

Commission notice concerning the alliance between Lufthansa, SAS and United Airlines (cases COMP/D-2/36.201, 36.076, 36.078 — procedure under Article 85 of the Treaty (ex Article 89))

(2002/C 264/03)

(Text with EEA relevance)

On 3 July 1996 the Commission initiated a proceeding pursuant to Article 85 (ex Article 89) of the EC Treaty with a view to examining the compatibility under EC competition law of the coordination agreements concluded between Lufthansa and United Airlines and between SAS and United Airlines ⁽¹⁾. On 18 September 1996 the Commission did the same in respect of the tripartite coordination agreement concluded between Lufthansa, SAS and United Airlines ⁽²⁾.

Following commitments proposed by the parties and a declaration by the Government of the Federal Republic of Germany, the Commission announced in a notice published in the *Official Journal of the European Communities* on 30 July 2002 its intention to take a favourable position on the cooperation agreements between LH/SAS/UA and to close the proceedings ⁽³⁾. Interested third parties have not raised any substantial new elements.

Accordingly the Commission has decided on 28 October 2002, on the basis of these commitments and the declaration, that there is no longer any reason to take action under Article 85 of the Treaty and that the proceedings can therefore be closed.

The non-confidential version of the text of the commitments proposed by the parties as well as the declaration by the Government of the Federal Republic of Germany are attached to the present notice.

⁽¹⁾ Case COMP/D-2/36.076/LH/UA and case COMP/D-2/36.078/SAS/UA respectively.

⁽²⁾ Case COMP/D-2/36.201.

⁽³⁾ OJ C 181, 30.7.2002, p. 2.

Attachment 1

NON CONFIDENTIAL VERSION

Case COMP/36.201 — Deutsche Lufthansa AG, Scandinavian Airlines System, United Airlines Incorporated

PROPOSED COMMITMENTS

Deutsche Lufthansa AG, Scandinavian Airlines System, United Airlines Inc., (collectively the Parties) hereby offer the commitments set out below to resolve the competition concerns identified by the European Commission in the context of proceeding COMP/36.201 concerning cooperation agreements between the Parties related to air transport between the European Community and the United States of America.

These commitments shall be binding on the Parties, their subsidiaries, successors and assigns and the Parties commit to cause their subsidiaries, successors and assigns to comply with these commitments.

1. DEFINITIONS

- 1.1. *Competitive air service* — a non-stop or indirect scheduled passenger air service which is operated at least six days per week on one or more of the identified city-pairs, and, in the case of an indirect service with a connecting time of not more than 150 minutes.
- 1.2. *Identified city-pairs* — Frankfurt–Chicago, Frankfurt–Los Angeles, Frankfurt–San Francisco, and Frankfurt–Washington.

- 1.3. *Prospective new entrant* — an eligible carrier (or eligible carriers that are members of the same alliance) able to offer a competitive air service singly or by codeshare and needing a slot or slots to be made available by the Parties in accordance with these commitments in order to operate a competitive air service. The term prospective new entrant includes 'prospective incumbent entrant'.
 - 1.4. *Eligible carrier* — any United States or EC carrier that has the right to operate air passenger services between at least one or more EC Member States and the United States of America. Carriers which are legally controlled by the Parties, a franchisee of the Parties, or an alliance partner of the Parties shall not be considered eligible carriers.
 - 1.5. *Prospective incumbent entrant* — a prospective new entrant that is operating competitive air services on one or more of the identified city-pairs (*confidential information deleted*). Flights operated by alliance partners of the Prospective New Entrant shall be considered flights of the prospective new entrant for the purposes of these commitments.
 - 1.6. *Competitive feeder service* — a service operated between Frankfurt and a carrier's or its alliance partners' European hub that would have (or would have had) a connection time of not more than 150 minutes with a new or existing transatlantic service to/from one of the United States cities in the identified city-pairs. (*confidential information deleted*).
 - 1.7. *Approved air service provider* — a prospective new entrant that is approved by the Commission and the competent authorities in the Member State concerned to operate competitive air service on one or more identified city-pairs pursuant to Part 4 of these commitments.
 - 1.8. *New air service provider* — any carrier (or carriers that are members of the same alliance) that individually or collectively by codeshare provide(s) new or additional competitive air service. The term new air service provider includes 'approved air service providers'.
2. SLOTS FOR A NEW NON-STOP OR INDIRECT SERVICE ON THE IDENTIFIED CITY-PAIRS
- 2.1. The Parties undertake to make slot(s) available at Frankfurt to allow one or more prospective new entrant to provide new or additional competitive air services.
 - 2.2. Slots will only be made available at Frankfurt to the prospective new entrants for the purpose of enabling the latter to commence a new or additional competitive air service, provided the prospective new entrant can demonstrate that all reasonable efforts to obtain the necessary slots for the provision of such competitive air service through the normal workings of the slot allocation procedures have failed.
 - 2.3. Where a prospective new entrant requests slots for the purposes of creating a new or additional indirect competitive air service, slots will be made available under these commitments subject to the following additional conditions:
 - Where the prospective new entrant commences a transatlantic service to/from a United States city that forms part of an identified city-pair, slots shall be made available for a feeder service for that transatlantic air service only if no existing competitive feeder service for that transatlantic service is operated by that prospective new entrant or its alliance partners. A prospective new entrant may, however, avoid the application of this condition by showing that its or its alliance partner's existing competitive feeder service is operated at an average revenue passenger seat load factor exceeding 80 % and that capacity cannot reasonably be increased by using larger aircraft.
 - Where a prospective new entrant is a prospective incumbent entrant operating an indirect competitive air service, the prospective new entrant shall not be eligible to receive slots for an additional feeder service that makes use of the same trans-Atlantic service as the existing indirect service.
 - 2.4. As described more fully in Part 3 of these commitments, the slots made available pursuant to these commitments are to be used at a minimum for the provision of the competitive air service on the particular identified city-pair(s) for which the slots were made available.
 - 2.5. Slots will only be made available to a prospective incumbent entrant pursuant to these commitments for the purposes of adding one or exceptionally in the case of Frankfurt–Washington, and as specified in Clause 3.1, up to two additional competitive air services beyond the number (currently) operated by that carrier and its alliance partners (*confidential information deleted*).

- 2.6. If prior to having operated the additional competitive air service(s) for four consecutive IATA seasons, a prospective incumbent entrant eliminates any of the frequencies that are operated on the identified city-pairs (*confidential information deleted*), and if the service is not continued by a subsidiary or an alliance partner of the prospective incumbent entrant within two months of the elimination of the service, the prospective incumbent entrant will be required to return the slots obtained pursuant to these commitments to the Parties.
- 2.7. The Parties will make the necessary slots available to the relevant prospective new entrant(s) selected in accordance with Parts 4 of these commitments.
- 2.8. Where one or more slots have been made available by the parties, the approved air service provider(s) shall remain under a continuing obligation to make all reasonable efforts through the normal workings of the slot allocation procedures to obtain the necessary slots at Frankfurt to enable it to provide a competitive air service. Should a slot (the new slot) be obtained by the approved air service provider through such procedures, the slot made available to the approved air service provider by the Parties pursuant to these commitments shall be returned to the Parties as soon as the new slot can be operated by the approved air service provider if:
- the new slot is used at any time to operate a non-stop scheduled air passenger service on any of the identified city-pairs and the new slot falls within a period of 120 minutes before or after the time of any slot made available to it by the Parties pursuant to these commitments; or
 - the new slot is used at any time to operate an indirect scheduled air passenger service on any of the identified city-pairs with a connecting time of not more than 150 minutes.
- 2.9. To ensure that the slots provided by the Parties are used consistently with these commitments, a mechanism will be agreed between the Parties and each approved air service provider that will allow the Parties to monitor how the slots are being used.

3. DURATION OF THE SLOT COMMITMENTS

- 3.1. Subject to the provisions of Clause 3.4 and subject to approval by the Commission and the competent authorities in the Member State concerned in accordance with Clause 3.3 or Part 4 of these commitments, the obligation of the Parties to make slots available at Frankfurt with respect to an identified city-pair shall be satisfied if a new air service provider commences one new or additional competitive air service on that identified city-pair with the exception of Frankfurt–Washington, where the Parties obligations will be satisfied if two new or additional competitive air services are commenced (but in no case will the Parties be obliged to make slots available for more than one indirect competitive air service on Frankfurt–Washington).
- 3.2. For the purposes of these commitments, it is accepted that a single daily connecting service departing from Frankfurt can constitute part of a new or additional competitive air service on more than one identified city-pair.
- 3.3. The Parties will inform both the Commission and the competent relevant Member State authorities in the Member State concerned of the announced commencement by a carrier of a new or additional competitive air service on an identified city-pair that does not use slots made available by the Parties as soon as possible following the announcement of that service. The Commission and the competent authorities in the Member State concerned will confirm to the Parties, in accordance with Part 4 of these commitments, whether or not such new or additional competitive air service is sufficient for the relevant carrier to qualify as a new air service provider with respect to that identified city-pair once such service is commenced.
- 3.4. The commitments contained in Parts 2, 5 and 6 are subject to being revived (as further explained in Clause 3.5) for a particular identified city-pair if a new air service provider fails to operate a new or additional competitive air service for four consecutive IATA seasons.
- 3.5. An approved air service provider which does not use the slots made available to it by the Parties under the present commitments to operate a new or additional competitive air service on a particular identified city-pair(s), will return to the Parties all slots which were made available for the operation of that competitive air service as soon as it fails to operate the competitive air service. For the purposes of these commitments, a carrier, its subsidiaries and its alliance partners will be deemed to have ceased operating a new or additional competitive air service on a particular identified city-pair where it or they, as the case may be, do not make at least 80 % use of the slots in question for a competitive air service on the particular identified city-pair unless justified on one of the grounds referred to in Article 10(5) of Regulation (EEC) 95/93 or any other Regulation that may amend or supercede it.

3.6. Any slots returned to the Parties before an approved air service provider has operated a new or additional competitive air service for four consecutive IATA seasons, will, in accordance with Part 2 of these commitments, be made available by the Parties to another prospective new entrant for the purposes of operating a new or additional competitive air service on the relevant identified city-pair(s).

4. APPROVAL OF A PROSPECTIVE NEW ENTRANT BY THE COMMISSION AND THE COMPETENT AUTHORITIES IN THE MEMBER STATE CONCERNED

4.1. The Parties shall make the slots available only to prospective new entrant(s) that receive(s) the prior approval of the Commission and or the competent authorities in the Member State concerned and only in a manner that receives the prior approval of the Commission and or the competent authorities in the Member State concerned. In considering its approval, the Commission and or the competent authorities in the Member State concerned shall consider those factors that are best calculated to remove the competition concerns raised by the Commission on the identified city-pairs. In particular, the Commission and or the competent relevant national authorities in the Member State concerned shall take into account the following criteria:

- (a) whether the prospective new entrant is a viable existing or potential competitor with the ability, resources and commitment to operate competitive air service in the long term and a viable and active competitive force;
- (b) in the case of a prospective new entrant that will provide indirect competitive air services, the elapse time; and
- (c) whether the prospective new entrant will offer to provide competitive air services on multiple identified city-pairs using 14 (28 in the case of Frankfurt–Washington) or less slots a week at Frankfurt.

4.2. Notwithstanding Clause 4.1(c), where there are more than one prospective new entrant, which can be considered as viable existing or potential competitors within the meaning of Clause 4.1(a), the prospective new entrant(s) providing nonstop services will be favoured.

5. FREQUENT FLYER PROGRAMMES

5.1. If an approved air service provider is not a participant in or does not have its own comparable frequent flyer program, then upon request, the Parties undertake to allow the approved air service provider to participate in one of their frequent flyer programmes or in their joint programme, if such a joint programme exists, for the Identified city-pairs operated non-stop by the approved air service provider. A contract with the approved air service provider will be concluded on reasonable and non-discriminatory conditions including as to compensation for any costs incurred by the Parties.

5.2. Any contract entered into pursuant to this Part will terminate for any identified city-pair if the approved air service provider ceases to operate a competitive air service on the city-pair(s).

6. INTERLINING

6.1. Upon request, the Parties undertake to enter into an interline agreement with an approved air service provider operating non-stop services on one or more of the identified city-pairs in any case where the approved air service provider does not have an existing interline agreement with the parties.

6.2. Any interline agreement entered into pursuant to this Part will:

- apply to the F, C and Y fare categories only;
- provide for interlining on the basis of the Parties' published one-way fares or half of the Parties' published round-trip fares;
- be limited to true origin and destination traffic on the Identified city-pair operated by the approved air service provider;
- be subject to the MITA rules and/or normal commercial conditions, including the requirement that the approved air service provider furnish the Parties with a letter of credit if the Parties deem it necessary; and
- include the possibility for the approved air service provider, or travel agents, to offer a return trip comprised of services provided one-way by the Parties and one-way by the approved air service provider.

6.3. Subject to seat availability in the relevant fare class, the Parties undertake to carry a passenger holding a coupon issued for travel on an approved air service provider's non-stop competitive air service on an identified city-pair. However, to avoid abuse, the Parties will be entitled to require that the approved air service provider or the passenger, at the approved air service provider's option, pay the positive difference between the fare charged by the Parties and the fare charged by the approved air service provider. Also, in cases where the approved air service provider's fare is less than the value of the coupon issued by the Parties, the Parties will be obliged to endorse their coupon only up to the value of the fare charged by the approved air service provider. Approved air service providers will have the same protection in cases where the Parties' fare is less than the value of the coupon issued by the approved air service provider.

6.4. All interlining agreements entered into pursuant to this Part will terminate for any identified city-pair if the approved air service provider ceases to operate a competitive air service on the city-pair(s).

7. IATA TARIFF CONFERENCES

7.1. The Parties undertake not to participate in that part of the IATA tariff conferences concerning EU-origin services on the identified city-pairs. The Parties will be free to accept or reject, at their exclusive discretion, any other airline's coupons for the identified city-pairs issued on the basis of a fare set during the IATA tariff conferences.

8. GENERAL PROVISIONS CONCERNING THE COMMITMENTS

8.1. If the cooperation agreements investigated by the Commission in this proceeding are made subject to requirements by another antitrust authority that are potentially inconsistent with these commitments, or if other circumstances occur that would, together with the obligations in these commitments, result in the making available of slots beyond what is absolutely necessary to remove the competition concerns raised by the Commission on any of the identified city-pairs, the Parties may request a review and adjustment of these commitments in order to avoid such inconsistencies or any obligations that will no longer be necessary to address the competition concerns raised by the Commission.

8.2. If an obligation in these commitments becomes incompatible with any applicable laws or regulations of the European Community or the United States of America, the Parties will cease to be subject to the particular obligation until such time as the incompatibility is eliminated. The Parties undertake to notify the Commission and the competent authorities in the relevant Member State concerned authorities and identify the obligation(s) that are suspended and the specific laws or regulations creating the incompatibility. Where possible, the Parties will make such a notification before the legislation in question comes into effect in order to allow the Commission and the competent authorities in the Member State concerned or relevant Member State Authorities to take appropriate measures.

8.3. If at any given time, on any one of the identified city-pairs, the Parties cease to offer a non-stop service, the Parties shall be entitled to request that the Commission and the competent authorities in the Member State concerned release them from their commitments with respect to the relevant identified City-Pair(s). The present commitments shall automatically re-apply to the relevant identified City-Pair(s) should the Parties recommence non-stop services.

8.4. The Parties shall provide the Commission with such information as the Commission and the competent authorities in the Member State concerned may require in connection with these commitments within 10 working days from receipt of the Commission's and the competent authorities in the Member State concerned' reasoned request.

Attachment 2

DECLARATION BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

In order to allow the European Commission to close, in view of the remedies proposed by the parties, the pending proceeding under Article 85 (ex 89) of the EC Treaty in the LH/SAS/UA transatlantic alliance case (Case COMP/D-2/36.201), which was opened on 3 July 1996, the Government of the Federal Republic of Germany, notwithstanding its general position on price leadership by sixth freedom carriers in relation to non-EEA markets, declares not to exercise any control on fares of indirect sixth freedom services from Germany to the four destinations identified by the Commission, i.e. Frankfurt-Chicago, Frankfurt-Los Angeles, Frankfurt-San Francisco and Frankfurt-Washington.

This declaration is based on the understanding that German air carriers will receive equivalent treatment with respect to sixth freedom price control under comparable conditions in other EEA markets where necessary as a result of the Commission's assessment of comparable transatlantic alliance cases.
