I. STATE OF THE PROCEDURE

On 10 December 1999, Austrian Airlines and Deutsche Lufthansa notified a cooperation agreement pursuant to Article 5 of Council Regulation (EEC) No 3975/87 for a decision applying Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement to the alliance concluded between them.

According to Article 5(2) of Regulation (EEC) No 3975/87, the Commission published a summary of the application in the Official Journal on 11 July 2000. The notice also summarised the reasons given by the parties for granting an exemption under Article 81(3).

On 4 October 2000 the Commission informed the Parties that, in respect to Article 5(3) of Regulation (EC) 3975/87, it has serious doubts with regard to the applicability of Article 81(3) of the Treaty.

On 11 May 2001, the Commission sent the Parties a statement-of-objections, confirming that the conditions of Article 81(3) of the Treaty are not satisfied and that it envisages taking a decision prohibiting the notified cooperation agreement. In particular, the Commission took the preliminary view that the cooperation agreement eliminates competition on a substantial part of the Austrian-German air transport market.

Subsequently, the Commission services entered into discussions with the parties with a view to finding appropriate and effective remedies for the competition concerns raised by the Commission in its statement-of-objections. As a result of these discussions, the parties have submitted proposed commitments which are set out in what follows. The main purpose of these commitments is to ensure that there can be viable new entrants which are interested in entering the market on the basis of these commitments. Under these circumstances, and to the extent that new entrants will have obtained the necessary traffic rights to operate on the relevant markets, the Commission envisages granting an exemption for the notified cooperation agreement.

II. PROPOSED COMMITMENTS

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

1. Commitments pertaining to slots

If an airline that did not operate air transport services between Austria and Germany on the date of notification (a 'new entrant'), which is independent of Austrian Airlines and Lufthansa (the parties), wishes to commence a new non-stop service on one or more Austria-Germany city pairs (the 'new entrant city pair or pairs'), the parties undertake to make slots available subject to the conditions described below. For the purposes of these commitments a non-stop service includes a multi-stop service using a single aircraft that begins and/or terminates in Austria, Germany or a third country and has at least one non-stop segment between Austria and Germany.

The parties agree to make slots available to a new entrant for a particular new entrant city pair (the 'new entrant slots') up to a maximum of 40% of the slots the parties operated on the city pair in question at the time of the notification. Nevertheless, any voluntary advance slot release by the parties shall count towards the 40%.

The parties undertake that the new entrant slots will be within 45 minutes of the time requested by the new entrant and allow, in the case of one-stop services, for a transit-ground time of the aircraft within 90 minutes. A transit-ground time of 45 minutes, provided the parties allow, in the case of one-stop services, for a transit-ground time of the aircraft within 90 minutes. Any slots obtained by the new entrant through the normal workings of the slot allocation procedure shall count towards the 40%.

The new entrant must make a clear written request to the parties concerning the intended service at least six weeks prior to the IATA scheduling conference for the traffic season where the new entrant intends to commence service. A new entrant will only be eligible to receive slots pursuant to these commitments provided that it can demonstrate that all reasonable efforts in good faith to obtain slots for the new entrant city pair through the normal workings of the slot allocation procedure at the subsequent scheduling conference (including allocation of slots by the coordinator following the slot-return deadline) have failed. During the whole period (between the above-mentioned written request and the end of the respective IATA-schedule-period) the new entrant shall maintain an ‘open book’ policy for the respective airports. Any slots obtained by the new entrant through the regular slot allocation procedure shall count towards the total number of slots the new entrant is entitled to demand pursuant to this part of the commitments unless the parties have a share of total frequencies on the city pair concerned that is in excess of 60%. Requests for slots pursuant to this paragraph are valid only for a specific scheduling season. Where a new entrant has not commenced service, has commenced service at a lower frequency than planned, or wishes to operate an additional frequency, the requirements of this section shall apply to any request for additional slots in a subsequent scheduling season.
New entrant slots shall be exclusively used to operate services on the new entrant city pairs with aircraft having a capacity of 46 or more seats. This condition does not apply where a new entrant has commenced service prior to the date of publication of the exemption decision in the Official Journal of the European Communities.

Where a new entrant wishes to use an aircraft for services on a route between Austria and Germany that is stationed at an airport in a third country, the new entrant can obtain slots pursuant to these provisions (including limitations on the number of slots available to support service on a city pair) for services from or to that third country to position that aircraft at the beginning or end of operations (technical slots). The parties shall be required to provide technical slots only where the new entrant requesting such slots and/or its franchise operate fewer than three daily frequencies to/from third countries from the affected airport at the time that the request is made. Furthermore, the parties agree to make technical slots available within 180 minutes of the time requested by the new entrant provided the parties hold slots within the relevant time period.

Where the new entrant operates a service involving a third country and one of the cities included in the new entrant city pairs (a third-country service) and the new entrant reduces frequencies on or ceases to operate the third-country service, the new entrant shall be required to use the slots previously devoted to the third-country service for service on the new entrant city pairs. The new entrant will in such a case be required to return the same number of new entrant slots to the parties as were previously devoted to the third-country service.

Where a new entrant which has obtained slots pursuant to this procedure decides not to commence services on the new entrant city-pair or to operate a lower number of services, the new entrant shall inform the parties immediately and shall return the slots to the parties. If any new entrant which has obtained slots pursuant to these commitments ceases to operate services on the new entrant city pair or stands to lose them in another way (e.g. misuse), the new entrant shall inform the parties immediately and shall return the slots to the parties. For the purposes of this paragraph, a new entrant and its subsidiaries will be deemed to have ceased operating on a new entrant city pair where it or they, as the case may be, have not used their slots for at least 80 % during the scheduling season for which they had been allocated for the city pair in question, unless the new entrant justifies the non-use of the slots on one of the grounds referred to in Article 10(5) of Council Regulation (EEC) No 95/93 or any other Regulation that may amend or supersede it.

In the case that the new entrant notifies the parties too late in a scheduling season to allow the parties to use the returned slots according to the provisions of Article 10(3) Regulation (EEC) No 95/93 with immediate effect or after the deadlines provided for in Article 10(4) of that Regulation and before the effective start of the scheduling season, the parties shall be entitled to require that the new entrant transfers to the parties a slot which is comparable to the returned slots. If for any reason the entrant is unable to transfer to the Parties a slot which is comparable to the returned slot, the Parties may seek to justify the non-utilisation of the surrendered slot on the basis of Article 10(5) of Regulation (EEC) No 95/93.

To ensure that the slots provided by the parties are used consistently with these commitments, a mechanism will be agreed between the parties and the new entrant that will allow the parties to monitor how the slots are being used. The parties will inform the Commission of the nature of such mechanism.

Slots made available by the parties under these commitments will be offered without any compensation.

2. Commitments pertaining to frequencies

The parties agree not to add any frequencies on a particular new entrant city pair for a minimum of four consecutive IATA tariff seasons beginning with and including the tariff season in which the new entrant commences service on the new entrant city pair.

3. Commitments pertaining to fares

Each and every time that the parties reduce a published fare on a new entrant city pair, they agree to apply an equivalent fare reduction (in percent) on three other Austria-Germany city pairs on which they do not have competition. This commitment applies only as long as the fare reduction on the new entrant city pair remains effective. For purposes of this commitment, a published fare shall include applicable IATA fares, carrier fares that are distributed to CRSs via the public tariff data base of ATPCO (Airline Tariffs’ Publishing Corporation) and fares marketed on the Internet where such fares are available to the general public.

The three other comparable Austria-Germany city pairs where the parties will apply equivalent fare reductions will be determined as follows: The parties will choose two city pairs out of the next five largest Austria-Germany city pairs by passenger volume on which they do not have competition. The parties will not be subject to any constraints in selecting the third Austria-Germany city pair provided that it is a city pair on which the parties do not have competition.

This commitment shall not apply in those exceptional cases where the Parties can demonstrate to the Commission that a fare decrease is justified because of changes in conditions on a specific city pair that are independent of the competitive activities of the new entrant.
4. Commitments pertaining to blocked space agreements

Upon request by a new entrant, the parties will enter into a blocked space agreement pertaining to the new entrant city pair(s) operated by a new entrant in any case where the number of frequencies offered by the new entrant are less than the number operated by the parties.

Any such blocked space agreement shall be based on a fixed number of seats (hard block basis) and apply for at least one entire IATA tariff season. The number of seats covered by such agreements shall be a maximum of 15 % of the seats offered on a particular frequency and in any event not less than 12 seats and no more than 25 seats in a particular aircraft. The new entrant shall carry the full commercial risk for the seats covered by the blocked space agreement.

5. Commitments pertaining to interlining

Upon request, the parties undertake to enter into an interline agreement concerning the new entrant city pair(s) operated by a new entrant in any case where the new entrant does not have an existing interline agreement with the parties.

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 when a one-way ticket is issued or half of the parties’ published round trip fares when a round-trip ticket is issued,
- be limited to true origin and destination traffic operated by the new entrant,
- be subject to the MITA rules and/or normal commercial conditions; and include the possibility for the new entrant, or travel agents, to offer a return trip comprised of services provided one-way by the parties and one-way by the new entrant.

Subject to seat availability in the relevant fare class, the parties undertake to carry a passenger holding a coupon issued for travel on a new entrant’s flight on a new entrant city pair. However, to avoid abuse, the parties will be entitled to require that the new entrant or the passenger, where appropriate, pay the positive difference between the fare charged by the parties and the fare charged by the new entrant. Also, in cases where the new entrant’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 new entrant. New entrants will have the same protection in cases where the parties’ fare is less than the value of the coupon issued by the new entrant.

All interline agreements entered into pursuant to this section for a particular new entrant city pair will terminate if the new entrant ceases to operate that new entrant city pair.

Upon request of a new entrant, the parties undertake to enter into a special pro-rate agreement with the new entrant for traffic with a true origin and destination in either Germany or Austria and/or for beyond Austria or Germany at comparable conditions entered into with third non-alliance/other alliance carriers in connection with such route. In the case of a special pro-rate agreement covering international transfer traffic, this commitment applies only to routes where international transfer traffic exceeds 35 % of the total traffic volume on the new entrant city pair.

6. Commitments pertaining to frequent flyer programme (‘FFP’)

If a new entrant is not a participant in one of the parties’ FFPs or does not have its own comparable FFP, then upon request, the parties undertake to allow the new entrant to participate in their joint FFP for the new entrant city pairs operated by the new entrant. A contract with the new entrant will be concluded on reasonable and non-discriminatory conditions including as to compensation for any costs incurred by the parties.

Any contract entered into pursuant to this section will terminate for a particular new entrant city pair if the new entrant ceases to operate that new entrant city pair.

7. Commitments pertaining to intermodal services

Upon request from a railway or other surface transport company operating between Austria and Germany (an ‘intermodal partner’), the parties undertake to enter into an intermodal agreement whereby the parties would provide passenger air transport on their services between Austria and Germany as part of an itinerary that included surface transportation by the intermodal partner (an ‘intermodal service’).

Any intermodal agreement entered into pursuant to this section will be based on the MITA principles (including the Intermodal Interline Traffic Agreement — Passenger and IATA Recommended Practice 1780e) and normal commercial conditions.

The parties shall accept full prorating according to the terms of MITA also on sectors where only railway service is performed provided that the railway operator has filed with IATA the sector and its mileage amount, and where no through fare has been filed, an add-on fare.

At the request of a potential intermodal partner, the parties will make efforts in good faith to reach an agreement on conditions comparable to those that they may have with other intermodal partners provided the necessary requirements are met especially with regard to safety, quality of service, insurance coverage and liability limits. The terms of any such agreement shall override the general obligations arising pursuant to this section.
8. Duration of exemption and commitments

These commitments will apply from the date the exemption decision adopted under Article 5(4) of Regulation (EEC) No 3975/87 is published in the Official Journal. The obligations of the parties pursuant to these commitments will expire on the date that the Article 81(3) exemption terminates.

In the event that the Commission revokes the Article 81(3) exemption of the cooperation agreement pursuant to Article 6 of Regulation (EEC) No 3975/87 or an equivalent provision in any successor regulation, or the Article 81(3) exemption is annulled, or the parties terminate the notified cooperation agreements, these commitments will be null and void as from the date of revocation, the date of the annulment judgment, or the date of termination. In such a case, the parties will have the right to demand return of any slots provided under these commitments to an airline which at the time of the revocation, annulment judgment, or termination, is operating services on routes between Austria and Germany using those slots. The parties will also have the right to immediately terminate any block space, interlining, FFP, or intermodal agreements entered into pursuant to these commitments.

III. CONCLUSION

The Commission envisages to grant an exemption under Article 81(3) of the EC Treaty and under Article 53(3) of the EEA Agreement for six years. Before taking such a decision, in accordance with Article 16(3) of Regulation (EEC) 3875/87, the Commission invites interested parties to submit their observations within 30 days of the date of publication of this notice, to:

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