purpose of this case, this question can however be left open as the parties' main competitor, bmi, operates from LHR.
17. Brussels is mainly served by Brussels National airport. The parties argue that the catchment areas of this airport and those of two other Belgian airports, i.e. Antwerp airport and Brussels South Charleroi are largely overlapping. They explain for example that the entry of VLM on the Antwerp-Geneva route and the entry of Ryanair on the Brussels (Charleroi)-Dublin route had an impact on Sabena's sales figures and yields on Brussels-Geneva and Brussels-Dublin.
 - Charleroi: the majority of answers to the requests for information sent out by the Commission services in this case consider that the airport of Charleroi is not substitutable to Brussels National, particularly as far as business passengers are concerned. Third parties mainly underline the lack of modern infrastructures adapted to business traffic, the location, the absence of convenient ground transport and of connectivity.

Ryanair, which operates between London Stansted and Charleroi, recognises that it is difficult to precisely measure the constraint that their services in Charleroi have on Brussels National in terms of business traffic. They however consider that the constraint is considerably wider than business travellers who need to fly to Stansted. They explain that business travellers are increasingly using low fare airlines for their travel needs because Ryanair's fare structures are generally now even more flexible than business class on the likes of BA. Ryanair's tickets are now changeable for a modest charge so if a business traveller cannot make the flight he or she booked they can change it for a later flight. Although Ryanair do not split business versus leisure passengers, they estimate that 30% of passengers carried between Brussels and the UK are business passengers. According to them, a growing number of business passengers are using Charleroi.

- Antwerp: the great majority of answers to the requests for information consider that Antwerp is not substitutable to Brussels National for the purpose of this case. Antwerp would appear to attract local business passengers mainly. This seems to be

¹⁰ With Eurostar included, Ryanair's share of point to point traffic for summer 2001 would be [between 5 and 15%].

¹¹ In the bmi-Lufthansa decision, which also concerned short-haul routes, the five London airports were considered as substitutable for non-time sensitive passengers. As far as time-sensitive passengers were concerned, however, the services out of Stansted were not considered to compete effectively.

corroborated by the facts, as VLM operates between Brussels National and London City (five two-way flights on weekdays), as well as between Antwerp and London City (six two-way flights on weekdays). On their website, a clear distinction is made between these two routes, which seems to indicate that the Antwerp-London route indeed constitutes a market of its own.

Other means of transport (Eurostar)

18. Eurostar operates 8 daily frequencies between Brussels and London (Waterloo). The parties explain that since its opening in 1996, Eurostar has been increasing its share of point-to-point leisure and business traffic to the detriment of airlines (e.g. BA's share of point-to-point business traffic has fallen from [25-35%] in 1996 to [15-25%]). The parties argue that it shows that Eurostar is competing with airlines for both business and leisure traffic. Eurostar also considers that it competes with the airlines for leisure and business traffic. For 2001, Eurostar estimates its market share to [...] % of the air/rail market ([...] % business and [...] % leisure).
19. It results from the market test that Eurostar is indeed considered as a valid alternative to travel by air for non-time sensitive, as well as for a great majority of time-sensitive passengers.
20. As far as this second category of passengers is concerned, the Commission services however investigated whether there could be time windows where travel by air would be the only realistic option available. This could primarily affect business passengers travelling out of London. The first Eurostar indeed leaves London at 06:53 and arrives in Brussels at 10:37, which makes early meetings in Brussels difficult. By comparison, the first SN flight leaves LHR at 06.45 and arrives in Brussels National airport at 08:50. The first BA flight leaves LHR at 07.10 and arrives in Brussels National airport at 09:30. As regards late finishes in London, the last Eurostar is equivalent to the last flight. The last Eurostar for Brussels indeed leaves London Waterloo at 19:27. By comparison, there is a SN flight leaving London for Brussels at 19:30.¹²

Timetables are more convenient out of Brussels, at least for departure in the morning. The first train leaves Brussels at 07:01 and arrives in London at 08:50, which allows early meetings. The last train to leave Brussels for London is at 19:57, which remains quite early. By comparison, the last flights operated by the parties leave Brussels at 20:35 (SN) and 21:30 (BA).

21. The parties made the following comments on this specific issue.
 - First, they argue that they are not able to price discriminate against customers for whom this time window is important. The parties explain that they charge a single price for unrestricted tickets, which by definition can be used at any time of day. They would therefore be unable to exploit any perceived advantage over Eurostar, as an unrestricted passenger pays the same price regardless of whether he wishes to travel in any "time window". Since most flights operate within time windows

¹² There is also an SN flight leaving London at 20:45 but the flight is operated by VLM and the codeshare agreement between SN and VLM will terminate as from 30 March 2003.

for which Eurostar is clearly equally convenient to the plane, the parties argue that that price is constrained by competition from Eurostar.

- Second, the parties explain that due to shorter transfer and check-in times¹³, the “time-windows” are very short, or even non-existent, and critical only to a small number of passengers. Very few flights therefore offer any material timing advantage over Eurostar. In addition, the parties explain that in September 2003, the journey time between London and Brussels will be reduced by 20 minutes to 2 hours 25 minutes, thereby reducing further any “time window” in which flights confer on passengers a material advantage over Eurostar.
- Third, the parties underscore that Eurostar could choose to operate trains within any time-windows, as it can easily alter the times of its trains. Eurostar is therefore free to add an earlier departure from London or a later service from Brussels in the evening. They give the example of Eurostar’s service between London and Paris (which departs from London at 5:15 am and arrives at Paris Nord at 9:23).

Conclusion

22. *Airport substitutability.* As far as business passengers are concerned and for the purpose of this case, it should be acknowledged that services from/to London Stansted do not exercise sufficient constraint on the other services from/to London. Similarly, services from/to Charleroi and Antwerp might not exercise sufficient constraint on services from/to Brussels National.
23. *Other means of transport.* The relevant market in the Brussels-London O&D pair is broader than the direct air services and includes rail transport. In the light of the explanations provided by the parties and the market test, rail can be considered as a competitive alternative to air for both non-time sensitive and time-sensitive passengers.

¹³ Only 15 minutes for business passengers as from September 2002.

Manchester-Brussels

Market information

Table 2

Period: w00-s01	Total O&D Direct pax ¹⁴	Business O&D Direct pax	MS total		MS business
Manchester-Brussels	[less than 250,000]	[less than 180,000]	BA	[between 35-45%]	[between 35-45%]
			Sabena/SN	[between 55-65%]	[between 55-65%]

24. In the summer 2001 season, BA operated 22 weekly frequencies and SN 32 weekly frequencies on this route. SN has decreased the number of weekly frequencies it offered on the route from 32 to 25 in the summer 2002 season. Singapore Airlines also operates three frequencies per week in each direction between Brussels and Manchester.
25. The parties intend to “cross-codeshare” on the route from the summer season 2003. Although a final decision has not yet been taken, their current plan comprises four SN-operated non-stop frequencies and three BA-operated non-stop frequencies daily.

Airport substitutability

26. BA and SN are both operating from/to Manchester airport. The parties argue that the Commission assessment should also take into account the recent entry of Ryanair on this market (from Brussels Charleroi to Liverpool). According to the parties, Manchester airport indeed competes with John Lennon airport in Liverpool for passengers in the Manchester/Liverpool area. The two airports are only 31 miles apart and linked by the M56 motorway. The parties also underline that Liverpool is a hub for another low-cost carrier, easyJet.
27. The great majority of answers to the requests for information consider that Liverpool only exercised limited constraint on services from Manchester, particularly as far as business passengers are concerned, although this might change in the future. They underline that, contrary to Liverpool, Manchester is an international hub airport (enhanced facilities, range of services, choice of carriers, high level of frequencies, etc).
28. For the purpose of this case and for the two following reasons, it is not necessary to reach a conclusion on this issue. First, as explained under paragraph 17, the services from/to the airport of Charleroi, from/to which Ryanair operates, might not exercise sufficient constraint on the services from/to Brussels National, at least as far as business passengers are concerned. Even if this was the case, Ryanair only operates seven weekly frequencies between Charleroi to Liverpool, which does not constitute

¹⁴ By comparison, the number of connecting passengers on these direct flights is [less than 150,000].

a competitive alternative for time-sensitive passengers, as it does not allow one-day trips.

Other means of transport

29. As there is no direct rail links between the two cities, rail transport cannot be considered as a convenient substitute for direct flights.

Conclusion

30. There exists therefore a relevant market for the scheduled air transport of time-sensitive and non-time sensitive passengers between Manchester and Brussels. There are indications that services from/to Liverpool and Charleroi are not part of the same market.

Birmingham-Brussels

Market information

Table 3

Period: w00-s01	Total O&D Direct pax ¹⁵	Business O&D Direct pax	MS total		MS business
Birmingham-Brussels ¹⁶	less than 250,000	less than 200,000	BA	[between 25-35%]	[between 25-35%]
			Sabena/SN	[between 35-45%]	[between 35-45%]
			bmi	[between 25-35%]	[between 25-35%]

31. In the summer season 2001, BA operated 16 weekly frequencies and SN operated 26 weekly frequencies on this route. British European entered the route in the winter season 2001/summer season 2002, initially with three weekday services.¹⁷ This was further amended to 5 weekday services to offer greater flexibility to the business market. British European codeshares with Air France on this route and MIDT data from the winter 2001 season show that they have captured a share of [between 15 and 25%] of total passengers on this route. In addition, the majority of passengers carried by British European on this route are business passengers. bmi also operates 16 weekly frequencies from East Midlands Airport (EMA).

Airport substitutability

32. The parties both operate from Birmingham airport. They argue that the Commission assessment should take into account the services operated by their competitor bmi, from/to the East Midlands Airport (EMA). The parties indeed consider that this airport competes for passengers with Birmingham airport, being only 37 miles away and linked by the M42 motorway.
33. The answers to the requests for information are less clear-cut than for Manchester and Liverpool. The superiority of Birmingham (infrastructure, connectivity, the fact that it is a hub for BA, etc) over EMA is underlined but it is also recognised that EMA is used for business traffic and that some companies might consider using this new service.

One should also note that bmi previously operated from Birmingham but withdrew from it for the s01 season. bmi currently operates entirely from EMA. This might be considered as an indication that the two airports are substitutable. bmi however argues that it is not the case and that they withdrew because they could no longer sustain competition from BA and SN. bmi explains that they did hope to recommence scheduled services between Birmingham and Brussels in December 2001 but

¹⁵ By comparison, the number of connecting passengers on these direct flights is [less than 70,000].

¹⁶ The table does not reflect the entry of British European in w01/s02

¹⁷ Not yet reflected in table 3.

eventually decided against re-entering the market, notably because the Brussels airport authority was unable to provide them with attractive slots. One should however note that bmi operates three daily flights to Brussels from EMA which allows one-day business trips.¹⁸ In addition, business passengers account for more than half of bmi's passengers on this route.

Other means of transport

34. As there is no direct rail links between the two cities, rail transport cannot be considered as a convenient substitute for direct flight.

Conclusion

35. There exists therefore a relevant market for the scheduled air transport of time-sensitive and non-time sensitive passengers between Birmingham and Brussels. There are indications that services from/to EMA are part of the same market.

4.2.2. The one-stop overlap routes

36. The parties have identified six affected routes.¹⁹ They stress that the available data overstate the parties' market shares. It is for Sabena and not SN and it does not include no-frills carriers. On four of the six routes, the parties explain that they face competition from a no-frills carrier operating from a substitutable airport.

Table 4

Parties + first competitor Period: w00-s01	Total O&D Pax (direct + indirect)	MS total O&D		MS unrestricted O&D
Manchester-Rome	[less than 70,000]	BA	[55-65%]	[55-65%]
		SN/Sabena	[5-15%]	[5-15%]
		LH	[5-15%]	[5-15%]
		5 other comp		

¹⁸ bmibaby has replaced bmi regional's scheduled services between EMA and Brussels as from the winter season 2002.

¹⁹ For one-stop overlap routes the parties have used data based on MIDT. MIDT provide information based on the number of tickets booked by travel agents (which means that it does not include no frills airlines, railway or direct sales by airlines). The parties have however preferred to use this source for one-stop overlap routes because it is more reliable than CAA for passengers flying indirect and indirect flights are an important source of competition on one-stop overlap routes. Passengers are then categorised as restricted and unrestricted according to the fare codes of their tickets.

Parties + first competitor Period: w00-s01	Total O&D Pax (direct + indirect)	MS total O&D		MS unrestricted O&D
Madrid-Manchester ²⁰	[less than 60,000]	BA	[80-90%]	[80-90%]
		SN/Sabena	[<5%]	[<5%]
		IB	[<5%]	[<5%]
		4 other comp.		
Brussels-Glasgow ²¹	[less than 40,000]	BA	[0-10%]	[0-10%]
		(SN/Sabena ²²)	[85-95%]	[85-95%]
		BD	[0-10%]	[0-10%]
		1 other comp.		
Manchester-Milan	[less than 90,000]	BA	[85-95%]	[85-95%]
		SN/Sabena	[<5%]	[<5%]
		KL	[<5%]	[<5%]
		3 other comp.		
Geneva-Manchester ²³	[less than 40,000]	BA	[60-70%]	[60-70%]
		SN/Sabena	[0-10%]	[0-10%]
		LH	[0-10%]	[0-10%]
		5 other comp.		
Barcelona-Birmingham ²⁴	[less than 40,000]	BA	[65-75%]	[65-75%]
		SN/Sabena	[0-10%]	[0-10%]
		IB	[5-15%]	[5-15%]
		4 other comp.		

37. Apart from the above, there are two other one-stop overlap routes where the increment in market share resulting from the alliance is [lower than 5%]. These routes are Brussels-Newcastle and Brussels-Bordeaux.

²⁰ Market shares do not reflect competition from easyJet which operates one daily flight from Liverpool (substitute for Manchester, according to the parties) to Madrid.

²¹ Market shares do not reflect competition from Ryanair which operates two daily flights between Glasgow (Prestwick) and Brussels South Charleroi.

²² SN withdrew from the route in January 2002. BA offers what is marketed as a direct service but the aircraft touch down in Birmingham (total journey time 3hours). British European entered in s02 with a similar service. The only non-stop service is provided by Ryanair which flies from Glasgow (Prestwick) to Brussels South Charleroi (1h35 mn). Ryanair operates two daily flights on this route.

²³ Market shares do not reflect competition from easyJet, which operates one daily service between Liverpool (substitute for Manchester, according to the parties) and Geneva.

²⁴ Market shares do not reflect competition from bmibaby which operates one daily service between EMA (substitute for Birmingham) and Barcelona

- Brussels-Newcastle ([less than 50,000] annual passengers and an increment of [less than 5%]). SN is the only carrier to provide a direct service on this route. British European and Air France entered the route on a code-share basis in the winter 2001 season but withdrew from it in July 2002. According to the parties, the likely reason for the withdrawal is that the route was unable to support two carriers' direct services. The parties are codesharing on Brussels-Newcastle since February 2003.
- Brussels-Bordeaux ([less than 65,000] annual passengers). BA provides a direct service on this route and SN's indirect service accounts for [less than 5%] of passengers.

4.2.3. *The non-overlap routes*

38. There are two Brussels-UK routes which are non-overlap routes, i.e. Brussels-Bristol and Brussels-Southampton. On these routes, the number of O&D passengers flown annually is low (around 30,000 or less). The most attractive indirect service is provided by KLM. The parties are codesharing on these routes since February 2003.
 - Brussels-Bristol ([less than 35,000] passengers a year). SN is the only carrier flying direct on this route. Sabena had withdrawn upon its bankruptcy in November 2001. BA then entered the route with a direct service. The parties explain that SN re-entered in December 2001, making BA's operations unprofitable. BA took the decision to withdraw and did so in May 2002.
 - Brussels-Southampton ([less than 25,000] passengers a year). BA is the only carrier flying direct on this route.
39. Until December 2002, BA was also the only carrier flying direct on Brussels-Cardiff ([less than 20,000] passengers a year) but they withdrew from this route and SN does not plan to enter this market.
40. The other routes which are only served by SN but not by BA are SN's African destinations (Dakar, Banjul, Conakry, Monrovia, Douala, Yaoundé, Kinshasa, Luanda and Kigali). Both companies fly to Nairobi and Entebbe. BA used to serve some of these routes but withdrew from them a few years ago (in 1991 for Banjul and in 1998 from Douala and Kinshasa).

5. ARTICLE 81(1) OF THE TREATY

5.1. Agreements between undertakings

41. The agreements notified to the Commission by BA and SN are bilateral agreements between these two undertakings.

5.2. Restrictions of competition between the parties

42. The parties intend to co-operate on all routes across their respective networks in terms of pricing, scheduling and capacity. Therefore, in principle, the notified agreements are likely to affect competition. The competitive effects of the alliance however need to be analysed with reference to the relevant markets.

5.2.1. Effects on the non- stop overlap routes

London-Brussels

43. The parties argue that the alliance will not have an appreciable impact on competition on this route, where the parties face competition from the Eurostar, from bmi and from no frills carriers. In addition, the data overstate the market share of SN as they show the passenger data of Sabena.
44. As the two main airline competitors on the route, BA and SN, have ceased competing against each other, it is however difficult to share the parties' views, at least as far as time-sensitive passengers are concerned.

Manchester-Brussels

45. The parties have a cumulated market share close to 100% on this route. It is therefore obvious that the alliance will have an appreciable impact on competition on this market, at least as far as time-sensitive passengers are concerned.

Birmingham-Brussels

46. In the light of the high number of frequencies operated by the parties, the alliance will have an impact on competition on this route, at least as far as time-sensitive passengers are concerned. The services operated by bmi out of EMA and by British European should however constitute competitive alternatives for these passengers.

5.2.2. Effects on the one- stop overlap routes

47. The parties consider that the alliance will not substantially affect competition on these routes as
- the increment in market share resulting from the alliance is less than 10%;
 - on all routes, one or more carriers provide one-stop services;
 - none of these routes start or end in London;

- there are no operational constraints at the concerned airports which could prevent new entry (except at Milan Linate airport, however the parties argue that it is also served by Malpensa airport).
48. It can be accepted that the alliance will not have an appreciable impact on market conditions on three of these routes, i.e. Madrid-Manchester, Manchester-Milan and Brussels-Glasgow. On the two first markets, the increment is low ([less than 5%]) and indirect competition is weak, as direct flights have a market share higher than [75%]. On Brussels-Glasgow, the market situation has evolved since January 2002 (not yet reflected in table 4), as SN withdrew from the route and no longer offers a direct service. The parties explain that BA offers what is marketed as a direct service but that the aircraft touch down in Birmingham (total journey time 3 hours). British European entered in the summer 2002 season with a similar service. The only non-stop service is provided by Ryanair which flies from Glasgow (Prestwick) to Brussels South Charleroi (1h35 mn). Ryanair operates two daily flights on this route.
49. As far as the other one-stop overlap routes are concerned, the alliance is however likely to have an appreciable impact on the market, as it will result in the elimination of a major indirect competitor.

5.2.3. Effects on the non-overlap routes

50. The alliance does not substantially modify the competitive situation on Brussels-Bristol (where SN is the only carrier flying direct) and Brussels-Southampton (where BA is the only carrier flying direct). The number of O&D passengers flown annually on these routes is low (around 30,000 or less) and it would appear that they are too thin to sustain two carriers' direct services. It can therefore be concluded that none of the parties can be considered as a realistic potential direct entrant on the route operated by the other.
51. The other routes served by SN but not BA are SN's African destinations. These routes do not fall under the scope of the procedural provisions of Regulation (EEC) 3975/87. This Regulation, which implements the EC competition rules in the air transport sector applies only to air transport between Community airports.

5.2.4. Conclusion

52. The alliance will have an appreciable effect on competition on the three direct overlap routes, i.e. Brussels-London, Brussels-Manchester and Brussels-Birmingham. The same goes for three of the six one-stop overlap routes identified by the parties.

5.3. Effect on trade between Member States

53. All the routes which constitute the relevant markets link two Member States. The agreements relate to the provision of air transport services and alter the manner in which those services would have been provided on these routes in the absence of an agreement. As a consequence, the agreements affect trade between the Member States.

6. ARTICLE 81(3) OF THE TREATY

54. Article 81(3) of the EC Treaty provides for the possibility that Article 81(1) be declared inapplicable if the agreements or concerted practices concerned contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that those agreements or concerted practices do not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

6.1. Contribution to improving the production or distribution of goods or to promoting technical or economic progress

55. The parties argue that they have largely complementary networks and customer groups. SN is a “full service” airline, which is not part of an alliance. SN needs to offer its passengers access to a global long haul network and BA is able to offer this in particular through its hub at London Heathrow. On the other hand, BA does not serve the majority of SN’s African destinations. SN’s customer base in Brussels will also provide valuable feed to BA’s network, thereby improving its efficiency.

56. It can be accepted that, overall, the alliance contributes to improving the production and distribution of transport services and to promote technical and economic progress. In particular, the complementarity of the parties’ networks and their network co-operation will make it possible to improve the services provided to consumers.

6.2. Allowing consumers a fair share of the resulting benefit

57. The parties argue that the alliance will benefit passenger transport in the following areas:

- *Wider choice of destinations and connections:* by being able to access BA’s network, SN passengers will have a wider choice of travel options at competitive prices. They will also be able to use BA’s offices worldwide to obtain tickets and information. BA’s passengers will gain easier access to SN’s African destinations.
- *Codeshare:* codesharing with BA on UK-Brussels routes will allow SN to offer its passengers an improved service in terms of quality, seating comfort, meal choice, etc.
- *Better scheduling:* the alliance will provide the necessary financial incentives for BA and SN to improve schedules and connections on UK-Brussels routes and to SN’s African destinations.
- *Co-location and signage:* the parties will also co-ordinate gate allocation and ground services to offer swift connections at Brussels National airport and London-Heathrow. Passengers on code-share flights will benefit from shorter transfer times and reduced connecting times, more efficient check-in and improved ground handling.
- *Benefits derived from frequent-flyer programmes:* the parties will put in place arrangements to allow SN and BA members to ‘earn and burn’ miles on each

other's flights. They also intend to explore the possibilities of sharing customer profile information, including seating preferences, tier status and frequent flyer activity, to provide passengers with superior service.

- *Improved ticketing*: the parties will work together to introduce reciprocal ticketing to each other's passengers and to integrate their systems. As a consequence, BA agents will be able to provide prompt and complete ticketing services to a passenger who has been issued a ticket by SN (and conversely). Passengers on restricted tickets will also be able to make and pay for any change in their tickets at any BA or SN point of sale.
 - *Reciprocal lounge products*: where practicable, the parties will introduce reciprocal lounge access.
58. It can be accepted that passengers will be able to enjoy the various types of benefits described by the parties. In particular, the alliance will allow SN's passengers to have access to a long-haul network. BA's passengers will also benefit from an easier access to SN's African destinations.
59. The parties have been working on co-ordinating their schedules to reduce waiting times for connecting flights.²⁵ They are also currently evaluating the feasibility of codesharing on SN's African routes.

6.3. Indispensability

60. The parties argue that they need to co-operate across their respective networks in terms of pricing, scheduling and capacity to react dynamically to challenges in the market place, allowing passengers to benefit fully from an improved service on the combined networks. Fully-fledged co-operation on Brussels-London is essential to enable the parties to offer sufficient inventory to connecting passengers at attractive fares, and therefore ensure SN passengers' access to BA world-wide network. Co-operation on regional UK-Brussels routes is equally indispensable to optimise access for UK passengers to SN's African and European destinations.

²⁵ The parties give the following examples:

- The parties' first departure from Heathrow to Brussels has been brought forward by 15 minutes which means that more connections are possible to SN's African services. In particular, this early morning flight now provides connections with SN's services from Brussels to Entebbe and Nairobi which were not available with a later arrival in Brussels. This gives passengers from London to these two destinations the choice, not previously available, of travelling direct from London in the evening or via Brussels in the morning.
- The parties' last service from Brussels to London on a Saturday night is now at a later time, meaning that the waiting time at LHR for passengers from Brussels connecting onto BA's long-haul services (including to Singapore, Bangkok, Hong Kong, Dubai, Kuwait, Tel Aviv, Sydney, Melbourne, Johannesburg, Lilongwe, Buenos Aires and Sao Paulo) will be reduced by 1 hour 40 minutes.
- An earlier first flight on Sunday mornings to Brussels also reduces by 1 hour 45 minutes the waiting time for passengers from BA's long-haul destinations travelling on to Brussels.

61. On the basis of the above, it is accepted that the parties need to co-operate across their respective networks and more particularly on UK-Belgium routes in order to secure the benefits of the alliance.

6.4. Possibility of eliminating competition

62. The parties consider that the alliance agreements do not eliminate competition. On the contrary, the alliance will increase competition in Europe, as it will enable SN to compete effectively with network alliances (such as Skyteam and Star) and no frills airlines.
63. The assessment as to whether the agreement affords the parties the possibility of eliminating competition in respect of a substantial part of the services in question must be made by reference to the relevant markets where appreciable restrictions of competition have been identified.

Brussels-London

64. While, as concluded above, the alliance will have an appreciable impact on competition on this route, it should not afford the parties the possibility of eliminating competition. The alliance will continue facing two main competitors: bmi and Eurostar. bmi operates 7 daily frequencies (reduced service at weekends) from London Heathrow and is member of the STAR alliance. Eurostar operates 8 daily frequencies between Brussels and London Waterloo and it results from the market test that it is considered as a competitive alternative for time-sensitive and non-time sensitive passengers. The 5 daily frequencies on weekdays operated by VLM (in codeshare with Virgin Express as from March 2003) between Brussels-National and London-City are also likely to exercise a competitive constraint on the parties. In addition, a growing number of business passengers are using the services provided by Ryanair between London Stansted and Charleroi and the constraint they exercise on the parties is consequently increasing, even if it might be doubtful whether it is sufficient for the moment (see paragraph 17).

Brussels-Manchester

65. This is the route where the alliance has the most restrictive effect as the parties' cumulated share of this O&D market is close to 100%. The parties contend that the airport of Liverpool competes for passengers in the Liverpool/Manchester area with Manchester airport. It however results from the market test that Liverpool is mainly a low-cost airport and could hardly be considered as a valid alternative to Manchester, at least as far as time-sensitive passengers are concerned. Even if this was the case, Ryanair only operates seven weekly frequencies between Liverpool and Charleroi, which does not constitute a competitive alternative for time-sensitive passengers, as it does not allow one-day trips.
66. In order for competition not to be eliminated on this market, it is therefore crucial to ensure that the parties' behaviour will remain constrained by the threat of new entry, i.e. that there are not barriers to entry on this market. An essential issue in this respect is the availability of slots at the airports concerned, notably at peak times.
67. Manchester Airport has confirmed that according to the information reported by the co-ordinator, airlines are still able to get the exact slots they require for the summer season 2003 at all periods of the day except during the morning peak (06:30-10:00

local time). During this morning peak, a number of slots were however still available and any request could be accommodated within a maximum of 30 minutes from the time requested. Manchester Airport has also explained that their policy was to increase capacity in line with demand. They have opened a second closely spaced parallel main runway in Spring 2001 which has provided additional capacity. There will be further developments of both runway and terminal capacity in the next few years to ensure that they can accommodate the expected business from both new and existing customer airlines.

68. Brussels National appears to be more congested than Manchester. The slot co-ordinator explained that there are time periods where the airport is full and other periods where it is close to being full. They globally correspond to what can be considered as “peak-time” periods.
69. The slot co-ordinator however confirmed that a new start-up airline based in Manchester had succeeded in obtaining slots to operate three daily frequencies on Brussels-Manchester for the summer 2003 IATA scheduling season. The slot co-ordinator however recently informed the Commission services that this new carrier had decided to postpone its entry on this route. It has consequently cancelled the slots it had obtained for the summer season. It remains that it was able to obtain these slots through the normal slot allocation procedures. Some of these slots could be considered as peak-time slots, which are normally difficult to obtain. This was possible because another carrier decided to alter its schedule.
70. The parties do not agree that there are difficulties for new entrants to obtain peak-time slots at Brussels National. They have provided an analysis of departure and arrival flight schedules at peak-times, which shows that slot capacity remains available for arrivals and departure at Brussels National, even within the peak-times (07:00-10:00 and 17:00-20:00). They also point out that following the demise of Sabena, the number of movements at Brussels National has decreased substantially (a loss of 20% compared to November 2000).
71. As competitors can run an effective competing service with two or three daily frequencies, they consider that the number of frequencies they will operate on the route (seven daily) do not constitute a barrier to entry. Both SN and BA currently operate four daily non-stop frequencies on the Brussels-Manchester route. They intend to “cross-codeshare” on the route from the summer season 2003. Although a final decision has not yet been taken, their current plan comprises four SN-operated non-stop frequencies and three BA-operated non-stop frequencies daily.
72. On the basis of the information provided by the slot co-ordinator, it is however considered that there might be capacity constraints at Brussels National at certain periods of the day, peak times in particular. The fact that a new carrier was able to obtain slots to operate a three frequency service on a daily basis - which in the meantime has been postponed to the winter season - does not necessarily guarantee that the same would hold true in the near future.
73. The parties have therefore accepted to provide the Commission with a set of commitments that would remedy these concerns. In short, the parties agree to make slots available at Brussels National for a new entrant to operate three daily services on the Brussels-Manchester route, in case it would not be possible to obtain these

slots through the normal slot allocation procedure. The parties operate 7 daily services on the route and the three daily services provided by a competitor should exercise sufficient constraint on their behaviour.

Brussels-Birmingham

74. The agreement will not afford the parties the possibility of eliminating competition in respect of a substantial part of the services in question. The alliance will indeed continue facing competition from bmi out of EMA (16 weekly frequencies) and from British European which entered the route in the winter 2001/summer 2002 season (initially with three weekday services, further amended to 5 weekday services to offer greater flexibility to the business market).

One-stop overlap routes

75. The agreement will not afford the parties the possibility of eliminating competition on three one-stop overlap routes, i.e.
- Manchester-Rome: the alliance will only eliminate the second indirect competitor ([5-15%] O&D and [5-15%] unrestricted O&D). Lufthansa is the first indirect competitor on this route ([5-15%] O&D and [5-15%] unrestricted O&D). In addition, Rome is a hub for Alitalia, which should therefore be considered as a potential direct entrant. Alitalia's indirect services already have a market share of [0-10%] O&D and [0-10%] O&D unrestricted on this route.
 - Geneva-Manchester: the alliance will eliminate the first indirect competitor at least for O& D unrestricted passengers ([5-15%] market share). However, Lufthansa is also a strong indirect player on this market ([0-10%] O&D and [0-10%] unrestricted O&D). In addition, Swiss has a hub in Geneva and is therefore a potential direct entrant Swiss's indirect services already have a share of [0-10%] O&D and [0-10%] unrestricted O&D on this route.
 - Barcelona-Birmingham: the alliance will only eliminate the fourth indirect competitor ([less than 5%] O&D and [less than 10%] unrestricted O&D) in terms of O&D passengers. Iberia, which operates from its hub is the first indirect competitor on the route ([5-15%] O&D and [5-15%] unrestricted O&D). Lufthansa ([less than 10%] O&D and [less than 10%] unrestricted O&D) and Air France ([0-10%] O&D and [0-10%] unrestricted O&D) are also relatively strong indirect players.

6. THIRD PARTY COMMENTS

76. The few comments which the Commission received in response to the Article 5 Notice focus on the London-Brussels market. It has been argued that the alliance appreciably restricts competition on this market and that remedies similar to those imposed by the Commission in the bmi/Lufthansa/SAS case²⁶ should be imposed.

²⁶ In this case, the parties had to surrender slots at Frankfurt Main airport as a condition for exemption.

77. As indicated above, it is not disputed that the alliance has an appreciable restrictive effect on competition on this market. The alliance should nevertheless not give the parties the possibility of eliminating competition on this market as they will continue facing two major competitors: Eurostar and bmi. It results from the market test that Eurostar is an effective substitute to transport by air between London and Brussels. In addition, bmi, which is a member of the Star Alliance, also operates on the route, and like the parties, from London Heathrow. Moreover, the 5 daily frequencies on weekdays operated by VLM (in codeshare with Virgin Express as from March 2003) between Brussels-National and London-City are also likely to exercise a competitive constraint on the parties. In addition, a growing number of business passengers are using the services provided by Ryanair between London Stansted and Charleroi and the constraint they exercise on the parties is consequently increasing, even if it might be doubtful whether it is sufficient for the moment (see paragraph 17).
78. In previous alliance cases, the Commission imposed remedies when there was a risk of elimination of competition resulting from the agreements at issue. In the bmi/Lufthansa/SAS case for example, there was a risk that competition would be eliminated for a substantial part of local time-sensitive passengers on the London-Frankfurt route. The co-operation between Lufthansa and bmi resulted in only two carriers remaining on the market for local time-sensitive passengers, i.e. the predominant Lufthansa/bmi combination and BA. The situation is different for London-Brussels. Eurostar is a competitive alternative for local time-sensitive passengers and bmi operates seven daily frequencies between Brussels and London Heathrow at weekdays. Remedies should therefore not be imposed on this route.

7. CONCLUSION

79. In the light of the commitments submitted by the parties, the Commission has decided not to raise serious doubts against the alliance agreements concluded between BA and SN. Provided the parties comply with the above commitments, these agreements shall be deemed exempted for the time already elapsed and for six years from the date of publication of the Article 5 Notice in the Official Journal, i.e. until 10 December 2008.

Annex: Set of commitments submitted by the parties